New Zealand Employment Relations Authority Decisions

Sunair Aviation Limited v Walters (Auckland) [2017] NZERA 91; [2017] NZERA Auckland 91 (31 March 2017)

Last Updated: 9 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 91
5579414

BETWEEN SUNAIR AVIATION LIMITED

Applicant

AND CHRISTOPHER WALTERS Respondent

Member of Authority: Andrew Dallas

Representatives: Mark Beech and Miranda Braddock, Counsel for the

Applicant

Warwick Reid and Rachel Rolston, Advocates for the

Respondent

Investigation Meeting: 2 November 2016 at Tauranga Submissions Received During the investigation meeting Determination: 31 March 2017

DETERMINATION OF THE AUTHORITY (No.2)

A. **Sunair Aviation Limited (Sunair) was entitled to an assessment of remedies because Christopher Walters (Mr Walters) was found**

to have breached an express and implied term of his employment agreement.

B. The remedy awarded to Sunair Air arising out of Mr Walters'

breaches is "loss of a chance" damages in the amount of

$66,681.90.

C. **Five percent interest is payable on the amount specified in (B) from 17 June 2016 until 17 June 2017 or until the amount is paid in full, whichever is earlier.**

D. **The parties are directed to use their best endeavours to reach agreement on a payment schedule and to submit any agreed schedule to the Authority for approval.**

E. Costs are reserved

Employment relationship problem

[1] This is an employment relationship problem between Sunair Aviation Limited (Sunair) and Christopher Walters for which the Authority has already issued a substantive determination.1

[2] To briefly re-state the relevant facts, Sunair employed Mr Walters in the rescue fire service (RFS) from 18 June 2008 to 31 March 2015.

[3] Sunair is an airport services and aviation company managed, and partly owned, by Daniel Power. Sunair holds various contracts at Tauranga Airport (airport).

[4] Between 1988 and 2015, Sunair provided rescue fire services to the airport. The agreement between Sunair and the Tauranga City Council (Council), which owns the airport, was described as being on a "casual, verbal basis".

[5] On 21 January 2015, the Council issued a document entitled "Request for Tender using Waited Attributes for Provision of Rescue Fire Services at Tauranga Airport" (the tender). In essence, this was the public request by the Council for tenders to operate the RFS.

[6] On 9 February 2015, Mr Walters, while employed by Sunair, submitted a tender for the RFS contract to the Council. The tender was submitted in the name of "Advanced Aviation Services" (AAS). AAS is a partnership between Mr Walters and his wife, Pam Walters.

[7] On 13 February 2015, Sunair submitted its tender for the RFS contract.

1 [2016] NZERA Auckland 198.

[8] Five parties tendered for the RFS contract: Sunair, AAS, Emergency Management Systems, Fire and Safety Australia and Falk. The parties were ranked on a percentage-weighted basis for their "non-price" and "price" attributes.

[9] The Council awarded the tender for the RFS contract to AAS. Sunair subsequently lodged proceedings in the Authority alleging Mr Walters had breached various express and implied terms of his employment agreement.

[10] The Authority found Mr Walters, in tendering against Sunair, had breached cl

18 of his employment agreement (which dealt with conflicts of interest and non- competition)2 and the implied duty of fidelity.3

[11] As a result of Mr Walters' breaches, the Authority found Sunair was entitled to an assessment of remedies. It was stated in the substantive determination that, as part of the process of determining remedies, an assessment would need to be made about the likelihood Sunair would have won the RFS contract in the absence of a tender submitted by Mr Walters/AAS and that if the likelihood was low, consideration would need to be given as to whether Mr Walters' breaches gave rise to damages for

"loss of a chance" by Sunair and how such damages, if any, were to be quantified.4

[12] This matter proceeded to an investigation meeting on the basis of the remedies sought by Sunair in its Amended Statement of Problem lodged on 25 January 2016. The remedies sought were (i) damages in the amount of $350,000 said to be Sunair's loss of profit under the RFS contract, (ii) interest awarded under the Judicature Act

1972 at a rate of five percent per annum and (iii) costs.

