

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

[2012] NZERA Christchurch 207
5374145

BETWEEN DEAN STRANG, PAUL NILES and
 STEPHEN PLEW
 Applicants

AND MOUNT COOK AIRLINE
 LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Richard McCabe, Counsel for Applicants
 David France, Counsel for Respondent

Investigation Meeting: 4 September 2012 at Christchurch

Submissions received: 4 September 2012 from both parties

Determination: 26 September 2012

DETERMINATION OF THE AUTHORITY

- A. Mr Ward was not appointed by the respondent as a direct entry Captain. Accordingly, there has been no breach of the applicants' employment agreement, and no right to by-pass pay has been triggered.**
- B. There is no obligation upon the respondent to assign a seniority position to Mr Ward.**
- C. Costs are reserved**

Prohibition from publication

[1] Evidence was put before the Authority in relation to the terms and conditions of a senior employee of the respondent, Mr Ward, some aspects of which should remain confidential; namely terms and conditions relating to Mr Ward's remuneration, his annual leave entitlements and his hours of work. Accordingly, I prohibit from publication any evidence which may lead to the disclosure of such information.

Employment relationship problem

[2] The applicants claim that their individual terms of conditions of employment have been breached by the respondent. The respondent denies any breach.

[3] The applicants are pilots employed by the respondent. They were originally employed pursuant to the terms of a Collective Employment Agreement (the CEA) that expired on 30 December 2011. The CEA did not continue in force under s.53 of the Employment Relations Act 2000 (the Act) and, accordingly, the terms and conditions of employment contained in the CEA have become individual terms and conditions of employment for the applicants and for every other pilot who had been employed by the respondent who is a member of the New Zealand Air Line Pilots Association (NZALPA). In this determination, for convenience, the agreement will be referred to as *the CEA*.

[4] Clause 7 of the CEA sets out the conditions that apply in relation to pilot seniority and promotion. These conditions apply to all pilots employed by the respondent, whether they are members of NZALPA or not. In accordance with clause 7, the company maintains a seniority list on which all pilots' names are entered and in accordance with which promotion to Captain is usually decided.

[5] In September 2011 the respondent advertised a vacancy for a senior management position, a Flight Operations Manager (FOM). The successful applicant for the FOM position was Mr Ward who, the applicants assert, is a Captain on secondment to the respondent from Air New Zealand Limited. They say that Mr Ward has been appointed as a direct entry Captain in breach of the seniority provisions of their employment agreements, and that the right to by-pass pay has therefore been triggered. They also assert that Mr Ward should be entered onto the seniority list.

[6] The documentation presented to the Authority indicates that Mr Ward was granted three years' leave without pay by Air New Zealand Limited and it is my conclusion that Mr Ward is an employee of the respondent, rather than seconded to it, employed under an Individual Employment Agreement for a fixed term of three years.

[7] The applicants assert that Mr Ward's direct appointment to the rank of Captain has occurred notwithstanding:

- a. Mr Ward not being allocated a seniority number or being placed on the seniority list;
- b. The position of Captain not being advertised as a vacancy;
- c. Mr Ward having no experience on the ATR72-500 type aircraft, the only aircraft operated by the respondent;
- d. The rank of Captain not being necessary for the position of FOM;
and
- e. The appointment as a direct entry Captain being in breach of the seniority provisions contained in clause 7 of the individual employment agreements.

[8] The applicants also assert that Mr Ward's appointment to a direct entry Captain position without any ATR72-500 experience represents significant and international recognised aviation safety hazards to the travelling public.

[9] The applicants seek the following:

- a. A determination that the respondent's failure to place Mr Ward on the seniority list is in breach of the seniority provisions contained in clause 7 of the individual employment agreement;
- b. A determination that Mr Ward's appointment to a direct entry Captain's position is in breach of the seniority provisions contained in clause 7;
- c. An order that the respondent comply with seniority provisions contained in clause 7;
- d. An order that the respondent pay *by-pass pay* to all First Officers by-passed by Mr Ward for the period Mr Ward held or holds the position of Captain;
- e. A penalty for breach of the Individual Employment Agreement;
and
- f. Legal costs.

