



# Employment Court of New Zealand

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## Benge v Finlayson [2011] NZEmpC 26 (29 March 2011)

Last Updated: 14 April 2011

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2011\] NZEmpC 26](#)

ARC 95/09

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

AND IN THE MATTER OF an application for further and better particulars

BETWEEN	WILLIAM MICHAEL BENGE First Plaintiff
AND	KENNETH CARRAN MACLEAN FINLAYSON Second Plaintiff
AND	PETER MATTHEWS Third Plaintiff
AND	MARK FRANCIS RAYMOND SIMICH Fourth Plaintiff
AND	ALASTAIR MURRAY STEWART RUSSELL Fifth Plaintiff
AND	BRYAN TOURELL Sixth Plaintiff
AND	CHRISTOPHER ROBERT JAMES PETERS Seventh Plaintiff
AND	PHILIP ROWAN Eighth Plaintiff
AND	AIR NEW ZEALAND LIMITED Defendant

Hearing: 23 March 2011 (Heard at Auckland)

Counsel: Jim Roberts and Randall Walker, counsel for plaintiffs

Kevin Thompson, counsel for defendant

March 2011]

**INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN**

[1] This judgment deals with the defendant's application for orders requiring the plaintiffs to give further and better particulars of their amended statement of claim of

5 November 2010. The hearing to determine these opposed applications is the culmination of a series of attempts to establish the pleadings before this litigation can go to trial. Despite a lengthy conference with counsel in Chambers as long ago as July 2010, the parties have not been able to agree about how the plaintiffs' claims are to be framed and the Court is now required to give directions about these issues.

[2] This is an important case for all parties and raises complex and potentially difficult questions of fact and law. The plaintiffs' claims relate to their treatment by their employer at the peaks of their careers as senior airline pilots. The monetary remedies claimed by the plaintiffs from the defendant may amount to several million dollars and the plaintiffs are not by any means all of the potentially affected pilots. So it is not surprising both that the pleadings are and will be lengthy and complex and that the defendant wishes to explore thoroughly and use all lawful defences that may be available to it.

[3] But that said, the length of time that it has taken even to produce a statement of claim, the dimensions of that statement of claim (96 pages), the length of the hearing of these applications for further particulars (one day dealing only with the broad applicable principles), not to mention the length of this judgment to deal with all of the defendant's claims, all herald difficult and protracted litigation. It is unfortunate that there have been generated, also, complaints of stonewalling, delay for its own sake, and misuse of economic power in litigation. Regrettably, even at this early stage there are indicia of personal animosities which, if they continue, do not bode well for what will be a lengthy and sometimes trying case. Unfortunately, at this early stage at least, I do not consider that the alternative of mediation is so likely to assist the parties that the delays to the proceedings that it may bring will be justified by prospects of resolution. That is not to say, however, that the Court will not keep mediation in mind and indeed it must, under the Employment Relations Act

2000 do so constantly and direct the parties to mediation unless there are good reasons (defined in the statute) for not doing so.

[4] The general nature of the litigation is as follows. The eight individual plaintiffs are or were employed by the defendant as airline pilots. They allege that upon attaining the age of 60 years, they were required by the defendant either to retire or to be demoted, actions which the plaintiffs say were unlawful in several different ways. The plaintiffs claim that the defendant, in breach of contract and/or unjustifiably, failed to advise them that the rules by which over age 60 pilots were constrained from flying in command of aircraft were about to change. They say that if that advice had been given, it would have enabled the plaintiffs either to preserve their employment or to maintain it at the same level as previously and thus would have enabled them to avoid what they say were the injurious consequences of the defendant's breaches. The plaintiffs claim compensatory damages.

[5] The plaintiffs' causes of action are in breach of contract (both individual employment agreements and the relevant collective agreements), personal grievances of unlawful discrimination pursuant to s 103(1)(c) of the Act and personal grievances of unjustified disadvantage in employment pursuant to s 103(1)(b) of the Act.

[6] The first issue raised by the defendant turns on the plaintiffs' decision to combine their proceedings in a single statement of claim. The defendant submits that the plaintiffs' individual circumstances are sufficiently different that they ought to be required to file separate statements of claim. Not unconnected with that is the defendant's complaint that the plaintiffs have unilaterally changed in the amended statement of claim, the order in which they appear as first to eighth plaintiffs. As I said in court, I think the most expeditious immediate resolution of that arguably inappropriate amendment is to hold the plaintiffs to their latest citations and as they appear in the entitling to this judgment. The plaintiffs should not, however, make further such unilateral changes to the proceedings.

[7] Whilst it is correct that the majority of the plaintiffs' causes of action are personal grievances and that, as such, they are personal to individual employees or ex-employees as opposed to being in the nature of a dispute affecting all members of a class of employee, that does not in itself necessarily dictate separate proceedings for each employee. There are clearly a number of common issues that the plaintiffs have and the defendant's way of treating those issues has also been by applying a standard approach or policy to them.

[8] So long as the common statement of claim differentiates sufficiently the truly individual circumstances of each of the plaintiffs, in addition to addressing the elements of their grievances that are common to them all, I do not consider that the plaintiffs should be required to file individual statements of claim so that, logically, their cases should then proceed as eight

separate, albeit very similar, cases. I am unpersuaded that the plaintiffs should now be required to file individual statements of claim.

[9] The defendant's application acknowledges the potential for the Court to permit the plaintiffs to continue by a single statement of claim so that it is appropriate now to turn to the defendant's assertions of inadequate pleading in that single amended statement of claim.

[10] The starting point for determining the adequacy of a statement of claim is reg

11 of the [Employment Court Regulations 2000](#) (the Regulations) which provides relevantly as follows:

#### **11 Statement of claim**

(1) Every statement of claim filed under regulation 7 or regulation 8 must specify, in consecutively numbered paragraphs,—

(a) the general nature of the claim:

(b) the facts (but not the evidence of the facts) upon which the claim is based:

(c) any relevant employment agreement or employment contract

or legislation and any provisions of the agreement or the contract or the legislation that are relied upon:

(d) the relief sought, including, in the case of money, the method

by which the claim is calculated: (e) the grounds of the claim:

(f) any claim for interest, including the method by which the interest is to be calculated:

...

(2) The matters listed in subclause (1) must be specified with such reasonable particularity as to fully, fairly, and clearly inform the Court and the defendant of—

(a) the nature and details of the claim; and

(b) the relief sought; and

(c) the grounds upon which it is sought.

(3) Each paragraph of a statement of claim must be concise and must be confined to 1 topic.

[11] It is significant, also, that the plaintiffs' proceedings are predominantly personal grievances although two of the seven causes of action of each are claims for breach of contract. In respect of those personal grievances which allege unjustified disadvantage in employment (two causes of action for each plaintiff), once the plaintiffs establish disadvantage in employment attributable to the acts or omissions of the employer, it will be for the defendant to justify in law those disadvantageous acts or omissions. Mr Thompson, counsel for the defendant, did not demur when I put to him that it appeared to be undisputed that the plaintiffs had suffered disadvantage in their employment which was attributable to the actions of the employer. The crucial question for decision will be the justification for that disadvantage and the defendant is confident that it can justify in law whatever disadvantages may have been suffered by its employees. So, in respect of the personal grievance causes of action and, especially, those alleging unjustified disadvantage, the plaintiffs' statement of claim need not be complex or detailed to meet the requirements of reg 11. That is because, in effect, their cases will turn on justification which I understand the defendant to accept that it should establish.

[12] At least some of the plaintiffs' difficulties in their pleadings are self-induced in the sense that they have over-pleaded including by attempting to negative what they anticipate will be affirmative defences raised by the defendant. It is not surprising in these circumstances that the defendant has been unable to resist seeking particulars of claims that are really arguments of law and other matters that have no place in a statement of claim. The plaintiffs' amended statement of claim could and should have been much more concisely and economically expressed and it is very regrettable, given the length of time that it has taken to get these issues back before the Court, that the parties have not been able to get on with the merits of their claims and defences. It is tempting to require the plaintiffs to now plead properly and succinctly so as to avoid a repetition of the present position. However, I have decided on balance that it will be better to allow them to plead in the way that they have and to make progress by requiring the defendant to plead its defences to most,

but not all, of the allegations as they are currently made in the amended statement of claim. They may re-plead their statement of claim more succinctly but I will not require this as a condition of proceeding.

[13] The amended statement of claim is unusual in the sense that after making some general allegations applicable to all of the plaintiffs, it deals with causes of action and then plaintiffs within those causes of action rather than the more usual converse.

Again, although this is both unconventional but more importantly makes it arguably difficult to analyse the amended statement of claim, I consider it better on balance to not require the plaintiffs to plead conventionally but to make progress, albeit somewhat awkwardly.

### General principles about particularisation

[14] I have already set out reg 11 of the [Employment Court Regulations 2000](#) which governs broadly the contents of statements of claim. There are, in addition, a number of useful statements of principle both in this court and in the courts of ordinary jurisdiction in New Zealand which I propose to adopt and apply in dealing categorically with the numerous and sometimes repetitive assertions by the defendant that it needs more particulars of the plaintiffs' claims before it can plead to them.

[15] In this Court there is the judgment in *O'Flynn v Southland District Health Board*.<sup>[1]</sup> As Judge Shaw concluded at para [4] of that judgment, in the absence of express provision for applications for further particulars in the Regulations, the High Court Rules apply. Then applicable was r 185 although that is now the materially similar, if not identical, r 5.21. This provides materially:

#### 5.21 Notice requiring further particulars or more explicit pleading

(1) A party may, by notice, require any other party—

(a) to give any further particulars that may be necessary to give fair notice of—

(i) the cause of action or ground of defence; or

(ii) the particulars required by these rules; or

(b) to file and serve a more explicit statement of claim or of defence or counterclaim.

