IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 510
5298805

	BETWEEN	MICHAEL ALEXANDER TALBOT Applicant
	AND	AIR NEW ZEALAND First Respondent
	AND	THE NEW ZEALAND AIR LINE PILOTS ASSOCIATION INDUSTRIAL UNION OF WORKERS INCORPORATED Second Respondent
Member of Authority:	K J Anderson	
Representatives:	M Talbot, In person K Thompson, Counsel for First Respondent R McCabe, Counsel for Second Respondent	
Submissions Received:	12 August 2011 for First Respondent 12 August 2011 for Second Respondent 24 August 2011 for Applicant	
Determination:	1 December 2011	

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination issued on 27th July 2011[1] the Authority determined the substantive matter. The Applicant, Mr Talbot, had raised a dispute about the interpretation, application, or operation of certain provisions of the collective employment agreement (CEA) entered into between the New Zealand Air Line Pilots' Association Industrial Union of Workers Incorporated (the NZALPA) and Air New Zealand Limited (Air NZ). The Authority largely accepted the arguments advanced by Air New Zealand in that it was not possible for the Authority to provide an interpretation of the term "first class" as sought by Mr Talbot. Rather, it was for the parties to decide that matter of what constituted a first class hotel, consistent with a

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process that Air NZ and the NZALPA had adopted over a number or years. By agreement, the NZALPA were joined as a party to the proceedings and Mr McCabe assisted the investigation of the Authority, particularly in regard to the involvement of the NZALPA relating to the application of the relevant provisions of the CEA.

[2] The parties have now provided submissions in regard to the matter of appropriate costs to be awarded by the Authority. While no details have been provided in regard to any costs incurred by the respondent parties, I accept that the preparation and advocacy for this matter, particularly by Air NZ, would have involved reasonable costs being incurred.

The submissions for Air New Zealand

[3] Air NZ seeks an award of costs against Mr Talbot in the amount of $5,000. While Air NZ acknowledges the usual tariff based approach of the Authority consistent with principles set down by *PBO (formerly Rush Security Limited) v Da Cruz,*[2] it is submitted that a higher award of costs than the usual $3,000 for a one day hearing is appropriate in the circumstances. Air NZ says that this is because via a letter dated 4th August 2010, the company proposed to Mr Talbot that should he accept that the interpretation of the relevant provisions of the CEA, as posited by Air NZ, was correct, then the company would be "… *prepared to let the legal costs to date lie where they fall in relation to this litigation.*" In its letter of 4th August 2010, Air NZ informed Mr Talbot that if he did not accept this "*offer*" then the company would rely upon it to seek a higher award of costs against him from the Authority than would normally be sought.

[4] However, I do not accept that the offer made by Air NZ to Mr Talbot can be seen as an offer consistent with the usual *Calderbank* principles as set out in such cases as *Health Waikato Limited v Elmsley*[3] and *Bluestar Print Group NZ v Mitchell.*[4] This is because a matter of interpretation of a document was involved rather than prospective monetary remedies arising and it seems to me that while the weight of the evidence substantially supported the position adopted by Air NZ (and the subsequent outcome), I do not believe that it is appropriate to apply a *Calderbank* approach given

[2] [2005] ERNZ 808
[3] [2004 1 ERNZ 172 (CA)
[4] [2010] NZCA 385

the overall circumstances of this matter; albeit such an approach may carry more weight in other circumstances.

[5] Finally, Air NZ submits that the Authority should increase the usual daily tariff on the basis that a variety of factors, including "*voluminous evidence and supporting documents"* being provided by Mr Talbot and the '*inevitable involvement*" of the NZALPA, warranted such increase. But I do not accept that there was anything out of the ordinary in regard to this case that warrants an increase in the amount of costs that would normally be awarded.

The submissions for the NZALPA

[6] The submissions for the NZALPA are brief in that the Authority is requested to use the usual tariff based approach and award the sum of $1,500 for the half day that the investigation meeting occupied.

The submissions for Mr Talbot

[7] Firstly, Mr Talbot points to the provisions of s.129 of the Employment Relations Act 2000 and the right of a party to an employment agreement to pursue a dispute about the interpretation, application or operation of that employment agreement. And then, in the substance of his submissions, Mr Talbot refers the Authority to the general principle (with reference to legal authorities), whereby the Authority and the Employment Court have adopted the approach that costs should lie where they fall in regard to "interpretation" disputes.

[8] While I accept that in many instances, it is appropriate that costs should be left to lie where they fall, when it comes to the Authority assisting the parties when a dispute arises regarding the interpretation, application or operation of an employment agreement, I do not accept that the circumstances regarding this matter fall within that general context. This is because it seems to me that this dispute was more about some dissatisfaction that arose on the part of Mr Talbot (and some colleagues) in regard to their views of the standard of the new hotel accommodation that had been agreed to between Air NZ and the NZALPA, rather than a matter whereby both parties accepted (even reluctantly, as in some instances) that it may be useful to have a third party interpretation of a provision contained in an employment agreement. The evidence presented at the investigation meeting showed that Mr Talbot, more probably than

not, had other avenues available to him, via representation by the NZALPA, which he chose not to avail himself of.

Determination

[9] I find that Air NZ is entitled to an award of costs but there is no reason to increase or decrease the normal tariff currently adopted by the Authority, of $3,000 per day. The investigation meeting for this matter occupied half of a day and hence Mr Talbot is ordered to pay to Air New Zealand the sum of $1,500.00.

[10] As it was represented by "in house" counsel and a minimal amount of involvement was required in the proceedings, I make no order for costs to the NZALPA accordingly.

K J Anderson
Member of the Employment Relations Authority