[10] The respondent denies that it has directly appointed Mr Ward to the rank of Captain on the ATR72-500 type aircraft and that he has been appointed to a direct entry Captain position. Further, it denies that Mr Ward has flown as a Captain on the ATR72-500 aircraft, and hence denies that any aviation safety hazards have arisen as alleged.

[11] Furthermore, the respondent denies that Mr Ward should be placed on the seniority list and denies that by-pass pay has been triggered by Mr Ward's appointment.

Relevant provisions of the employment agreements

[12] The provisions of Collective Employment Agreement between the respondent and NZALPA for the period 2009-2011, which have now become part of the applicants' individual employment agreements, include the following clauses:

*Clause 1.1 – **Parties and Coverage***

:
:

The Agreement shall cover all members of NZALPA while employed as pilots by the Company to fly aircraft provided for in this Agreement including but not limited to pilots who also perform managerial duties and/or supervisory duties and/or flight examining duties and/or flight instruction duties and/or checking duties and/or training duties and/or carry out projects and/or administrative functions from time to time. Coverage under this Agreement shall not apply to the position of Flight Operations Manager.

*Clause 2 – **DEFINITIONS***

2.2 ***“By-pass Pay”** means the monetary amount required to take a pilot's existing salary to the full salary of the vacancy denied.*

2.3 ***“Captain”** means a pilot who is employed to act as pilot in command of an aircraft.*

...

2.10 ***“First Officer”** means a pilot who is employed to act as second in command of an aircraft.*

...

2.16 ***“Pilot”** means and includes duly qualified Captains, First Officers, and any other officers who may from time to time be engaged in the flying of commercial aircraft, but shall not include any other members of the aircraft crew.*

*Clause 3 – **HOURS OF EMPLOYMENT***

The Company shall be entitled to require its pilots to report for duty and to perform flying and other duties in connection with the operations of the Company aircraft at any time and from time to time,

whether by day or night, and whether before 8:00am or after 5:00pm on any day, without payment of any monies in respect of overtime, shift work, penal rates and so forth other than those prescribed in this Agreement.

...

*Clause 7 – **SENIORITY AND PROMOTION***

*7.1 **Pilot Seniority***

7.1.1 The Company will maintain a seniority list covering all pilots employed by the Company and shall make the list available on request.

7.1.2 A seniority position shall be assigned to each pilot on the date rostered for the first revenue flight as a pilot. Where a pilot fails to meet the required standard in the required checks prior to first revenue flight, the seniority position may be amended to the new date of the first revenue flight.

7.1.3 A pilot once having established a seniority position shall continue to accrue seniority and shall not lose seniority except by termination of employment as a pilot with the company.

...

7.1.5 All positions within flight operations must be advertised to all pilots on the seniority list. Where possible, appointments, positions and vacancies will be filled from within the company. Should no suitable qualified person be available from within the company and a pilot is employed from outside, his/her seniority will be in accordance with this Agreement. By-pass payment will not be paid to any pilot bypassed in accordance with this subclause and the pilot appointed to the vacancy will retain the right to the equipment category and rank awarded. The provisions of this subclause shall not be used to avoid bypass payment when the pilot has not been given the opportunity to qualify for the applicable aircraft type rating.

*7.2 **Command Vacancy***

7.2.1 Promotion in rank shall in all cases and under all circumstances be at the discretion of the Company but without restricting the exercise of such discretion the Company undertakes to promote the most senior qualified pilot applicant in order should he/she be considered suitable.

...

*7.7 **Advertising Positions***

The requirement to advertise positions in any of the preceding sections of this clause shall be achieved in the following way:

Company Flight Operations shall maintain a standing bid system in which all pilots may declare their interest in promotion to a command, or appointment to a supervisory

training, flight examining or flight instructor position. Impending vacancies to these positions shall be advertised to all pilots by Company email. All standing bids shall be considered as part of filling any vacancy in these positions. Pilots may amend their standing bid at any time in person or by email to the Flight Operations administrator and appointments to these positions may be made without further reference to the pilots concerned.