[16] This is consonant with, and is available to assist in ensuring compliance with, reg 11 of the Regulations. As the judgment in *O'Flynn* confirms, the overall objective of particulars is to inform the other party and the Court of the nature of the case as distinguished from the mode in which it will be proved,<sup>[2]</sup> to prevent surprise and to limit and define issues.

[17] As reg 11 itself emphasises, there must be a distinction between facts and evidence of the facts. Differentiating them can be problematic. As the Court of Appeal noted in *Price Waterhouse v Fortex Group Ltd*<sup>[3]</sup> at p13:

The object of a Statement of Claim is to "state" the "claim", so that the Court knows what it is to rule upon, and the Defendant knows the case which it must meet. As a matter of practicalities, this initial "statement" is not at the level of a full disclosure of all evidence and documentation. It is of course an abbreviated summary "statement" of the basic facts said to give rise to the claim, and of the relief which is sought

And at p14:

In marginal cases, it is better to avoid generalities and rules of thumb, and to return to principle. The pleader and Court simply ask "in the circumstances of this claim, is that statement sufficiently detailed to state a clear issue and inform the opposite party of the case to be met?". This is not, under modern practice, simply some minimum which a Defendant needs so as to be able to plead. It is intended to supply an outline of the case advanced, sufficient to enable a reasonable degree of pre-trial briefing and preparation. Discovery and interrogatories are only an adjunct, not a substitute for pleading.

In the result, and particularly in complex cases, a rather more detailed factual narrative has come to be required than was the case in earlier and simpler times. That does not require the full detail which later will be contained in a brief of evidence. Nor does the modern requirement for pre-trial exchange of briefs dilute the earlier and differently based requirement for sufficiently particular pleading. What is required is an assessment based on the principle that a pleading must, in the individual circumstances of the case, state the issue and inform the opposite party of the case to be met. As so often is the case in procedural matters, in the end a common-sense and balanced judgment based on experience as to how cases are prepared and trials work is required. It is not an area for mechanical approaches or pedantry.

[18] The judgment in *Commerce Commission v Qantas Airways Ltd* (above) also signals the dividing line between proper particulars (permitted) and probing for

evidence (not permitted). So too does the judgment of the High Court in *Commerce*

*Commission v Telecom Corporation of New Zealand Ltd*<sup>[4]</sup> identify particularisation that is unreasonably burdensome or oppressive for the party concerned should not be permitted.

[19] The practice of probing for evidence, which is inappropriate to support facts pleaded, is actively discouraged as illustrated by judgments such as *BNZ Investments Ltd v The Commissioner of Inland Revenue*<sup>[5]</sup> where Miller J stated:

The temptation to insist upon excessively refined pleadings is to be resisted as unnecessary and wasteful of costs and court

time. That is particularly so in complex cases, where over-pleading can obscure rather than clarify the issues. Case management should ensure that each side is fairly informed of the case that must be met. It can extend to requiring leading counsel to agree a list of issues. Evidence can be exchanged in good time before the trial.

And in *Commerce Commission v Telecom Corporation of New Zealand Ltd*:[\[6\]](#)

It is elementary that a pleading must recite the material facts relied on, by which is meant those facts which the plaintiff must prove in order to make out its cause of action. A plaintiff is not, however, required to prove the evidence it proposes to rely on in order to prove those material facts. This proposition was put in emphatic terms by Joske J in *Trade Practices Commission v Total Australia Limited* (1975) 24 FLR 413 at 417. He said:

“While the defendant is entitled to know the case it is called upon to meet, it is not entitled to be told the evidence it will be called upon to prove the case. A defendant is entitled to ask for the material facts upon which the plaintiff will rely and he may make his request for the facts and matters relied on, which is taken to mean the same thing. When he asked for the facts and circumstances relied on he is going beyond the scope of particulars, and is proving for evidence ...”

[20] As to questions of law in a statement of claim, it is difficult to go past the words of Lord Denning MR in *Re Vandervell's Trusts (No 2)*:[\[7\]](#) “While it is necessary to state the facts, it is not necessary to state the legal result of those facts.” To introduce controversial legal argument is even more surely inappropriate.

[21] So guided, I now examine the numerous and voluminous claims by the defendant for further particulars.

[22] The first issue relates to para 2.1 of the amended statement of claim. The defendant says that because some plaintiffs are now, and others were formerly, pilots employed by it, the amended statement of claim should identify which are in each category.

[23] Paragraph 2.1 is a general background paragraph identifying the parties. The circumstances of each plaintiff are set out later in the amended statement of claim. I do not consider it so material to the plaintiffs’ claims whether they are now employed by the airline, that this should be a feature of the plaintiffs’ pleading at para 2.1. The plaintiffs must, nevertheless in those parts of the amended statement of claim where their individual circumstances are dealt with in more detail, identify whether they are now or were formerly employed by the defendant and, if the latter, the dates of the end of their employment.

[24] The next part of the defendant’s application relates to para 2.3 of the amended statement of claim. This again pleads generally that each plaintiff had, at all material times, individual terms of employment with the defendant consisting of the terms of any applicable collective agreement, other terms agreed with the defendant from time to time, and implied terms.

[25] Again, this is broad background information in para 2.3 that is or must be particularised subsequently in respect of each plaintiff. The statement of claim must specify in relation to each plaintiff the relevant collective agreement applicable to the period or periods of time the subject of the proceedings, any relevant individual agreement or agreements likewise applicable, and any other terms or conditions of employment upon which the plaintiffs rely but which were not contained in such collective agreements or individual employment agreements.

[26] The next particulars relate to para 3.16 of the amended statement of claim. This is also a paragraph contained under the general heading to paragraph 3 (“Background”). It deals with an allegation that the operation of aircraft by Pilots-in-Command over the age of 60 years is governed by Part 129 of the Federal Aviation Regulations of the United States of America. Paragraph 3.16 of the amended statement of claim asserts: “At all material times Part 129 did not

expressly incorporate the Age 60 Rule.” The “Age 60 Rule” is a shorthand to para

2.1.10 of Annex 1 (“Pilot-in-Command”) to the International Civil Aviation Organisation’s Standard. The defendant says in relation to Part 129 of the Federal Aviation Regulations that if the Age 60 Rule was not expressly incorporated, the plaintiffs should particularise the basis for its inclusion in Part 129.

[27] The plaintiffs say in response that they have not pleaded that the Age 60 Rule was included in Part 129 of the Federal Aviation Regulations so that the defendant seeks then to particularise pleadings they have not made. Further, the plaintiffs say that these particulars are not required to fully, fairly and clearly inform the defendant of the case it is required to answer and that the defendant’s application is itself an acknowledgement that it is fully aware of the cases claimed against it. Finally, the plaintiffs say that they are not required to plead the defendant’s possible defence and say that if the defendant wishes to plead an affirmative defence that the Age 60 Rule is incorporated into Part 129, then it is entitled to so plead in its statement of defence.

[28] Paragraph 3.16 is a classic example of the plaintiffs’ unnecessary over-pleading which has, unsurprisingly, generated an application for further particulars. It deals with matters which may arise out of an affirmative defence or other pleading by the defendant and which will be addressed appropriately in legal submissions informed by evidence that may be called at the hearing. If the plaintiffs wish to continue to rely upon para 3.16 in their amended statement of claim (and indeed similar

unnecessary and inappropriate pleadings), then to require them to provide further particulars would simply compound and exacerbate that over-pleading.

[29] Paragraph 3.16 is also an example of the plaintiffs' inappropriately pleading issues of law in the sense that it purports to assert a particular interpretation of an international convention which is applicable domestically and relevant to factual elements of the case. For this reason, also, it is not only inappropriate that the pleading be made but to require particulars of it as the defendant now seeks would be to perpetuate and exacerbate that position. Although it is over to the defendant as to how it pleads to para 3.16 and other similar paragraphs in the amended statement of claim, it may care to decline to plead to these matters as being questions of law, but

in any event to deny them. For these reasons I decline to direct the plaintiffs to provide further particulars of para 3.16 as it seeks and my reasoning will, by analogy, apply to a number of other similar paragraphs in the amended statement of claim that I deal with subsequently.

[30] Next at para 3.17 of the amended statement of claim the plaintiffs assert that there was nothing within the ICAO Convention that prevented pilots aged 60 years or more retaining their rank of Captain with associated benefits. The defendant says that the plaintiffs should be required to particularise all distinctions and/or differences to be relied on by them as between "Captain" and "Pilot-in-Command"; to particularise, in the context of their employment with Air New Zealand, all circumstances in which the designated Pilot-in-Command will not also be a Captain; and to particularise all matters said to be encompassed by the expression "associated benefits" including whether those benefits enabled any of the plaintiffs to exercise the privileges of "Pilot-in-Command".

[31] The plaintiffs oppose providing those particulars because, they say, the defendant is asking them to particularise pleadings they have not made; because the particulars sought are not required to fully, fairly and clearly inform the defendant of the case it is required to answer; that the defendant's application is itself an acknowledgement that it is fully aware of that case; and finally that the plaintiffs should not be required to plead the defendant's defence. They point out that they have simply pleaded that there was nothing contained within the ICAO Convention that prevented pilots who were over the age of 60 years from retaining their rank of Captain. They say this is a statement of fact which the defendant can either admit or deny or in respect of which the plaintiffs can plead a positive defence if its position is that the ICAO Convention prevented pilots aged 60 years of age and over from retaining their rank of Captain. Finally, the plaintiffs say that the term "associated benefits" includes remuneration, superannuation and "the respect afforded to those individuals who hold the rank of Captain and seniority in that rank."

[32] I decline to direct that the plaintiffs particularise further their para 3.17 for the same reasons as I have set out above in respect of para 3.16. Although I consider that Mr Thompson has made a valid point of distinguishing the company rank of "Captain" and the convention reference to "Pilot-in-Command", that is a matter not for pleadings but for determination at trial. Similarly, Mr Thompson has made the valid point that if the plaintiffs are to rely upon what they describe in para 3.17 of the amended statement of claim as "associated benefits", they will need to particularise this. The plaintiffs have, however, done so as just set out at para [31]. Having noted those particulars that the plaintiffs have given, however, I remain of the view that the defendant may nevertheless decline to plead to para 3.17 of the amended statement of claim on the basis that it is an allegation of law but in any event that it is denied.