The Authority's investigation

[13] During a second investigation meeting convened by the Authority to consider the issue of remedies, evidence was received from Mr Kemp on behalf of Sunair and Mrs Walters on behalf of Mr Walters. Advocate for Mr Walters and Counsel for Sunair also spoke to written submissions. In addition, some evidence from the first investigation meeting, particularly that of Ray Dumble and Quinton Dace, was relevant to the issue of any liability arising out of Mr Walters' determined breaches.

Mr Dumble and Mr Dace were involved in the tender process on behalf of the

2 Ibid at [37].

3 Ibid at [44].

4 Ibid at [58].

Council. Mr Dace was an employee of the Council and Mr Dumble was the Chief

Executive of the airport.

[14] This determination, reserved at the conclusion of a one day investigation meeting, has been issued outside the statutory period of three months after receiving the last submissions of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

[15] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during the investigation meeting. While I have not explicitly referred to all the submissions of the parties in this determination, I have fully considered them.

Sunair's claims against Mr Walters

Damages

[16] Sunair had made a claim for *damages* in its Statement of Problem and Amended Statement of Problem, particularied as $350,000 for "loss of profit under the RFS Contract". In submissions, Sunair variously sought *general*, *special* and *expectation* damages.

[17] It is an established principle that a claim for special damages is expected to be specifically pleaded and the pecuniary loss giving rise to the claim particularised.5 As the statements of problem did not plead special damages, the issue was not properly before the Authority to be determined.

[18] During the second investigation meeting, Sunair claimed that it suffered loss

as a result of Mr Walters' breaches and the proper remedy for such losses was

expectation damages.

5 *NZ Times Co Ltd v Wellington Publishing Company Ltd* [1914] NZGazLawRp 17; (1914) 33 NZLR 907.

[19] Matthew Kemp, a forensic accountant, provided a detailed expert witness report, which set out a calculation for losses totalling $723,091, including adjustments to initial calculations based on further information provided by Mrs Walters. Sunair's loss was expressed on a "gross" basis, exclusive of goods and services tax.

[20] Through Mr Kemp's evidence (and in submissions during the investigation meeting), Sunair raised, for the first time, the issue of damages for "consequential losses" arising out of the possible re-awarding of the RFS contract to AAS after its expiry in 2021 and the performance by AAS of "additional services" at Tauranga Airport, after it had commenced performing services under the original RFS contract, for a period of 12 years.

[21] Mr Kemp calculated that $357,177 was the loss of profits under the RFS contract to Sunair. Mr Kemp also calculated a loss of profits to Sunair for the additional services. These services appeared to relate to additional RFS positions required by the Civil Aviation Authority for the effective operation of two rescue fire appliances and an additional RFS resource required by the airport to assist with terminal security during peak times. These additional services did not feature as part of the original RFS tender. The loss of profits associated with these services was stated to be $365,914.

[22] The two figures calculated by Mr Kemp (totalling $723,091) contained different components. The first component was the "profit" for the initial six years of the RFS contract (for the years, 2015 – 2021) with discount of 10% for "chance" (on the basis that Mr Kemp believed the likelihood of Sunair winning the contract in the absence of a tender by AAS as "very high"). The same logic was applied to the first six years of the additional services to be provided by AAS.

[23] The second component was the consequential loss for the subsequent six year period (for the years, 2022 – 2027) with a discount of 35% for "chance" (on the basis that Mr Kemp believed there was a 20% likelihood that Sunair would not have been awarded the contract again and a 15% chance Sunair may not have been in a position to seek its renewal). Again the same logic was applied to the consequential loss for the subsequent six year period for the provision of additional services by AAS.

[24] Appropriately, Mr Kemp applied a "time value of money" discount to the calculation of both figures. This discount was 5 percent per annum, which he said represented a "low risk" market interest rate.

[25] As stated above, these claims for consequential losses were not raised in the statements of problem nor did Sunair seek leave to lodge a further amended statement of problem pleading the same. When asked about this, Counsel for Sunair submitted that the proceedings had evolved and the Authority, as an "informal" body, could consider such matters. The advocate for Mr Walters appeared to agree.