7.8 **By-pass Payment**

7.8.1 *The monetary amount required to take a pilot's existing salary to the full salary of the vacancy denied shall be known as by-pass pay. By-pass pay will be paid to those pilots affected in accordance with the provisions of the Agreement.*

7.8.2 *By-pass pay will be paid to all pilots who are by-passed by a junior pilot as provided in this Agreement.*

The issues

[13] The Authority must determine the following:

- a. Has Mr Ward been appointed as a direct entry Captain?
- b. If so, is such appointment in breach of the seniority provisions of the applicants' employment agreements?
- c. Has the right to by-pass pay been triggered?
- d. Should Mr Ward be subject to entry on the seniority list?

Has Mr Ward been appointed as a direct entry Captain?

[14] Mr Plew gave evidence to the Authority on behalf of the applicants. Mr Plew's evidence was that, prior to working for the respondent company, Mr Ward had been a Captain in Air New Zealand, flying Boeing 737-300s. This is agreed by the respondent. Mr Plew produced as evidence a print out which he explained was a Captain's duty roster for 2012 which showed Mr Ward's flying duty for the respondent during the period 30 April 2012 to 13 May 2012. This showed him working *administration* duties on some days and appeared to show him flying as a First officer on six days during that period, although that information had been added in manuscript. Ms Williamson, the General Manager of the respondent, explained that, during this period, Mr Ward would have been training to fly the ATR 72-500 aircraft operated by the respondent.

[15] I was also shown a crew sign-off sheet for Tuesday, 24 April 2012 which appeared to show, for flight NZ5374 between Christchurch and Rotorua, Mr Andrew Ward flying as a Captain. He was flying with another pilot (Mr Ford) who was designated as First Officer (although Mr Ford is a Captain and Flight Examiner). Ms Williamson explained that Mr Ford would have been flying as the pilot in command and Mr Ward would have been flying as First Officer, because Mr Ward was still training at that point. She believed that Mr Ford was shown as a First officer rather than as a Captain, because Mr Ward had been loaded into the administration system as a Captain and so the system may have shown Mr Ford as a First Officer by default.

[16] I was also shown a document for the period 20 August to 2 September 2012 which showed Mr Ward as a line Captain. Mr Plew also gave evidence that Mr Ward had been seen wearing a Captain's uniform whilst flying with the respondent company.

[17] It was the evidence of Ms Williamson that Mr Ward was not flying as a Captain as he had not yet received his upgrade training to enable him to fly the ATR 72-500 aircraft as a pilot in command. This was not likely to happen until sometime in 2013. I accept that evidence, as do the applicants I suspect. To allow Mr Ward to fly in command of an ATR 72-500 aircraft before he had received his upgrade training would be in serious breach the CAA regulations, which could, I understand, risk the company losing its civil aviation licence.

[18] However, the key question to consider is whether Mr Ward was appointed as a Captain, as it is theoretically possible that he was appointed as a Captain before he starts to fly in command of the respondent's aircraft. On balance, I accept that Mr Ward was not appointed by the respondent company as a direct entry Captain. I reach this conclusion on the following grounds.

[19] Ms Williamson gave evidence that the documents relied on by the applicants were administrative only, and that Mr Ward was shown as a Captain because that was how he had been loaded into the system. I accept that the administrative documents do not prove that Mr Ward has been appointed as a Captain.

[20] Ms Williamson said that Mr Ward may also be occasionally be called Captain but that retired pilots sometimes retained that title, so it was not unusual that Mr Ward

may want to refer to himself as such. I accept that the title *Captain* is an honorific that Mr Ward may continue to use, but that does not mean he was appointed by the respondent as a Captain.