[33] At para 3.18 of the amended statement of claim the plaintiffs say that Federal Aviation Regulations did not prevent 60 years and older pilots retaining their ranks of Captain and associated benefits. The defendant says, in relation to this pleading, that the plaintiffs should particularise all distinctions and/or differences sought to be relied upon as between "Captain" and "Pilot-in-Command"; particularise, in the context of the plaintiffs' employment with Air New Zealand, all circumstances in which the designated Pilot-in-Command will not also be a Captain; and particularise all matters said to be encompassed by the expression "associated benefits", including whether those benefits enable any of the plaintiffs to exercise the privileges of "Pilot-in-Command".

[34] The difficulty with this paragraph in the amended statement of claim appears to be that of the plaintiffs attempting to negate in advance what they anticipate may be asserted as a positive defence by the defendant. Although it may be a matter of evidence and/or submission at trial if the defendant asserts that Federal Aviation Regulations do what they plaintiffs assert they do not do, the claims made by the plaintiffs at para 3.18 of the amended statement of claim are premature at least and possibly unnecessary.

[35] In a similar category is the defendant's challenge to the adequacy of para 3.19 which reads: "There was nothing contained within any other foreign legislation that prevented pilots who were over the age of 60 years retaining their rank of Captain, and associated benefits." Again, the defendant seeks to have the plaintiffs particularise all distinctions and/or differences sought to be relied on as between "Captain" and "Pilot-in-Command"; to particularise, in the context of the plaintiffs'

employment with Air New Zealand, all circumstances in which the designated Pilot-in-Command will not also be a Captain" and to particularise all matters said to be encompassed by the expression "associated benefits" including whether those benefits enabled any of the plaintiffs to exercise the privileges of "Pilot-in-Command".

[36] For the same reasons set out above in relation to paras 3.16 and 3.17 I do not require the plaintiffs to particularise paras 3.18 and 3.19 but to address them as questions of law to which it is not required to plead but to deny in any event. This also leaves open to the defendant the opportunity to plead a positive defence if it wishes to do so.

[37] Paragraph 3.20 of the amended statement of claim alleges: “The Age 60 Rule prevented the pilots over the age of 60 years from flying as PIC in territories, such as the United States, that had not filed a „difference“.”

[38] The defendant says that the plaintiff should state whether it is alleged that in addition to pilots over the age of 60 not being able to fly as Pilot-in-Command in territories, such as the United States, those same pilots are able to fly as Pilots-in-Command in ICAO administered air space (such as that immediately outside the territorial limits of a sovereign territory, for example, Oakland Oceanic Flight Information Region (FIR). Next, the defendant says that if the plaintiffs so concede, they should be required to state on what basis, with reference to relevant documents, rules etc. Finally, if the plaintiffs do not concede, the defendant says they should state similarly on what basis, with reference to relevant documents, rules, laws etc.

[39] The plaintiffs oppose providing the particulars sought on several bases. First, they say the defendant is in reality seeking interrogatories and not particulars. Second, if these are particulars, they are particulars of pleadings that are not made by the plaintiffs. Next, the plaintiffs say the defendant “is probing for evidence” and finally, that those particulars not required to fully, fairly and clearly inform the defendant of the case it is required to answer and the defendant’s application is itself an acknowledgement that it is fully aware of that case.

[40] This is another example of anticipatory and premature pleading and/or inappropriate pleading of questions of law. For what it is worth I do not consider that the defendant is “probing for evidence” as the plaintiffs allege, nor is it sufficient to say, as they do, that the defendant itself already knows the answer to questions it puts to the plaintiffs. As I emphasised repeatedly during the hearing, general rules of pleading and reg 11 of the Regulations in particular require that the Court as well as the defendant be informed of the nature of the claim. Alleging that a defendant knows what is being alleged, so that the plaintiffs should not be required to specify it, misses the point, as Mr Roberts conceded.

[41] For the same reasons as set out previously in relation to paras 3.16 and following, I do not consider that the plaintiffs should be required to particularise para

3.20.

[42] Next, the defendant challenges the sufficiency of the plaintiffs’ allegations at para 3.21 of the amended statement of claim. That reads: “Immediately before reaching their 60th birthdays, each of the plaintiffs held the rank of Captain Boeing

747 or Boeing 767, and each flew regularly as PIC.” First, the defendant says that to the extent that it is alleged that each of the plaintiffs “„only“ flew regularly as PIC”, they should particularise all circumstances in which the plaintiffs did not fly as Pilot-in-Command, other than as CAP2 due to unplanned and/or unexpected rostering requirements. No one explained to me the meaning of “CAP2” although I assume, for the purpose of this decision, that it refers to a pilot holding the rank of Captain but who flies an aircraft not as Pilot-in-Command but, in effect, as co-pilot. Also, the defendant seeks particulars of each occasion where a plaintiff did not fly as Pilot-in- Command, the terms, conditions and benefits applicable to that circumstance and, in particular, whether those terms and conditions differed from when flying as Pilot-in- Command.

[43] In response, the plaintiffs say that the defendant is in effect seeking orders that they particularise all circumstances in which they did not fly as Pilots-in- Command (other than CAP2) due to unplanned and/or unexpected rostering requirements or whilst on training flights. They say that to the best of their knowledge at this time, there were no other circumstances in which the plaintiffs did

not fly as Pilots-in-Command. They say the technical reasons and circumstances surrounding each occasion on which the plaintiffs did not fly as Pilots-in-Command is information in the knowledge of the defendant and, as such, further clarification and/or particulars may be provided after disclosure. Further, the plaintiffs say that by seeking details of each occasion where the plaintiffs did not fly as PIC, the defendant is “probing for evidence” and such particulars are, in any event, not required to fully, fairly and clearly inform the defendant of the case it is required to answer. Finally, they contend that the defendant’s application is itself an acknowledgement that the defendant is fully aware of the plaintiffs’ case.

[44] I agree with the plaintiffs that para 3.21 is sufficiently particularised for a statement of claim. The defendant’s request for particulars is for evidence. The plaintiffs do not assert that they “only” flew regularly as Pilots-in-Command but, rather, that they flew regularly as Pilots-in-Command. The defendant’s concerns should be addressed properly as ones of evidence or perhaps even interrogatories although I note, as above, that the plaintiffs have attempted to provide some particulars in any event. The defendant’s application to particularise para 3.21 is refused.

[45] At para 3.24 the plaintiffs allege that three of them (Messrs Benge, Finlayson and Matthews) were demoted from their rank of Captain by the defendant because of the Age 60 Rule. Although the plaintiffs have now specified the dates on which they say they were so demoted, the defendant calls upon them to specify the date upon which each of their condition of employment in relation to remuneration changed. The plaintiffs say that these dates are “knowledge within the control of the defendant”.

[46] I agree with the plaintiffs that they should not be required to particularise para 3.24 but not for the same reasons as they assert. If the defendant relies upon alterations to remuneration of the plaintiffs as being significant as part of or in addition to rank demotion, then that is a matter for the defendant to assert in its defence and would appear to be within its knowledge. For that reason I do not agree to the defendant's application that the plaintiffs should be required to specify the dates upon which each of their conditions of employment in relation to remuneration changed.

[47] At para 3.25 of the amended statement of claim the plaintiffs plead:

At all material times, the defendant had obligations, which are normal incidents of the employment relationship, as part of the wider implied term to treat the plaintiffs fairly and reasonably and in particular:

- a. It had obligations of trust, confidence and fair dealing;
- b. It had an obligation to treat the plaintiffs in a way that enables them to retain their dignity;
- c. It had obligations to take steps to avoid unnecessary harm to the plaintiffs.

[48] The defendant seeks to require the plaintiffs to:

- (a) Particularise the entire basis for the implication of the term or terms referred to.
- (b) Whether it is alleged there is a single implied term, or multiple implied terms and if multiple, list them individually.
- (c) Particularise the source or sources relied upon for each of the

obligations referred to ...

[49] In reply, the plaintiffs resist providing such particulars on the basis that the defendant is seeking legal submissions, such particulars are not required to fully, fairly and clearly inform the defendant of the nature of the case it is required to answer, and that "the defendant is fully aware of the terms implied as normal incidents of employment." In addition, the plaintiffs say that in the course of a Chambers hearing on 30 July 2010, counsel for the defendant expressly acknowledged that he understood the nature of the plaintiffs' claim in this regard.

[50] Again I agree with the plaintiffs' stance but not for the same reasons as they advance. Paragraph 3.25 sets out what the plaintiffs allege were constituents of the implied obligation of the defendant to treat them fairly and reasonably. It is not appropriate to require the plaintiffs, as the defendant purports to do, to particularise "the entire basis for the implication of the term or terms", "whether it is alleged there is a single implied term, or multiple implied terms and to list them individually", or

to "particularise the source or sources relied on for each of the obligations". It is open to the defendant to deny the existence of such implied terms and for this to be a question either at trial or perhaps even for a preliminary determination on a strike-out application if the defendant is sufficiently confident that the Court will conclude that no such implied term could exist as between the parties. For these reasons I refuse the defendant's application for particularisation in respect of para 3.25 of the amended statement of claim.

[51] Next is paragraph 3.26. The plaintiffs say simply that "[t]he implied terms in paragraph 3.25 above are modified by the relevant statutory regime applicable to the circumstances." The defendant says the plaintiff should particularise which of the alleged implied terms are modified, how each of those terms are said to be modified, the basis for the modification, and the part of the "relevant statutory regime" applicable in relation to each of those obligations which undertakes the modification.