[26] The Court in *Goel v The Director-General for Primary Industries* analysed what it described as "the Authority's unique statutory role and powers".6 However, in undertaking this unique statutory role and exercising its powers, the Authority must have regard to, among other things, but primarily, the principles of "natural justice".7

[27] While the Authority is not a court and some degree of informality may feature as part of its investigation of employment relationship problems, such informality cannot trump the obligation to adhere to the principles of natural justice. Given the significant amount of money claimed by Sunair as consequential losses, Mr Walters ought to have been properly informed about the evolving nature of the case put against him. In other words, this evolution should have been reflected in the pleadings through lodgement of a further amended statement of problem. Consequently, I am not prepared to take up Sunair's invitation to consider these matters and I do not believe the advocate for Mr Walters was fully seized of the situation when he appeared to acquiesce to it. In any event, even if considered, Sunair would have been confronted with questions of remoteness, assuming causation was, or could be,

established.8

Summary of Sunair's claim against Mr Walters

[28] At this point then, Sunair's 'live' damages claim before the Authority against

Mr Walters is a claim for $222,273, being the calculated loss of profits by Mr Kemp under the RFS contract as tendered for by Sunair and AAS.

6 [2015] NZEmpC 54 at [53] - [56].

7 Employment Relations Act, s 157(2)(a).

8 See, for example, *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 489.

Other claims

An account of profits?

[29] Also in its submissions Sunair sought to raise "account of profits" as an alternative remedy if the Authority could not find damages or loss of chance damages. Sunair did not raise account of profits in its statements of problem or seek leave to lodge a further amended statement of problem. Therefore, Sunair is again confronted the same problem facing the heads of damages claims for consequential losses identified above.

Penalty for a breach of good faith and employment not pressed or pursued

[30] As outlined in paragraph [21] of the substantive determination, Sunair initially sought damages arising out of an alleged breach of good faith by Mr Walters. However, after being put on notice by the Authority about the Court's decision in *Hally Labels Limited v Powell*,9 which, in effect, found the remedial regime in the Act covered the field in terms of available remedies for breaches of good faith, Sunair did not press this claim against Mr Walters, even when granted, and taking, the

opportunity to lodge an amended statement of problem.

[31] In addition, Sunair did not seek a penalty against Mr Walters for breach of his employment agreement in its statement of problem. This was also not raised as a cause of action in its amended statement of problem.

[32] In light of the finding that Mr Walters breached cl 18 of his employment agreement, and in the circumstances in which he did, he may have been liable for a penalties under s 4A and s 134 of the Act.

[33] However, as neither of these causes of action were brought or pressed by

Sunair against Mr Walters it would not be appropriate, in the circumstances of this case, for the Authority to consider imposing such penalties at its own motion.

9 [2015] NZEmpC 92.

Would Sunair have won the tender?

[34] The central question to answer in assessing any damages flowing to Sunair as a result of Mr Walters' breaches of his employment agreement is whether it would have won the tender for the RFS in the absence of a tender from AAS.

[35] The objective starting point for assessing this question is the tender. The tender was prepared by Mr Dace and reviewed by Mr Dumble.

[36] A review of the tender discloses the following:

SECTION C – REQUEST FOR TENDER CONDITIONS

6. RFT CONDITIONS

6.1 Rights Reserved by Tauranga City Council

6.1.1 Tauranga City Council reserves the right to:

- reject all or any RFT response, and not award and not accept the lowest price response.

• call and/or re-advertise for RFT responses or revisit any prior ROI

process

• ...

• suspend or cancel (in whole or in part) this RDT process.

• ...

• consider or reject any alternative RFT response.

• ...

- enter in discussions and/or negotiations with any tenderer at any time and upon any terms and conditions, before or after acceptance of an RFT

response.

• ...

• Obtain similar goods/services from any third party and not deal

exclusively with any tenderer under the RFT process ...

...

6.1.3 It is Tauranga City Council's preference that one contract be awarded

for the good/services. However, Tauranga City Council may, in its sole discretion, divide the goods/services and award different contracts for different goods and services.

...

6.1.5 The terms of this RFT does not guarantee the successful tenderer any volume, value, or the placement of any orders.