[21] I have also read the terms and conditions under which Mr Ward is employed. They are quite different from those under which Captains are employed by the respondent. Remuneration, hours of work and leave provisions are all structured quite differently in Mr Ward's employment agreement compared to the equivalent provisions in the CEA. In addition, Mr Ward's job title is Flight Operations Manager, and his duties are quite different from those of a Captain. His role includes the following key responsibilities;

- a. to ensure the company's compliance with the CAA requirements and the company exposition in regards to the Air Transport operator obligations of Pilots, Cabin Crew and Customer Services Ground operations.
- b. Setting and maintaining the safety standards for Flight Operations and the Airline Training Organisation.
- c. Direction and control of the Flight Operations Department, through planning, developing policies, directing and coordinating activity to ensure the availability of trained aircrew and support services to meet the airline's schedules and any logistical variations.
- d. Providing motivation, guidance and coaching to employees and reinforcing high standards with regard to performance, safety, customer service and adherence to company values.
- e. Supporting the ongoing commercial viability of the business by contributing to effective annual business plans.

[22] Key areas of accountability include leadership, strategic direction, contribution to business goals, management of employees, and ensuring operational safety and regulatory compliance, relationship management, self development and ensuring a safe working environment is maintained. Whilst a Captain's role will undoubtedly encompass some of these tasks and accountabilities, his or her primary role is flying in command of aircraft, whereas Mr Ward's primary role is directing the Flight

Operations Department and managing the respondent's compliance with regulatory requirements.

[23] The evidence of the respondent is that Mr Ward will be trained at some point to fly in command of the ATR 72-500 aircraft. However, I do not accept that this means he was appointed as a Captain. Ms Williamson explained that the reason that Mr Ward continues his flying activities while employed by the company is to ensure he has a first hand knowledge of the various issues that arise in flying aircraft, so that the quality of his decision making will be enhanced. He currently flies occasionally as a First Officer, so he can fly with Captains. Once he is trained as a Captain on ATR 72-500s he will be able to fly with First Officers. Although he could sit in the jump seat, behind both pilots, and observe both, I believe that it is likely that Mr Ward's experience will be richer, and therefore more useful, if he is actively flying aircraft himself in command of the aircraft and as second in command.

[24] Ms Williamson also explained that the Aviation Training Manager, the senior person in the company responsible for the respondent's operation of its competency assessment programme, now reports to Mr Ward and that, because of that, she now requires Mr Ward to also hold a flight examiner rating. This means that he must meet the appropriate competency checks to serve as a pilot in command for the ATR72-500 aircraft.

[25] It is the applicants' case that Mr Ward has been appointed both as a Flight Operations Manager and a Captain. However, once one steps back from the circumstantial detail, the bigger picture does not support that view. Mr Ward was appointed as a FOM. It was a preferred condition of the role when advertised that Mr Ward had to hold an Airline Transport Pilot's Licence and, given its seniority, it is likely that a successful post-holder would be senior enough within the industry to have attained the rank of Captain. This does not mean, though, that the respondent appointed Mr Ward as a Captain.

[26] All in all, I am satisfied that Mr Ward was not appointed as a direct entry Captain.

[27] Having found this, I find that it is not necessary to determine whether Mr Ward's appointment was in breach of the seniority provisions of the applicants'

employment agreements and that, as a consequence, the right to by-pass pay has been triggered.

[28] However, it is still necessary to decide whether Mr Ward should be entered onto the seniority list. This is because, if he does get upgraded to the position of Captain able to fly the 72-500 aircraft in 2013, the issue of by-pass pay could be triggered if he were on that list (or, more accurately, assigned a seniority position). Conversely, if Mr Ward is not on the seniority list when he attains the right to fly in command of the respondent's aircraft, that event will not trigger by-pass pay as he would be outside of the system described in clause 7.

Should Mr Ward have been entered onto the seniority list?

[29] It is the respondent's position that the seniority provisions set out in the CEA do not apply to Mr Ward because he has not been employed as a pilot. Furthermore, Ms Williamson said that there was no vacant Captain's position at Mt Cook which Mr Ward was appointed to and that is why he is not on the seniority list. The respondent further argues that Mr Ward is expressly excluded from the provisions of the CEA because he is a FOM.

[30] Ms Williamson stated that Mr Plew and the other applicants will all move up the seniority list and will be upgraded in accordance with their expectations (unless an event provided for in the collective agreement occurs which results in their being bypassed). She states that Mr Ward's appointment as an FOM has not affected their progression in the list and their opportunity to upgrade in accordance with their position on the seniority list.