[52] In reply, the plaintiffs say that they should not be required to provide this detail because such particulars are already contained in the amended statement of claim in sufficient detail to fully, fairly and clearly inform the defendant of the nature of the case it is required to answer and that to do so would amount to providing legal submissions by the plaintiffs. Again, the plaintiffs say that in Chambers on 30 July

2010, counsel for the defendant expressly acknowledged that he understood the nature of the plaintiffs' claims in this regard.

[53] I agree with the defendant that as it stands, para 3.26 is inadequately pleaded. The plaintiffs must provide the particulars sought by the defendant. The paragraph is an important statement of the implied terms of employment of the plaintiff on which many of their claims depend.

[54] Next, at para 3.27 the plaintiffs say:

At all material times the relevant statutory regime included the defendant having statutory obligations:

a. To act in good faith and provide information to the plaintiff (s4

[Employment Relations Act 2000](#));

b. To avoid actions that would discriminate against the plaintiffs on the basis of age ([s103\(a\)\(c\) Employment Relations Act 2000](#) and [ss21](#) and [22 Human Rights Act 1993](#)); and

c. To adjust its activities, if age discrimination was permitted by an exception, to:

i. accommodate the restriction placed by the permitted exception to ensure that the plaintiffs were not subject to discrimination; or

ii. minimise any different treatment on the basis of age ([s106\(1\)\(i\) Employment Relations Act 2000](#) and [s35 Human Rights Act 1993](#)).

[55] The defendant says that to the extent that the “relevant statutory regime” set out is not complete (as indicated by the use of the expression “included”), the plaintiffs should particularise any other relevant statutory, legislative or regulatory regime which is relevant to the plaintiffs’ claims and/or forms part of the “relevant statutory regime”. Next, the defendant says that the plaintiffs should be required to specify whether the [Civil Aviation Act 1990](#) and subordinate legislation under that Act, the ICAO Standards and/or, for example, the Federal Aviation Regulations, form any part of the “relevant statutory regime”. Further, the defendant says that with reference to each of the statutory references contained in para 3.27b of the amended statement of claim, the plaintiffs should particularise separately for each statute and each relevant section within each statute, the section and/or subsections relied upon as involving a statutory obligation; how the statutory obligation operates or is to be interpreted in the case of each plaintiff; which statutory obligation is applicable to which plaintiff and which cause of action; and how each statutory obligation modifies the implied term or terms referred to at para 3.25. The defendant also calls upon the plaintiffs to particularise all matters relied on by them in support of any allegation or allegations that the implied term or terms referred to differ in any way to the statutory obligations arising under the [Employment Relations Act](#) and/or the [Human Rights Act](#). Penultimately, the defendant says the plaintiffs should particularise the source of the statutory obligation referred to at para

3.27c and how that statutory obligation modifies the implied terms referred to in para

3.25 of the amended statement of claim. Finally, the defendant says the plaintiffs should particularise all limits, if any, to the statutory obligation to adjust the defendant’s activities as alleged in para 3.27c.

[56] In reply, the plaintiffs object to providing such particulars because they say they have pleaded the “relevant statutory regime” on which they intend to rely to support the legal position that at all times the defendant had obligations to treat the plaintiffs fairly and reasonably as pleaded in 3.25-3.28 of the amended statement of claim. Further they say that the particulars sought by the defendant in para 12(b) of its application seek to require them to particularise pleadings they have not made and that such particulars are not required to fully, fairly and clearly inform the defendant of the case it is required to answer, and that the defendant’s application is itself an acknowledgement that the defendant is fully aware of that case. The plaintiffs say that if the defendant wishes to plead an affirmative defence to this allegation and plead that there are other statutes and/or regulations relevant to the matter, then it is entitled to do so in its statement of defence.

[57] In relation to the particulars sought at para 12(c) of its application, the plaintiffs say that they are opposed to provide such particulars because those sections and subsections are already contained in the amended statement of claim; the particulars are not required to fully, fairly and clearly inform the defendant of the case it is required to answer, and that the defendant’s application is itself an acknowledgement that the defendant is aware of that case; the defendant is seeking to require the plaintiffs to make legal submissions; and the amended statement of claim particularises how the statutory obligations modify the implied terms in para

3.28.

[58] Turning to the defendant’s para 12(d), the plaintiffs oppose the particulars sought on the basis that these would be legal submissions, that the defendant is asking the plaintiffs to particularise the pleadings they have not made, and that such details are not required to fully, fairly and clearly inform the defendant of the case it is required to answer. In addition the plaintiffs say again that in Chambers on 30

July 2010, the defendant’s counsel acknowledged expressly that he understood then nature of the plaintiffs’ claim in this regard. Further, the plaintiffs say that the source of the statutory obligation referred to at para 3.27(c) of the amended statement of claim are [ss 30](#) and [35](#) of the [Human Rights Act 1993](#) but that the remaining particulars sought by the defendant at para 12(e) of its application are not required. That is because the plaintiffs say that the defendant is seeking legal submissions

from them; that these particulars are not required to fully, fairly and clearly inform the defendant of the case it is required to answer; and that the amended statement of claim particularises how the statutory obligations modify the implied terms in

para

3.28.

[59] Finally at para 12(f) of the defendant's application, the plaintiffs are opposed to providing these particulars on the basis that the defendant is asking them to plead to its presumed affirmative defences; that they are only required to plead the defendant's breach and not the manner in which the defendant may have limited its breach; that the particulars are not required to fully, fairly and clearly inform the defendant of the case it is required to answer; and the defendant's application is itself an acknowledgement that the defendant is fully aware of that case.

[60] I agree with the defendant that the plaintiffs should specify whether the statutory obligations set out under (a), (b) and (c) in para 3.27 are the only ones relied upon or whether, by the use of the word "included" those are some but there are others and, if so, to specify those others. I do not agree, however, that the plaintiffs should be required to specify whether the [Civil Aviation Act 1990](#) and its subordinate legislation or ICAO Standards form part of the "relevant statutory regime". The plaintiffs do not rely upon those. If the defendant does in responding to the pleading, then it can so allege in its statement of defence. Nor do I agree that the plaintiffs should be required to particularise separately for each statute and each relevant section within each statute, the sections and subsections relied on or how the statutory obligation operates or is to be interpreted in the case of each plaintiff. It is sufficient, in my view, for the amended statement of claim to specify, as para 3.27 does, the statutory obligations relied upon by the plaintiffs. I further agree with the plaintiffs that they should not be required at this stage to particularise further the effect of the specified statutory provisions upon the implied term or terms referred to earlier in the statement of claim. Those are matters that are more properly dealt with in an analysis of the existence and extent of the implied terms, either by way of submissions at trial or if, as the defendant has signalled it will, at a preliminary interlocutory application to determine the existence and, if so, the extent of such implied terms. Nor do I agree that the plaintiffs should particularise "all limits, if

any, to the statutory obligation to adjust the defendant's activities" as alleged in para

3.27c. That, too, is a matter of submission at or before trial but not of pleading.

[61] Next is para 3.28 of the amended statement of claim. This pleads:

The statutory obligations set out in paragraph 3.27 inform and provide content to the implied terms in paragraph 3.25, and establish the implied term that:

a. The defendant would not discriminate on the basis of age; and

b. The defendant would, if discrimination on the basis of age was permitted by a statutory exception, take all steps to avoid unnecessary harm to the plaintiffs by taking sufficient steps to adjust its activities to accommodate any restriction and avoid or minimise the impact of any age related discrimination.

[62] The defendant calls on the plaintiffs to particularise in what manner, and how, each of the statutory obligations set out in para 3.27 inform and provide content to the implied terms said to exist at para 3.25 of the amended statement of claim; to particularise the basis for the implication of the further implied terms referred to at para 3.28a and b; to particularise whether the implied terms referred to at para 3.28 are in addition to, or in substitution for, the implied term or terms in para 3.25 as modified; to particularise whether the implied term or terms differ from each of the separate statutory obligations said to arise under the "relevant statutory regime"; and, if so, to particularise all matters relied upon by the plaintiffs in support of any allegation or allegations that the implied term or terms referred to differ in any way to statutory obligations arising under the [Employment Relations Act](#) and/or the [Human Rights Act](#).

[63] In response, the plaintiffs say that the particulars sought will amount to the provision of legal submissions by them; that the implied terms referred to in para

3.28 of the amended statement of claim are in addition to, and informed and modified by, the implied terms at para 3.25 as has already been pleaded by the plaintiffs; and that the implied terms are informed and modified by the statutory obligations arising under the "relevant statutory regime" as previously pleaded.

[64] Again, for reasons set out above, I conclude that the plaintiffs should not be required to particularise further the statement of the implied term or terms now

contained in para 3.28. The alleged implied terms are sufficiently described to enable the defendant to plead to them. Any further detail of the sort that the defendant seeks is more appropriately the subject of legal argument at or before trial.

[65] Next, at para 4.2 of the amended statement of claim, the first cause of action of the first plaintiff (William Benge) is addressed. This follows para 4.1 providing particulars about Mr Benge's circumstances. Paragraph 4.2 says: "The defendant breached the implied terms in paragraph 3.28 by the actions it took in paragraphs

4.1c to 4.1i above." I agree with the defendant that Mr Benge should specify which of the terms or implied terms of his

employment agreement with the defendant he contends were breached with respect to each of the allegations set out at para 4.1c to

4.1i (inclusive). I agree also with the defendant that if these breaches are said to be of implied obligations imported from statutory provisions, the relevant sections and subsections of the statute should be specified. I do not agree with the defendant, however, that Mr Benge should be required to particularise how each of the breaches amounts to a breach of the implied terms or terms.

[66] The next paragraph of the amended statement of claim which is said by the defendant to be pleaded insufficiently, is 4.3. This sets out the damage to or losses incurred by Mr Benge as a result of the breaches. These include, in summarised form, loss of status, less respectful treatment by other employees, loss of income, loss of superannuation contributions and other benefits, and humiliation and loss of dignity.