Legal principles – causation and remoteness

[37] Sunair must establish in a "commonsense, practical way" that the loss claimed is attributable to the breaches of Mr Walters' employment agreement.10 It must do so on the balance of probability.11 Traditionally a "but for" test has been applied by the courts.12 However, this is no longer accepted as the definitive approach to causation.13

A "but for" test may still form part of a broader "commonsense" approach, which relies on "hard facts" and includes questions of reasonableness, foreseeability and probability.14 While cloaked in legal principle, causation will ultimately be a question

of fact.15

[38] Assuming causation is established, consideration then moves to one of "remoteness". Remoteness, which is often subject to "policy considerations" and determined as a question of fact, is, in summary, whether, and to what extent, the law protects Sunair from the loss it claims to have sustained as a result of Mr Walters'

breaches.16 Sunair's loss will be sufficiently linked (that is, not too remote) to Mr

Walters' breaches if it was within the contemplation of both parties that it was not an

unlikely consequence of the breach.17

Jurisdiction

[39] It is clear the Employment Court and Authority have jurisdiction to hear and determine damages claims arising out of breach of contract.18

10 *Sew Hoy & Sons Pty Ltd (in rec & liq) v Coopers & Lybrand* [1995] NZCA 510; [1996] 1 NZLR 392 (CA).

11 *Wilther v Essex Area Health Authority* [1987] UKHL 11; [1988] AC 1074.

12 *Monarch Steamship Company Ltd v Karlshamns Oljefabriker* (A/B) [1949] AC 196 (HL).

13 *Fleming v Securities Commission* [1995] NZCA 320; [1995] 2 NZLR 514 (CA).

14 See, *Hoy & Sons Pty Ltd* per Cooke P, Thomas and Barker JJ..

15 *County Ltd v Girozentrale Securities* [1996] 3 All ER 834.

16 The remoteness principle is traditionally expressed in *Hadley v Baxendale* (1854) 156 ER 14.5

17 A*ttorney-General v Gilbert* [2002] NZCA 55; [2002] 1 ERNZ 31 (CA) at [96].

18 See, *Medic Corporation Ltd v Barrett* (No.2) [1992] NZEmpC 251; [1992] 3 ERNZ 977, *Nova Energy Limited v Michael Mitchell, National Energy Limited and Alan Mitchell* (No.6) [2015] NZERA Auckland 337 and

Employment Relations Act s 162.

Submissions of the parties

Mr Walters

[40] Advocate for Mr Walters submitted an inquiry into causation between Mr Walters' breaches and Sunair's loss lay at the heart of the Authority's investigation. It was submitted that if the evidence of Mr Dumble (supported by Mr Dace) was accepted by the Authority, the prospect of Sunair winning the RFS tender was "nil". It follows that if the prospect was "nil", then Sunair would not be establish, on the balance of probabilities, a causal link between Mr Walters' breaches and its loss.

[41] The advocate said Mr Walters was assisted by a number of aspects of Mr

Dumble's evidence:

(i) there was a high degree of dissatisfaction with Sunair management (Mr

Power) generally by the airport;

(ii) Mr Dumble viewed Sunair use – and proposed continuing use as stated in its tender document – of RFS personnel to service the Air New Zealand Limited (Air NZ) baggage handling contract as "double dipping" and compromising of public safety;

(iii) Mr Dumble said he would not have dealt with Sunair if Mr Walters had not have tendered;

(iv) the creation of an "in house" solution – that is, the RFS being directly performed by the airport – was a viable option for Mr Dumble because the contract was for labour only (the Council, through the airport, maintained ownership of the RFS' resources including the fire trucks and fire station);

(v) precedent for such an "in house" solution existed at the Bay of Plenty

airport located in Rotorua;

(vi) the Council's probity report into the tender process found it was fair

and reasonable; and

(vii) Mr Dumble was an experienced manager of the airport and shouldered responsibilities imposed by the Civil Aviation Act.

[42] The advocate also submitted Sunair's tender was not in accordance with the tender specifications because Sunair proposed to use its own quality assurance employee to comply with one of the requirements of the tender, rather than, as proposed (by the Council), a RFS employee. This, it was argued, demonstrated Mr Power wanted to provide a service that suited him rather than the airport.

[43] The advocate argued Mr Kemp's evidence was of no use to the Authority because it was founded on the (wrong) assumption that the tender would have been awarded to one of the tendering parties, notwithstanding the clear words of the tender.