[31] Ms Williamson said that, since 4 July 2012, over a six week period that covered three rosters, Mr Ward had had 35.02 flight time hours. Ms Williamson said that he would not maintain this level of flight hours going forward. She explained that, over that same six week period, a First Officer would typically fly around 75 flight time hours and a Captain would fly approximately 89 flight time hours.

[32] The applicants, however, argue that Mr Ward effectively holds two positions; FOM and pilot, and in his capacity as a pilot, he should be placed on the seniority list. They refer me to the Employment Court case of *Julian v Air New Zealand Limited* [1994] 2 ERNZ 612 which examined the wording of a collective employment agreement which contained the clause *The Company will maintain a seniority list*

covering all Company pilots. The Employment Court held that, for the purposes of the seniority list maintained by Air New Zealand, it was irrelevant what their contractual relationship in other respects may be.

[33] On this particular point, however, it is my view that *Julian* can be distinguished because it is the terms of the CEA currently before the Authority that govern the operation of the seniority and promotion of pilots employed by the respondent, and so it is necessary to examine in detail those terms to determine whether clause 7.1 catches Mr Ward and his flying activities. I carry out this examination below.

The terms of the CEA

[34] The applicants argue that if the Authority accepts that Mr Ward performs duties as a pilot, he must be entered into the seniority system irrespective of his other contractual relationships. It is certainly true that, no matter how many or how few hours Mr Ward flies for the respondent, and regardless of the reason that he does so, he always does so as a qualified pilot and so does *perform duties as a pilot* during those times. However, I do not believe that it is the performance of duties as a pilot that requires him to be entered into the seniority system, and that this is clear when one examines the wording of the CEA.

[35] The starting point is clause 7.1.1, which states that the respondent will maintain a seniority list covering all pilots *employed* by the respondent company. Mr Ward is employed by the respondent company, but is he a pilot for the purposes of the CEA? The definition of the word *pilot* in clause 2.16 of the CEA says that it *means and includes duly qualified Captains, First Officers, and any other officers who may from time to time be engaged in the flying of commercial aircraft...* As *pilot means Captains and First Officers*, it is necessary to examine the definitions of those two terms.

[36] A *Captain* is defined in the CEA as meaning *a pilot who is employed to act as pilot in command of an aircraft.* A *First Officer* means *a pilot who is employed to act as second in command of an aircraft.* These definitions are circular, as *pilot* is defined as including, inter alia, a *Captain* and a *First Officer*, but the definitions of *Captain* and *First Officer* include the term *pilot*. The term *pilot* is not capitalised in

the CEA (other than in the definitions clause) so as to show when it is being used as a defined term and when it is being used generically.

[37] However, I believe that the fact that the term *pilot* is expressly defined, means that it must carry a meaning in the CEA over and above a generic, layman's understanding of the word. If it were to mean simply, anyone who flies an aircraft for the respondent, one would not expect the term to be defined. As it is, the term is defined in a more narrow way in terms of *duly qualified Captains, First Officers and any other officers who may from time to time be engaged in the flying of commercial aircraft*. I therefore take the use of the word in the CEA to designate the defined term.

[38] Mr Ward is not, I have found, *a pilot who is employed to act as pilot in command of an aircraft*, as I construe this definition of *Captain* to mean, *employed by the respondent to act as a pilot*. The term *employed to act as pilot* means, in my view, employed with the purpose of acting as a pilot. Mr Ward is not employed by the respondent with the purpose of acting as a pilot, and he is not employed with the purpose of being in command of an aircraft. Similarly, he is not employed by the respondent with the purpose of acting as second in command of an aircraft. He is employed with the purpose of acting as the respondent's FOM. His flying activities are incidental to those duties I believe.