[67] I do not agree that it is necessary for Mr Benge to specify the manner in which he was treated “differently” by other employees, the identities of the other employees involved, the manner in which they may have been “less respectful” to Mr Benge and the occasions on which he may or may not have brought these to the attention of the defendant. These are matters of detail that will be disclosed in briefs of evidence exchanged before trial but need not be particularised in the amended statement of claim.

[68] As to Mr Benge’s claims to have lost income-affected superannuation contributions and other benefits, the defendant asks that he particularise the date on

which he first knew that his employment as a B747 Captain would not continue beyond, at the latest, age 60. This, too, is a matter of evidence that may or may not emerge from a positive defence to be advanced by the defendant and it is not appropriate for Mr Benge to have to specify these particulars at this point. It may be the appropriate subject of an interrogatory.

[69] Paragraphs 4.5-4.12 deal with the second plaintiff’s (Kenneth Finlayson’s) first cause of action in breach of contract. The defendant seeks from Mr Finlayson the same details as it sought from Mr Benge in respect of his materially identical pleadings. The same reasons that I have just given in relation to the first plaintiff, I allow or disallow those particulars in respect of Mr Finlayson also.

[70] At para 4.17 of the amended statement of claim the plaintiffs collectively end some further generalised pleading starting at para 4.13 with the following allegation: “Messrs Simich, Russell, Tourell, Peters and Rowan were each demoted in accordance with the procedure set out in the age 60 provisions.” The defendant asks that each of these plaintiffs be required to particularise all actions, events and/or occurrences relied on in support, or which contradict, the allegation that each of them was “demoted” including reference to bids lodged for alternative positions.

[71] I agree with the plaintiffs that to accede to this request would be to require them to provide evidence, including evidence to support any defence that the defendant may mount to these claims. I agree with the plaintiffs that if the defendant alleges that each of them made or ought to have made bids for alternative positions to mitigate any disadvantage to them, this is properly the subject of an affirmative defence. The defendant’s claims in relation to para 4.17 of the amended statement of claim are refused.

[72] Next comes the following paragraph, 4.18. This introduces the first cause of action of the fourth plaintiff (Mark Simich) for breach of contract. He repeats paras

1-3.28 and paras 4.13-4.17 and then adds particulars about himself. The defendant seeks to have Mr Simich “particularise all facts or other matters relied upon in support of the allegation that the implied term or terms said to exist in paragraphs

3.25-3.28 can coexist with the express contractual terms set out in paragraph 4.13.”

That is not, however, a matter of pleading for the plaintiff. If the defendant denies the existence of implied terms on the basis that they are inimical to express terms, then it is for the defendant to plead that in relation to the implied terms.

[73] Next, in relation to para 4.18g where Mr Simich alleges that “Air New Zealand treated [him] differently based on his age”, the defendant asks the Court to direct him to particularise how he was treated differently, who the comparator pilot is (if applicable) and any relevant statutory, contractual or common law provision which would be breached if Mr Simich was treated differently. The plaintiffs say that those particulars are already contained in the amended statement of claim and that the defendant has been fully, fairly and clearly informed of the nature of the case it is required to answer. They say the defendant is probing for evidence.

[74] With the exception of the last particular sought (identification of provisions breached if treated differently), I consider that the defendant is entitled to the particulars sought by it in relation to para 4.18g as set out at para 19 of the defendant’s application and these must be provided in what I will direct may be a second amended statement of claim to be filed by the plaintiffs.

[75] The next part of the amended statement of claim challenged is para 4.19 which also relates to Mr Simich's particulars. This simply says: "The defendant breached the implied terms in paragraph 3.28 by the actions it took in paragraphs

4.18d to 4.18i above." I agree with the defendant that Mr Simich must relate particular breaches to particular implied terms although he is not required to particularise how, with reference to each component part, the breach or breaches is or are said to have occurred. I also agree with the defendant that the plaintiff should particularise which of the express terms, if any, in his employment agreement were breached by those actions in paras 4.18d-4.18i and/or Mr Simich's consequent movement from the rank of Captain Boeing 747 to the rank of First Officer Boeing

747.

[76] Next is para 4.20 of the amended statement of claim. This deals with the loss or damage alleged to have been suffered by Mr Simich. The defendant calls on the plaintiff to particularise which of the losses in para 4.19 is attributable to each of the breaches in para 4.19. The plaintiffs say in reply that all of the para 4.19 breaches relate to each and every part of the damage or loss referred to in para 4.20.

[77] I think that is a sufficient answer for pleading purposes although it will, of course, be open to the defendant to pursue this question in evidence at the trial. In relation to para 4.20b I agree with the plaintiffs that in seeking particulars of the manner in which other employees are alleged to have been less respectful and of those occasions on which Mr Simich brought this to Air New Zealand's attention, the defendant is probing for evidence which will emerge later and appropriately. It is, of course, open to the defendant to allege that if such consequences did occur, Mr Simich did not bring them to the company's attention although the defendant has not asserted any obligation in this regard.

[78] In relation to para 4.20d the defendant calls on Mr Simich to particularise the date on which he first had knowledge that his employment as a B747 Captain would not continue beyond, at the latest, age 60 (including with reference to earlier provisions around a retirement age and the application of the ICAO/FAA restriction). In this regard I agree with the plaintiffs that para 4.20d simply asserts that Mr Simich felt obliged to modify his behaviour to adjust to a significantly lower income as a result of the loss of superannuation and other benefits. He has not pleaded questions relating to ICAO/FAA restrictions and if these are part of an affirmative defence they can be pleaded by the defendant. I agree that para 4.20d is sufficiently pleaded by Mr Simich at this stage.

[79] The next challenge is to paras 4.22-4.37 and amounts to a repetition of requests for particulars in relation to the first cause of action of Messrs Russell, Tourell, Peters and Rowan. I make the same directions for the same reasons that I have just set out in respect of Mr Simich.

[80] Next challenged is para 5.1 of the amended statement of claim. Again this is a generic pleading in the sense that it relates to all plaintiffs and concerns "amendment to ICAO 167." It says: "On or about 8 March 2005 Air New Zealand obtained knowledge that 83 per cent of Contracting States supported an international age limit above 60 for airline pilots." The defendant calls on the plaintiffs to

"particularise all facts or other matters relied on in relation to the allegation that 83 per cent of Contracting States supported an international age limit above 60 for airline pilots and that Air New Zealand obtained that knowledge on 8 March 2005." I agree with the plaintiffs that the defendant is seeking evidence from them and that it is not entitled to do so as a matter of pleading. This is an allegation that can be admitted or denied and, if denied, the subject of an affirmative defence but will ultimately be one for determination at trial.

[81] Next is para 5.4 of the amended statement of claim which provides particulars about Amendment 167 which is said to have "allowed PICs to hold that position until the age of 65 years, if the First Officer was under the age of 60, and subject to six-monthly medical assessments." First, the defendant calls on the plaintiffs to particularise what they mean by several words which I highlight in italics in the following quotations:

a. Amendment 167 was *effective* on 10 March 2006.

...

d. Amendment 167 would be *applicable* on 23 November 2006.

...

5.5 ...

b. Contracting States could *disapprove* of any part of

Amendment 167 by the Effective Date of 17 July 2006;

[82] The plaintiffs have now particularised, sufficiently in my view, those matters to which the defendant is entitled as follows. “Effective” means the date Amendment 167 was adopted by ICAO, “applicable” means the date Amendment 167 came into force, and “disapprove” means the ability of a Contracting State to object to the amendment.

[83] Next, the defendant calls on the plaintiffs to particularise “all the restrictions, if any, which would apply to pilots age 60 or over acting as PIC up until 23

November 2006, and then all restrictions applicable from 23 November 2006.” I agree with the plaintiffs, however, that the defendant is seeking particulars of matters that have not been pleaded and that may more properly be affirmative defences to be advanced by the defendant if it wishes. I agree that in addition to particulars about the restrictions on pilots acting as Pilots-in-Command being set out elsewhere in the

statement of claim, the defendant now has sufficient particulars of para 5.4 to fully, fairly and clearly inform it of the case to answer.

[84] Next is para 6.2f of the amended statement of claim. This arises with regard to the first plaintiff’s (Mr Bengé’s) second cause of action in breach of contract. It alleges that among other things, Mr Bengé’s “[b]id” was “accepted ... But for the age discrimination that resulted in Mr Bengé being demoted from his rank as Captain, Boeing 747 when he reached age 60, whether lawful or unlawful, Mr Bengé would have remained as a Captain, Boeing 747.”

[85] The defendant asks that Mr Bengé be required to particularise all facts or other matters relied on in this part of the pleading including with reference to the phrase “relevant statutory regime”, Mr Bengé’s employment agreement and any implied term or terms; what is meant by the phrase “the age discrimination”; how “the age discrimination” is said to have occurred; and whether it is alleged to have been lawful or unlawful. The defendant says that if Mr Bengé claims that the age discrimination was unlawful, he should particularise all matters including reference to “the relevant statutory regime”, Mr Bengé’s employment agreement and any implied term or terms in support of that allegation.

[86] Mr Bengé says that what is meant by “the age discrimination”, and how it is said to have occurred, is self-evident from the rest of the pleadings but amounted to his demotion by the defendant when he reached the age of 60 years. Paragraph 6.2f does relate to lawful or unlawful age discrimination. Except to the extent that I agree that unlawful age discrimination should be referenced to any relevant statutory provision that prohibited unlawful age discrimination and which Mr Bengé must now do, I agree with the plaintiffs that the particulars are sought are already contained within the pleadings generally, that the defendant is probing for evidence and that it has sufficient particulars to fully, fairly and clearly inform it of the case it is required to answer.

[87] Next is para 6.2i of the amended statement of claim. This is also a particular in relation to Mr Bengé’s claims for breach of contract and asserts:

Air New Zealand does have a discretion whether to promote pilots but:

i. That should not apply where the pilots have been and would still be

Captains but for previous discrimination; and

ii. Cannot be exercised for an unlawful reason.