Sunair

[44] Counsel for Sunair submitted Mr Walters' tender relied heavily on the experience of Sunair's current staff and its track record. Counsel said Mr Walters used Sunair's track record and held it out as his own, for his own benefit and to Sunair's detriment.

[45] Counsel said Mr Walters' actions were deliberate and when he was put on notice of his breaches by Sunair after winning the tender, Mr Walters declined its proposals to rectify the situation (such as handing the contract back to the airport or working in partnership with Sunair). This, it was said, went to the issue of quantum of damages.

[46] Counsel said Mr Dumble's suggestion of an in-house option (rather than awarding the tender to Sunair in the absence of AAS) was not valid given his concession that he had not really turned his mind to it and that, in any event, as he was the only Council employee at the airport, he was reluctant to perform a human resources function..

[47] Counsel said in terms of the non-price attributes, AAS received higher scores than Sunair for the same attributes which included the same team and manager, skill base and track record. Further, the Council committee considering the tenders observed staff discipline was an issue for Sunair but not for AAS, even though they were referring to the same group of workers.

[48] Counsel observed in terms of price attributes, AAS was the lowest tenderer followed by Sunair. The difference between them was $7420 per annum. The other tenderers were more, or significantly more, expensive than both Sunair and AAS.

[49] Counsel took issue with Mr Dumble's view there were performance issues with Sunair. Counsel said, except for two noted incidents over 27 years, there was no other evidence of these performance issues.

[50] Counsel also took issue with Mr Walters' assertion (during the first investigation meeting) that the reason why Sunair did not win the tender was because of ramp duty. Counsel pointed to the evidence of Mr Power that this was only done in pressing need and was not precluded by the RFS contract (nor tender itself).

[51] Counsel pointed to the relationship between Mr Walters and Mr Dumble, which it was submitted had undermined Mr Power and Brian Godfrey, the RFS manager. Counsel said Mr Walters' tender damaged Sunair's tender, making it less attractive to the Council, because it had cemented a view (held by Mr Dumble) that Sunair had no staff loyalty and its operation was, in effect, dysfunctional.

[52] Counsel argued Mr Walters knew from his relationship with Mr Dumble that he would have a strong chance of winning the tender and this made Sunair's loss foreseeable. Counsel submitted it is more likely than not that Sunair would have been successful in its tender for the RFS contract if Mr Walters did not tender.

[53] Finally, Counsel claimed nominal damages only were not appropriate given its loss was clearly demonstrated, forensically established and directly linked to the breach. Counsel, however, submitted that "loss of chance" damages may flow from Mr Walters' breaches if causation for Sunair's loss could not be established.

Conclusions about the awarding of the RFS contract

[54] The contract for RFS was a competitive tender. The Council was not required by the terms of the tender to accept any of the tenders submitted and the tender also reserved the right of the Council to call for further tenders as it saw fit.

[55] This in my view, together with the evidence of Mr Dumble, creates some difficulties for Sunair demonstrating on the balance of probabilities that Mr Walters' breaches caused its loss.

[56] Mr Dumble said in his evidence that the requirements of the tender set out the main areas of interest to the Council and the percentage-weighting given to the various attributes assisted the committee's consideration. However, at no stage was a commitment made that the RFS contract would be awarded to the entity which achieved the best overall score.

[57] Mr Dumble pointed to the failure of Sunair to provide any detail in the "resources" section of its tender beyond "N/A" as an indication of a lack of commitment to the RFS. Mr Dumble said he had to convince the other members of the panel to give Sunair a mark of 50% based on his own understanding of Sunair's capabilities. In that way, it could be reasonably said Mr Dumble had, despite his reservations, assisted Sunair.

[58] Mr Dumble said the purpose of the tender was to look at the options available. Mr Dumble said public safety and the level of service were the paramount factors in the final decision to award the tender to AAS.

[59] Mr Dumble raised concerns about Sunair's performance, although not all his concerns related to the RFS contract. It was, however, clear Mr Dumble did not hold Sunair management in high regard.

[60] Mr Dumble was concerned about the use of RFS personnel to help service Air NZ's baggage handling contract. The proposed continuation of this practice, as set out in Sunair's tender, was, on Mr Dumble's evidence, a reason why Sunair

would not have been awarded the tender even in the absence of the AAS tender.