[39] This view is supported by the fact that the FOM vacancy bulletin makes no mention of pilot duties and that Mr Ward's employment agreement does not require him to fly commercial aircraft for the respondent. Whilst cited by the applicants in support of their position, these facts help persuade me that Mr Ward is not *employed* as a pilot, and so they do not assist the applicants. Further in support of the conclusion that Mr Ward is not employed as a pilot are the differences between the terms and conditions of employment of Mr Ward and those of all pilots employed by the respondent. These differences touch on many fundamental aspects of employment, such as rostering requirements, structure of remuneration, hours of work, leave and the provision of a uniform.

[40] The respondent states that it is an essential requirement of the FOM role that Mr Ward flies from time to time. Whilst this could be said to support a view that Mr Ward was actually employed as a pilot, given that the requirement stems from the nature of the duties of the FOM, I do not believe that the requirement alone makes

Mr Ward employed with the purpose of acting as a pilot. The purpose of his employment is that he acts as FOM, and the respondent believes that he will be a better FOM if he flies from time to time in both the First Officer's seat and the Captain's seat.

[41] Is Mr Ward *any other officer who may from time to time be engaged in the flying of commercial aircraft*? Unfortunately, the term *officer* is not defined in the CEA. Literally speaking, as a qualified pilot, Mr Ward is arguably an officer who is from time to time engaged in the flying of commercial aircraft. However, I believe that it is necessary to construe this phrase in accordance with accepted rules of contractual interpretation. I refer to the rule known as *ejusdem generis*, which applies when a list of two or more specific descriptors is followed by more general descriptors. The rule provides that, in such a case, the class of the general descriptors must be restricted to the same class of more specific words that precede them.

[42] In this case, the phrase *any other officer* is preceded by the terms Captain and First Officer, both of which are defined as *pilots employed to act as pilots in command or second in command of an aircraft*. Applying the rule of *ejusdem generis*, the term *any other officer* must therefore, I believe, mean an officer who is employed to engage in the flying of commercial aircraft. As I have found that Mr Ward was not *employed* as a pilot, he cannot fall within this definition either.

[43] It is my view, therefore, that although Mr Ward is clearly performing duties of a pilot while he is flying aircraft for the respondent, he is not a pilot for the purposes of the CEA. Furthermore, as clause 7.1.1 refers to a requirement on the respondent to *maintain a seniority list covering all pilots employed by the Company*, as Mr Ward is not a pilot for the purposes of the CEA, he is not required to be assigned a position on the seniority list.

[44] Mr McCabe, counsel for the applicants, suggests that if the respondent's argument that Mr Ward is not a pilot were to succeed, then the respondent could recruit any number of pilots, calling them something else, such as FOMs, and thereby circumvent and undermine the seniority system and s. 97(3) of the Act. With respect, I do not believe that such an extrapolation is realistic. Such an action would be a clear breach of the duty of good faith by the respondent. Furthermore, the applicants have not sought to argue, correctly in my view, that Mr Ward is really not performing the duties of a FOM, or that his appointment as a FOM was in some way a sham.

[45] Finally, although it unnecessary to do so, I should like to address briefly the alternative argument of the respondent, which relies on an interpretation of clause 7.1.5 of the CEA. That is, that as no pilot from within the respondent company applied for Mr Ward's position, then *no suitable qualified person [was] available from within the Company* and so by-pass pay is not payable. It is my view that the fact that no suitably qualified person applied for the post does not bring the Company within the ambit of clause 7.1.5. There may well have been pilots within the respondent Company who were *available*; it is just that none of them applied. Being available to fill a vacancy and being willing to do so are two completely different concepts. Therefore, I am not persuaded by the respondent's alternative argument.

Conclusion

[46] I do not find that Mr Ward has been appointed as a direct entry Captain. Therefore, I do not find that the CEA has been breached, nor that the right to by-pass pay has been triggered.

[47] In addition, given my finding that Mr Ward has not been employed as a pilot as defined by the CEA, I cannot find that Mr Ward should be placed on the seniority list.

Costs

[48] Costs are reserved. If the parties are unable to agree how costs are to be dealt with between them, then the respondent is to serve and lodge a memorandum within 28 days of the date of this determination and the applicants may lodge a memorandum in reply within a further period of 28 days.

David Appleton

Member of the Employment Relations Authority