[88] The defendant seeks further particulars, by reference to “the relevant statutory regime”, of the applicable employment agreement with any implied term or terms to define the phrase “previous discrimination” (including whether it is alleged that such previous discrimination was lawful or unlawful) and, if unlawful, the basis for that allegation. The defendant also says that if it is alleged that there was “an unlawful reason” as foreshadowed by para 6.2i(ii), Mr Bengé should particularise that unlawful reason with reference to “the relevant statutory regime”, the applicable employment agreement and any implied term or terms.

[89] Mr Bengé says that the particulars sought are or should be self-evident from the pleadings that his propositions are statements of law and not fact and so should not be particularised; that the defendant has sufficient particulars to fully, fairly and clearly inform it of the case it is required to answer; and that the particulars are irrelevant to his statement of claim. As to the particulars sought in para 26(b) of the defendant’s application relating to the phrase “an unlawful reason”, the plaintiffs oppose the particulars sought on the basis that they are asked to particularise pleadings they have not made; they seek legal submissions from the plaintiffs; and those particulars are not required to fully, fairly and clearly inform the defendant of the case it is required to answer.

[90] This is another example of inappropriate pleading by the plaintiffs which has led, probably inevitably, to the request for particulars. These matters are ones for an affirmative defence if the defendant wishes to raise it but more probably the subject of legal submissions at trial. As in some of the earlier instances, therefore, to the extent that para 6.2i of the amended statement of claim assists the plaintiffs' case, I will not require them to particularise this nor, except to the extent that it may wish to include this in an affirmative defence, is the defendant required to do any more in its statement of defence than to deny the pleading.

[91] Next is para 6.2k of the amended statement of claim. This asserts in relation to Mr Bengé:

Air New Zealand breached clause 12.2.1.1 of the terms of Mr Bengé's collective agreement by failing to accept his bid for a command position for the Boeing 747 that were open between 10 March 2006 (or alternatively 17

July 2006) and 25 October 2006.

[92] The defendant seeks particulars of all facts or other matters relied on including, with reference to "the relevant statutory regime", provisions in the employment agreement (other than cl 2.2.1.1) and any implied term or terms, in support of the allegation that Air New Zealand breached cl 2.2.1.1 of the relevant collective agreement. I consider, however, that para 6.2k sets out sufficiently the allegation. Mr Bengé has pleaded neither any other provision of the employment agreement nor any implied term and to this extent particulars are sought of pleadings that have not been made. This part of the application is disallowed.

[93] Next is para 6.2m which says, in respect of Mr Bengé:

As a result of Air New Zealand's breach of contract, Mr Bengé has suffered

loss, in that rather than being reinstated to his former rank as at 23

November 2006 he was not reinstated to his original rank until 19 February 2008.

[94] The defendant calls on Mr Bengé to specify the implied and express terms which it is alleged that it breached. Mr Bengé responds by saying that the term of the collective agreement breached was cl 12.2.2.1. He says that otherwise the defendant is fully, fairly and clearly informed of the case it is required to answer and in these circumstances I think that the defendant's request for particulars has been satisfied.

[95] The defendant then moves to paras 6.4-6.17 (inclusive) of the amended statement of claim. These are the particulars of the second cause of action (breach of contract) for each of Messrs Finlayson, Matthews, Simich, Russell, Tourell, Peters and Rowan and are all materially identical. Air New Zealand repeats the requests for the same particulars in relation to the second cause of action of these plaintiffs as it has in relation to Mr Bengé. To the extent that the situations are identical, I make the same orders and directions for the same reasons as I have just done in relation to the first plaintiff.

[96] Next is para 7.1 of the amended statement of claim. This is again a generalised introduction to the plaintiffs' third causes of action being unlawful discrimination under [s 103\(1\)\(c\)](#) of the Act. The plaintiffs rely on [ss 103\(1\)\(c\)](#) and

104(1)(b) of the Act. Paragraph 7.1 is a pleading of law supporting the broad assertion that the Act "prohibits discrimination on the basis of age against existing employees." The balance of the paragraph summarises [ss 103\(1\)\(c\)](#) and 104(1)(b) in the latter of which it is said that in accordance with s 106 of the Act, 104(1)(b) is analogous to s 22(1)(c) of the Human Right Act.

[97] The defendant calls on the plaintiffs to particularise "all facts or other matters relied on", including with reference to the relevant statutory regime, in support of the allegation that s 104(1)(b) of the Act is "analogous" to [s 22\(1\)\(c\)](#) of the [Human Rights Act](#); to particularise all facts or other matters relevant to the necessary comparator alleged to be applicable for the purposes of [s 104\(1\)\(b\)](#); and to particularise the "detriment" in relation to the description of the work to be performed by Mr Bengé for the purposes of [s 104\(1\)\(b\)](#) of the Act and taking

account of the judgment of the Supreme Court in *McAlister v Air New Zealand Ltd.*[\[8\]](#)

[98] My overall view that the defendant is seeking inappropriately to prepare the ground for legal argument by these requests for particulars as a result of the plaintiffs having sought to plead interpretive propositions of law in their statement of claim. However, the plaintiffs have nevertheless advised the defendant and the Court that "the comparator group" was the other pilots of the defendant whose bids for Captain rank on 747 or 777 aircraft were accepted from 10 March 2006 to 23 November

2006. The defendant now has information that may assist it in the preparation of its defence. I agree with the plaintiffs otherwise, however, that the defendant cannot have the information sought. To the extent appropriate, it is particularised elsewhere in the statement of claim but the defendant is otherwise probing for evidence. It is, assuredly, seeking to have the plaintiffs make legal submissions as is illustrated by its wish to argue the application of the *McAlister* case. That application for

particulars is dismissed.

[99] Paragraph 7.2 concludes the brief generic introduction to the third causes of action. It says: “But for the Age 60 Rule, Air New Zealand would not have demoted the plaintiffs from their rank as Captain Boeing 747 or Captain Boeing 767. The defendant says: “In the event that the plaintiffs are alleging a „but for“ test is applicable, particularise all facts or other matters in support of that allegation, including with reference to the relevant statutory regime.” Further, the defendant asserts:

In circumstances where the plaintiffs are seeking to rely on [section 104\(1\)\(b\)](#) of the [Employment Relations Act](#), particularise all facts or other matters relied upon to establish the relevant of an allegation, in effect, referring to [section 104\(1\)\(a\)](#), and if such an allegation is made, all facts or other matters relied upon in support of such a claim.

[100] This, too, is an untenable claim to particulars. Paragraph 7.2 is an assertion of fact that may or may not reflect a correct legal test but can and should nevertheless be admitted or denied. Whether it reflects a correct legal test will be for later analysis by evidence and upon legal submissions. Further, as the plaintiffs say, the facts and other matters relied on in support of these contentions are included in the following paragraphs in the particulars of each of the individual plaintiff’s claims. I agree there are no references to [s 104\(1\)\(a\)](#) in the plaintiffs’ third cause of action which relies, rather, on [ss 103\(1\)\(c\)](#) and [104\(1\)\(b\)](#) of the Act. Mr Thompson may be correct that that is an erroneous legal categorisation of the relevant statutory criteria but that is a matter for later submission and not pleading. No further particulars are therefore required of para 7.2.

[101] Paragraph 7.3 of the amended statement of claim sets out the particulars of the first plaintiff (Mr Bengé) in support of his third cause of action, unlawful discrimination contrary to [s 103\(1\)\(c\)](#) of the Act. At para 7.3a.i Mr Bengé asserts that Air New Zealand does have a discretion whether to promote pilots but “[t]hat should not apply where the pilots have been and would still be Captains but for previous discrimination.”

[102] The defendant seeks particulars of all facts or other matters in support of that allegation that any discretion should not apply where pilots have been and would still be captains but for previous discrimination. This includes the basis for any allegation of “previous discrimination”, referenced to the relevant statutory regime, the employment agreement and/or any implied term or terms, and whether it is alleged such “previous discrimination” was unlawful.

[103] I agree with the plaintiffs that the allegations in para 7.3a.i are propositions of law and therefore not appropriate to an application for further and better particulars of fact. Except to the extent of noting the volunteered response by the plaintiffs that the “previous discrimination” was the defendant’s demotion of the plaintiffs from their rank of Captain on each of their 60th birthday anniversaries, I agree that the plaintiffs should not be required to provide further particulars in support of para 7.3a.

[104] Moving to para 7.3c (“In declining to accept bids from Mr Bengé in the period 10 March 2006 (or alternatively 17 July 2006) to 25 October 2006, Air New Zealand unlawfully discriminated against Mr Bengé on the prohibited ground of age.”), the defendant seeks particulars including reference to the relevant statutory regime, the employment agreement and/or any implied terms. The first plaintiff says, in answer to this request, that its pleading provides that the defendant unlawfully discriminated against him by declining to accept bids from him in the period 10 March 2006 (or, alternatively, 17 July 2006) to 25 October 2006 on the basis of his age. Further, the plaintiff says that these actions breached [s 103\(1\)\(c\)](#) of the Act. I agree that the defendant is not entitled to any further particulars of para

7.3c of the amended statement of claim.

[105] Next, the defendant calls on Mr Bengé to particularise the date on which he alleges he first raised his personal grievance with Air New Zealand for the purposes of the third cause of action and the manner in which that personal grievance was raised. This is for the purpose of the defendant’s stated intention to strike out parts of the proceedings on the grounds of failure to comply with time limits for raising personal grievances. That is not, however, in my view a matter of particularising the present proceedings. If, as it is signalled it will do, the defendant proposes to apply to strike out causes of action on these grounds, it should do so by alleging a failure to comply with the legislative requirements to raise a personal grievance within time. Either an agreed or a disputed date or dates of doing so will emerge in the evidence in support of, and in opposition to, such an application which will then be for the

Court to determine. An application for particulars in the statement of claim should not be used by the defendant to garner evidence to support a strike-out application in this manner.