[61] Mr Dumble stated Sunair did not comply with the terms of the tender by proposing its internal quality assurance manager fulfil the functions of the proposed Airport Fire Safety Officer position. He said this was not acceptable to him.

[62] In evidence and submissions, Sunair drew attention to the relationship between Mr Walters and Mr Dumble, but it did not allege a conspiracy between the pair. In any event, even if alleged, there was no evidence before the Authority to support such a proposition. If anything, the Council's probity report into the tender process and Mr Dumble's evidence that he would have expected Mr Walters to "deal with" his employment agreement obligations to Sunair before submitting a tender for the RFS contract, are suggestive of an independent relationship.

[63] Mr Dumble said alternatives existed to awarding the RFS contract to AAS including an in-house solution. I do not accept Sunair's submission this was not "viable" option. While it was not Mr Dumble's preferred option and little, if any, preparatory work had been undertaken, it remained a real option for the council given it was under no obligation to accept any of the submitted tenders. Mr Dumble also said in his evidence he would have approached another company which provided rescue fire services at two other regional airports.

[64] On the plain words of the tender and the evidence of Mr Dumble, and to the extent it was supported by that of Mr Dace, his evidence as well, I find Sunair cannot demonstrate on the balance of probabilities the necessary causality between Mr Walters' determined breaches and the loss it has suffered. Simply put, Sunair was unable to demonstrate that absent Mr Walters' breaches, it would have won the tender. The plain words of tender and the evidence of Mr Dumble cast too much doubt for this to be a viable proposition.

[65] As causation cannot be established, it is not necessary to consider the issue of remoteness.

[66] However, that is not the end of the matter. As stated in paragraph [11] above, Sunair is entitled at this point to an evaluation of damages for "loss of a chance". That is the chance Sunair would have had if Mr Walters had not bid. Counsel submitted that chance was high given the tender scores, Sunair's good track record and Mr Kemp's evidence.

Damages for "loss of a chance"?

Legal principles

[67] The classic formulation of loss of a chance damages arising from a breach of contract is found in *Chaplin v Hicks.*19 In essence loss of a chance allows a plaintiff, who is unable to prove on the balance of probabilities a causal link between a breach of contract and their loss, to recover a proportion of that loss based on the value of the chance of a different outcome (or preventing that outcome).

[68] The loss of a chance must be substantive rather than speculative.20 Difficulties in ascertaining the value of the chance are not an impediment to a successful claim. It is also not necessary to prove the benefit of the chance is more likely than not, at least,

51 percent.21

[69] The Court of Appeal has accepted loss of a chance damages as an established head of damages.22 Loss of a chance damages have been successfully argued in the Employment Court.23

[70] Claims for loss of a chance fall into three categories.24 Tender cases, such as this, fall into the third such category, which concerns the hypothetical or future acts of a third party (in this case, the Council).25

[71] To be successful in a claim for loss of chance damages, Sunair must prove, as a matter of causation, that it had a "real or substantive chance as opposed to a speculative one" and then, the "evaluation of the chance [becomes] part of the assessment of the quantum of damage".26 Evaluation in this context is a matter of

"informed estimation".27

19 [1911] UKLawRpKQB 104; [1911] 2 KB 786

20 *Allied Maples Group Ltd v Simmons & Simmons* [1995] EWCA Civ 17; [1995] 4 ALL ER 907 (CA).

21 *Martelli McKegg Wells v Commbank International NV* CA75/96, 7 November 1996.

22 *Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243 (CA), *Bank of New Zealand v New Zealand*

Guardian Trust Company Ltd [1998] NZCA 768; [1999] 1 NZLR 664 (CA) and *Benton v Miller & Poulgrain* [2005] 1

NZLR 66 (CA)

23 See, *Waikanae Holdings (Gisborne) Limited v Smith* [2005] NZEmpC 54; [2005] ERNZ 267.

24 *Allied Maples*, above n 20, per Stuart-Smith LJ

25 See, for example, *Transit New Zealand v Pratt Contractors Limited* [2002] NZCA 391; [2002] 2 NZLR 313 (CA)

26 *Allied Maples*, above n 20, p 919

27 *Martelli*, above n 21, p 12

[72] Therefore, the focus of the Authority's inquiry must be on whether Sunair has established there was a real or substantive chance of the Council awarding the RFS contract to Sunair in the absence of a bid by Mr Walters. If the Authority finds there was no real or substantive chance, no real value can be placed on Sunair's lost chance to be awarded the tender.