[106] Next is para 7.3e of the amended statement of claim. This asserts, in relation to Mr Bengé:

As a result of Air New Zealand’s discrimination, Mr Bengé has suffered loss of income and benefits as well as continued humiliation by being held in the rank of First Officer by Air New Zealand when there was no longer any possible ground to deny Mr Bengé promotion to the rank of Captain.

[107] The defendant seeks to have Mr Bengé particularise “all facts or other matters relied on in support of the allegation of ‘discrimination’ including with reference to the relevant statutory regime, the employment agreement and/or any implied

term or terms;”. Further, the defendant says that if it is alleged that the discrimination was unlawful, “the process by which Mr Bengé arrives at that allegation.” Finally in this regard, the defendant calls on Mr Bengé to particularise the fleet to which he alleges he ought to have been appointed as a Captain for the purposes of para 7.3(e).

[108] In response, the first plaintiff says that the facts and other matters relied on in support of the allegation that the defendant discriminated against Mr Bengé, and the process by which this is arrived at, are fully pleaded in the preceding paragraphs and it is not necessary to repeat those. In any event, he clarifies that the third cause of action is a breach of [s 103\(1\)\(c\)](#) of the Act in relation to that. Finally, Mr Bengé says that while it is not relevant for the purposes of para 7.3e to what fleet he ought to have been promoted as Captain, it was either the B747 or the B777 fleet.

[109] I agree with the first plaintiff that as a particular of loss, the paragraph does not require further particularisation to allow the defendant to admit or deny its allegations of fact and, if it wishes to do so, to provide further particulars. This part of the application is dismissed.

[110] Paragraphs 7.5-7.18 of the amended statement of claim repeat the requests for particulars in relation to the third cause of action for Messrs Finlayson, Matthews,

Simich, Russell, Tourell, Peters and Rowan. The decisions just given in respect of the first plaintiff, Mr Bengé, concerning his materially identical third cause of action, are applicable to these paragraphs and for the same reasons.

[111] Paragraph 8.1 of the amended statement of claim is a general introductory pleading applicable to all plaintiffs’ fourth causes of action which are pleaded as an alternative to the third causes of action alleging discrimination in breach of s

103(1)(c) of the Act. The defendant’s first claim to “[p]articulate all facts or other matters relied upon, including with reference to the relevant statutory regime, in support of the allegation that [section 104\(1\)\(a\)](#) of the [Employment Relations Act](#) is

„analogous“ with [section 22\(1\)\(b\)](#) of the [Human Rights Act](#)” is another example of an inappropriate request for particulars about an inappropriately pleaded part of the statement of claim. That is because para 8.1b is a legal submission which should not be in a statement of claim. There is, therefore, no requirement to particularise.

[112] Next, the defendant calls on the plaintiffs to identify and “[p]articulate all facts or other matters relevant to the necessary comparator group applicable for the purposes of [section 104\(1\)\(a\)](#).” The plaintiffs say that “the comparator group is other pilots of the defendant [whose] bids for Captains rank on 747 or 777 aircraft were accepted between 10 March 2006 and 23 November 2006.” I consider the provision of that particular satisfies the request.

[113] Next, the defendant asks that the plaintiffs particularise “the qualifications and experience said to be applicable for the purposes of [section 104\(1\)\(a\)](#).” The plaintiffs say that the defendant is probing for evidence and that these particulars are not required to fully, fairly and clearly inform the defendant of the case it is required to answer. I agree and dismiss the application at para 34(c) of the defendant’s application.

[114] Next, the defendant calls on the plaintiffs to particularise whether “age, for the purposes of the plaintiffs’ claims under [section 104\(1\)\(a\)](#) is a genuine occupational qualification.” The plaintiffs oppose providing these particulars on the basis that this amounts to a pleading to an anticipated defence in respect of the breaches which the defendant is entitled to plead affirmatively in its statement of

defence. I agree that those particulars are not required to fully, fairly and clearly inform the defendant of the case it has to answer and that part of the application is likewise dismissed.

[115] Finally, in relation to para 8.1 the defendant seeks to have particularised “all limitations and qualifications on any requirement on an employer to *reasonably adjust its activities to accommodate the employee*.” Again I agree with the plaintiffs that this would amount to providing information about how the defendant may have limited its breach or as to possible defences to a breach which are not matters for the statement of claim but, rather, for pleading by the defendant. Likewise, there is no requirement for the plaintiffs to provide these particulars.

[116] Next is para 8.2 of the amended statement of claim. This reads, concluding the general background assertions to the plaintiffs’ fourth cause of action: “But for the Age 60 Policy, Air New Zealand would not have demoted the plaintiffs from their position as Captain Boeing 747, or Captain Boeing 767.”

[117] The defendant’s request for particulars is a repetition of the same allegation in relation to the third cause of action relating to a potential “but for” test. I reject it on the same grounds as I did in relation to the third cause of action.

[118] Paragraph 8.3 of the amended statement of claim sets out the particulars relating to the first plaintiff (Mr Bengé) in respect of his fourth cause of action of unlawful discrimination in employment which is an alternative to his third cause of action. This relates to accommodation by the defendant of the consequences of Mr Bengé’s age. First, the defendant calls on Mr Bengé, with reference to each relevant part of the relevant statutory regime, the employment agreement, and any implied term or terms, to particularise all facts or other matters relied on in this cause of action which required the defendant to take

any of the steps outlined to “have accommodated Mr Benges age” other than the steps outlined in [s 35](#) of the [Human Rights Act](#) if that is applicable. The plaintiffs oppose doing so because they say this is probing for evidence and the particulars are already contained sufficiently within the amended statement of claim and the defendant has sufficient to fully, fairly and clearly inform it of the case it is required to answer.

[119] I agree with the plaintiffs that the defendant is seeking material to which it is not entitled in respect of this part of the pleading. At para 8.3a the first plaintiff has set out what he alleges the defendant could or should have done to accommodate him and these particulars are sufficiently concise to be admitted or denied and, if denied, the denial explained.

[120] Next, in respect of para 8.3a.iv, the defendant asks that Mr Benge particularise the employment agreement provision, document or other publication which identifies “CAP2” as a position to which he could have been appointed. I agree with the plaintiffs that this is not a matter of particularisation but, rather, one of affirmative defence to be put forward by the defendant. The defendant’s claim relates at best to an anticipated defence and is unsustainable.

[121] Next, the defendant wishes particularised all facts or other matters relied upon, including with reference to the relevant statutory regime, the employment agreement and/or any implied term or terms in support of the allegation that there has been discrimination of Mr Benge as alleged in para 8.3b and, if it is alleged that any discrimination was unlawful, the basis of that allegation. Again I agree with the plaintiffs that the request for facts relied on goes too far and the particulars supplied by the plaintiffs are sufficient to enable the defendant to plead to them.

[122] Finally in relation to para 8.3, the defendant requests again that Mr Benge provide the date upon which he says he first raised a personal grievance with Air New Zealand for the purposes of his fourth cause of action and the manner in which that personal grievance was raised. My conclusion is the same as in respect of other similar requests by the defendant for particularisation of time and manner of personal grievance raising. The plaintiffs are not required to do so as a matter of pleading.

[123] Paragraphs 8.5-8.18 of the amended statement of claim are the materially identical provisions for the second to eight plaintiffs in respect of their fourth causes of action (as alternatives to their third causes of action) and seek the same particulars for Messrs Finlayson, Matthews, Simich, Russell, Tourell, Peters and Rowan as I

have just dealt with in respect of Mr Benge. My conclusions and the reasons for them apply to the requests in respect of the other plaintiffs.

[124] Next is para 9.2 of the amended statement of claim. This is a generalised pleading covering all plaintiffs in respect of their fifth causes of action, unjustified disadvantage in employment (personal grievances) under [s 103\(1\)\(b\)](#). My prefatory comments in this judgment about the relative simplicity of pleading an unjustified disadvantage grievance are applicable to this part of the application. The defendant’s claims for further particulars contained at paras 37-39 of its application filed on 3

March 2011 all seek details that the plaintiffs are not required to provide in a statement of claim alleging the personal grievance of unjustified disadvantage in employment under [s 103\(1\)\(b\)](#).

[125] The plaintiffs have sufficiently pleaded that they were disadvantaged in their employment and indeed, as already noted, I do not understand the defendant to disagree with that assertion. The real issue is whether the defendant was justified in doing so. That is a matter for it to establish which does not include by seeking particulars of its anticipated affirmative defence from the plaintiffs. The applications for further particulars relating to the plaintiff’s unjustified disadvantage grievances are rejected. So, too, is the request for particularisation of when those plaintiffs allege that they raised their personal grievances with their employer. That is for the same reason that I have rejected other claims for particulars about the dates and manners of raising personal grievances.

[126] Paragraph 10 is a generalised pleading in respect of all plaintiffs’ sixth causes of action, unlawful discrimination under [s 103\(1\)\(c\)](#) of the Act. The defendant seeks, in relation to para 10.1, that the plaintiffs particularise all facts or other matters relied upon, including with reference to the relevant statutory regime, in support of the allegation that [s 104\(1\)\(b\)](#) of the Act is analogous with [s 22\(1\)\(c\)](#) of the [Human Rights Act](#). For the same reasons as I have already dealt with this question in the same context, it is inappropriate to either plead, or more particularly here to seek, further details of submissions of law and no order is warranted.

[127] Next, the defendant seeks particulars of “all facts or other matters relevant to the necessary comparator group applicable for the purposes of [section 104\(1\)\(b\)](#).” In this instance, also, the plaintiffs have identified the comparator group as being “all other pilots of the defendant in the rank of Captain with equal or less service than the plaintiffs from 23 November 2006.” I consider this particular satisfies the defendant’s request in this regard.