[73] However, for the reasons that follow, I find that Sunair has established that it had a real or substantive chance in the absence of Mr Walters' breaches/tender based on three grounds, which emerged from the evidence and appropriate extrapolation.

AAS as a "vehicle of convenience"

[74] In some ways, Mr Walters' tender, submitted as AAS, could be seen as a "vehicle of convenience" for Mr Dumble. In awarding the tender to AAS, Mr Dumble was not required to take the risk of the tender going to an unknown party or directly focusing his attentions on developing an in-house solution or approaching other potential interested parties. Instead, Mr Dumble was able to secure the essential elements of Sunair's RFS operation severed of its management structure, which he clearly perceived as problematic.

[75] Mr Dumble's evidence was that he was an experienced manager of the airport and shouldered the responsibilities imposed by the Civil Aviation Act. He said safety was of paramount concern but against this, Mr Dumble awarded the RFS contract to an entity with, at that stage, no actual track record of managing the RFS (as opposed to working within it, in the case of Mr Walters). I do, however, have no reason to doubt Mr Dumble's evidence that AAS is performing the RFS contract to the standard required by the airport.

Practical realities

[76] In the absence a tender by AAS – and because it was tolerably clear from the evidence the other tenderers were not suitable and/or too expensive – Mr Dumble would have had to turn his mind more acutely to developing an in-house solution or approaching other potential parties.

[77] While Mr Dumble was adamant he would not have dealt with Sunair in such circumstances, the practical reality was Sunair was already mobilised to perform the RFS contract. Moving beyond Sunair would have resulted in the redundancy of experienced personnel, including Mr Walters. Mr Dumble may well have secured the services of these employees for any future venture, whether in-house or external, but there could be no guarantee of that. It may well have also been the case that for, at least an interim period, until the in-house or external solution was in place, Mr Dumble would have found it necessary to let Sunair carry on performing the RFS contract.

Unfairness to Sunair

[78] The requirements of "fairness" have been found to have application in tender cases.28 For the reasons that follow, I find there was unfairness in the approach Mr Dumble took to the Sunair tender. The tender allowed the Council to enter into discussions with a tenderer. Mr Dumble said he identified three significant problems with the Sunair tender: (i) the failure to complete the "resources" attribute of the tender, (ii) the proposed use of RFS personnel for baggage handling duties and (iii) the proposed use of Sunair's quality assurance manager (rather than the creation of an Airport Fire Safety Officer position within the RFS as required by the tender).

However, Mr Dumble never raised these issues with Mr Power until Sunair had been unsuccessful with its tender.

[79] At the time the request for tenders was made, and during the time they were being considered, Sunair performed the RFS contract, as it had done for 27 years. On a fact specific basis, these 27 years must have meant something or, at least, the courtesy to be put on notice by Mr Dumble about the deficiencies in its tender and to be afforded an opportunity to address these. This was particularly so in circumstances where a viable alternative tender had actually been submitted from within the RFS by

Mr Walters.

28 See, for example, *Pratt,* above n 8.

[80] The failure to provide Sunair with such an opportunity meant the loss of a chance to submit a more acceptable tender.

The deficiencies in Sunair's tender would likely have made AAS's tender look more attractive to the panel, even though, in several significant respects, it was assessing very similar attributes.

[81] Further, Mr Dumble, being aware Mr Walters was a current member of the RFS and an employee of Sunair, and despite any issues of confidentiality, should have advised Mr Power of the existence of the AAS tender. The AAS tender arose out of Sunair's RFS operation. As it was, Mr Dumble conceded in his evidence that he would have expected Mr Walters to "deal with" his employment agreement obligations to Sunair before submitting a tender. The failure to advise Sunair of the existence of the AAS tender deprived Sunair of a chance to secure a different outcome (or prevent the current outcome from occurring). That is, Sunair lost an opportunity to, for example, seek an injunction to restrain the Mr Walters' alleged breaches of his employment agreement or take some other form of action.

Evaluation of damages for loss of a chance

[82] Having found Sunair had a real or substantive chance in the absence of a tender from AAS, it is entitled to an evaluation of the value of that chance and the damages that flow from it. There appear to be two approaches to assessing the value of a chance emerging from employment cases. The first is the "percentage approach",

which has been considered by the Court of Appeal.29 The second is the "arbitrary

approach".30 The approach that is preferred here is an amalgam of the two, on the basis that in reality even percentage assessment requires a certain degree of

arbitrariness.

29 See, for example, *Waikanae Holdings,* above n 23.

30 See, for example, *Max Tarr Electrical Contractors Ltd v Dixon* [2001] NZEmpC 43; [2000] 2 ERNZ 281. See, *Morris v*

Interchem Agencies Ltd [2003] NZCA 140; [2003] 1 ERNZ 93 (CA).

[83] The obvious and most useful starting point for the evaluation is Sunair's loss of profits for the life of the RFS contract. Mr Kemp calculated these as $222,273 after discounts for chance and time value of money. Alternatively, Mr Kemp assessed the value of the chance at 90 percent. This was based on his assessment of the material provided by Sunair that it was the best priced tender (in the absence of AAS) and the relatively close scores between the four participants for the non-price attributes.

[84] Using a 90 percent chance as starting point then, any relevant "contingencies" have to be taken into account.31 The more contingencies extant, the lower the value of the chance.32

[85] As an exercise in informed estimation based on the evidence and the parties' submissions, a number of relevant contingencies reduced the value of Sunair's chance.

[86] The most significant of these is that the Council was under no legal obligation to award the tender, by its own terms, to any tendering party. So even if Sunair's tender was treated more fairly by Mr Dumble, there must remain considerable doubt about whether the tender would have been awarded to Sunair (or any of the tendering parties).

[87] Other relevant contingencies are that Mr Walters was not subject to a restraint of trade; he did not, as was accepted by Sunair, use confidential information to formulate his tender; and, as was found by the Authority, he was not to be subject to fiduciary obligations.33

[88] These contingencies combined support a significant reduction in Sunair's chance from 90 percent. The reduction for the non-binding nature of the tender warrants the largest deduction. That reduction is 40 percent. The other matters

combined warrant a further reduction by 20 percent.

31 See, *Takaro Properties Ltd v Rowling* [1986] NZCA 27; [1986] 1 NZLR 22 (CA).

32 See, *Hall v Meyrick* [1957] 2 QB 455.

33 *Interchem,* above n 30 at [42].

[89] Therefore, Sunair's loss of a chance damages are assessed at 30% of the calculation provided by Mr Kemp for the RFS contract as tendered for by Sunair. That amount is $66,681.90.

[90] Mr Walters must pay Sunair $66,681.90 as loss of a chance damages.

Payment schedule

[91] The parties are directed to use their best endeavours to reach agreement on a payment schedule and to submit any

agreed schedule to the Authority for approval. If asked, the Authority will issue the schedule as a determination or, preferably, a consent determination.

Claim for interest

[92] Sunair has made a claim for interest on any damages awarded. The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed under s 87(3) of the Judicature Act 1908. The rate applicable at the time the statement of problem was lodged is 5 percent per annum.

[93] Applying the principles of loss of chance to the chance to earn interest, I find Sunair could have reasonably expected to have accrued interest on monies payable under the RFS contract. Therefore, I consider that it is appropriate for an award of interest to be made to Sunair.

[94] However, the period for which interest attaches to the award of damages should be reasonable and time limited to reflect the fact they are "loss of a chance" rather than compensatory damages. That period is from the date of issuance of the first determination (which determined Mr Walters' breaches) being 17 June 2016 until

17 June 2017 or until the amount is paid to Sunair in full, whichever is earlier.

Costs

[95] Costs are reserved. The parties are encouraged to resolve the issue of costs between themselves. If unable to do so, either or both parties may apply to the Authority for a timetable for exchange of memoranda on costs.

[96] If asked to do so, the parties can expect the Authority will assess the issue of costs from the starting point of a daily tariff, $3500 for a matter such as this commenced before 1 August 2016, and adjusted upwards or downwards for relevant factors.34

Andrew Dallas

Member of the Employment Relations Authority

34*PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC

135 at [106]-[108].