[128] Next, in relation to 10.1 of the amended statement of claim the defendant asks that the plaintiffs particularise the “detriment” in relation to the work of the description being performed by Mr Benge for the purposes of [s 104\(1\)\(b\)](#) of the Act and taking account of the Supreme Court’s judgment in *McAlister*. The plaintiffs resist this application, saying that the particulars of detriment are set out in para 10.9 of their amended statement of claim and, in relation to other matters, the defendant is seeking legal submissions. As to the term “detriment”, the plaintiffs say this is contained in [s 104\(1\)\(c\)](#) of the Act

and is further defined in [s 104\(1\)\(2\)](#) of the Act. They say the facts supporting the allegation that they have suffered detriment is full and sufficient particularisation of their causes of action and application for further particulars is unwarranted probing for evidence. Finally in this regard, the plaintiffs say that reference to the Supreme Court's judgment in *McAlister* indicates that the defendant is indeed fully aware of the nature of the case against it and is attempting strategically to align its case by obtaining concessions from the plaintiff.

[129] I agree with the plaintiffs that the defendant is not entitled to particulars which have not already been provided either in the amended statement of claim as a whole or in the answer to this application. Such would otherwise amount to a combination of probing for further evidence and submissions of law, or anticipate a possible defence that the defendant may raise.

[130] Next is para 10.3 of the amended statement of claim. The plaintiffs assert: "As at 23 November 2006, the plaintiffs were not prevented from flying as PIC by legislation or any other requirement." The defendant seeks particulars of "all requirements and restrictions, with reference to ICAO/FAA rules and/or regulations which would restrict the plaintiffs as PIC once turning 60 years of age." Although their pleading is arguably unnecessary and inappropriate, I agree with the plaintiffs

that it simply asserts a negative, that the defendant's application seeks to have the plaintiffs particularise matters they have not pleaded, plead potential defences, and that the particulars sought are otherwise unnecessary for the defendant to plead to the statement of claim. No further particulars are directed.

[131] The next paragraphs the subject of the defendant's application are 10.5 and

10.6 of the amended statement of claim. In those the plaintiffs say: "Air New Zealand took no steps to ensure that the plaintiffs would be returned to their former rank as Captain Boeing 747 or Captain Boeing 767 prior to 23 November 2006" and "Air New Zealand failed to immediately restore the plaintiffs to their former rank as Captain Boeing 747 or Captain Boeing 767 on 23 November 2006 when there was no longer any possible lawful reason to deny them their former rank." The defendant asks that the plaintiffs particularise "all facts or matters, including with reference to the relevant statutory regime, the employment agreement and/or any implied term or terms which would entitle the plaintiffs to appointment as captain Boeing 747 or captain Boeing 767 on 23 November 2006 and/or require Air New Zealand to take steps to restore any of the plaintiffs to their former positions. Further, the defendant seeks particulars about what steps or other matters were taken by Air New Zealand from 23 November 2006 (or 25 October) to deny the plaintiffs access to any vacancy in their former fleet/rank.

[132] I agree again with the plaintiffs that the defendant's requests go altogether too far. The defendant is probing for information from the plaintiffs that goes beyond fair particularisation of their pleadings and the application must be denied.

[133] Next at para 10.7 of the amended statement of claim the plaintiffs allege that the defendant had a discretion to promote pilots but none where they should have been and would still have been Captains but for previous discrimination, and such discretion could not be exercised for an unlawful reason. The defendant seeks particulars of all facts or other matters including with reference to the relevant statutory regime, employment agreement and/or any implied term that the plaintiffs had been the subject of "previous discrimination" and, if such was unlawful, the basis for that allegation. Further, the defendant says that if it is alleged to have been

an unlawful reason for discrimination, it seeks particulars of all facts or other matters in support of that allegation.

[134] The plaintiffs say that the "previous discrimination" was the defendant's demotion of them pursuant to the Age 60 Rule as previously pleaded throughout the amended statement of claim and that the defendant is otherwise fully, fairly and clearly informed of the nature of the case it has to answer. They say that the "unlawful reason" in para 10.7b of the amended statement of claim is also clearly pleaded in the preceding paragraphs but, for the avoidance of doubt, reiterate that the defendant's failure to reinstate the plaintiffs to their previous ranks of Captain when there was no longer any possible lawful reason to deny them their former rank, constitutes discrimination pursuant to [ss 103\(1\)\(c\)](#) and [104\(1\)\(b\)](#) of the Act. The plaintiffs oppose further particularisation on the basis that whether "previous discrimination" was lawful or unlawful is irrelevant to their case under para 10.7a of the amended statement of claim. They say that if such particulars are relevant to the defendant, it is entitled to plead them as an affirmative defence and otherwise that the defendant has sufficient particulars to fully, fairly and clearly inform it of the case against it.

[135] I agree with the plaintiffs that having given the two answers that they have, set out above, the defendant is not entitled to the further particulars that it seeks if indeed these are further particulars of the amended statement of claim.

[136] Next is para 10.9 of the amended statement of claim. This asserts that the plaintiffs notified Air New Zealand of their personal grievance on 5 February 2007 by letter which constituted the raising of a personal grievance. The defendant calls on the plaintiffs to disclose, in relation to each, the date on which he first raised the personal grievance with Air New Zealand for the purpose of the sixth cause of action and the manner in which the personal grievance was raised. Despite my previous conclusions that it is not necessary for the plaintiffs to do so, I consider that para

10.9 adequately meets the defendant's request by identifying a date and the nature of

the communication which was said to have raised the personal grievance.

[137] Next is para 11.1 of the amended statement of claim. This is another general pleading applicable to all of the plaintiffs' seventh causes of action which are for unlawful discrimination under [s 103\(1\)\(c\)](#) and are alternatives to their sixth causes of action. At para 11.1a and 11.1b the plaintiffs again plead questions of law about the analogy between [s 104\(1\)\(a\)](#) of the Act and [s 22\(1\)\(b\)](#) of the [Human Rights Act](#). These are unnecessary but, having been pleaded, cannot be required to be particularised in the way in which the defendant seeks to have them made legal submissions I have already, in other respects, determined these questions against the defendant. Again, the defendant seeks particulars of the comparator group which the plaintiffs have identified in respect of [s 104\(1\)\(a\)](#) as being "all pilots of the defendant in the rank of Captain with equal or less service than the plaintiffs from 23

November 2006." I agree that the remaining particulars sought in relation to para

11.1 (being whether age is a genuine occupational qualification for the purpose of the claims under [s 104\(1\)\(a\)](#) of the Act and particularising the limitations and qualifications on any requirement on an employer to "reasonably adjust its activities to accommodate the employee") amount to evidence for which the defendant is probing unjustifiably. The balance of this particular request (excluding particulars of the comparator group that have been supplied) is refused.

[138] Paragraph 11.3 of the amended statement of claim reads: "As at 23

November 2006, the plaintiffs were not prevented from flying as PIC by legislation or any other requirement." The defendant seeks to have the plaintiffs particularise all requirements and restrictions, with reference to ICAO/FAA rules and/or regulations which would restrict the plaintiffs as PIC once turning 60 years of age. This is another example of the plaintiffs inviting a request to particularise by pleading unnecessarily and/or inappropriately trying to negative an anticipated defence. Despite that, I do not agree that they should have to give further particulars of that allegation which will be a matter for submissions at the trial.

[139] Next are paras 11.5 and 11.6 of the amended statement of claim. These say, in relation to all of the plaintiffs, that: "Air New Zealand took no steps to ensure that the plaintiffs would be returned to their former rank as Captain Boeing 747 or Captain 767 prior to 23 November 2006" and "Air New Zealand failed to immediately restore the plaintiffs to their former rank as Captain Boeing 747 or

Captain Boeing 767 on 23 November 2006 when there is no longer any possible lawful reason to deny them their former rank." The defendant asks that the plaintiffs particularise all facts or matters, including with reference to the relevant statutory regime, the employment agreement and/or any implied term or terms which would entitle the plaintiffs to appointment as Captain Boeing 747 or Captain Boeing 767 on

23 November 2006 and/or require Air New Zealand to take steps to restore any of the plaintiffs to their former positions.

[140] I decline the defendant's requests. The paragraphs are statements of fact that can be admitted or denied by the defendant and, if it wishes to do so, can be pleaded to affirmatively. To require further particulars would be to enter into the territory of legal submissions and/or would go beyond the legitimate purpose of ensuring that the defendant is fully, fairly and clearly informed of the case against it. The claims in respect of paras 11.5 and 11.6 do not succeed.

[141] Paragraph 11.7 contains an allegation that the defendant had a discretion whether to promote pilots but alleges that that should not apply where pilots have been, and would still be, Captains but for previous discrimination and could not be exercised for an unlawful reason. Again, the defendant seeks to have the plaintiffs particularise all facts or other matters, including with reference to the relevant statutory regime, employment agreement and/or any implied term in support of any allegation that the plaintiffs had been the subject of "previous discrimination" and, if it is alleged that the previous discrimination was unlawful, the basis for that allegation. The defendant also says that if it is alleged that there has been an unlawful reason, the plaintiffs should particularise all facts or other matters, including with reference to the relevant statutory regime, the employment agreement and/or any implied term or terms in support of that allegation.

[142] The plaintiffs resist providing these particulars although they do confirm formally that the "previous discrimination" was the defendant's demotion of the plaintiffs pursuant to the Age 60 Rule as previously pleaded throughout the amended statement of claim. They say the same thing about the "unlawful reason" in para

11.7b but, for the avoidance of doubt, confirm that the defendant's failure to reinstate

them to their previous rank of Captain when there was no longer any possible lawful

reason to deny them their former rank, constitutes discrimination pursuant to ss

103(1)(c) and 104(1)(a) of the Act. Otherwise, the plaintiffs say that para 11.7 is sufficiently particularised to enable the defendant to understand the allegation sufficiently to plead to it and I agree. No further particulars are required.

[143] Finally, the adequacy of para 11.9 of the amended statement of claim is challenged. This is another paragraph setting out

when and how the plaintiffs say they raised their personal grievance with the defendant. The defendant asks that they particularise the first time “in which the plaintiffs allege that a personal grievance was raised with Air New Zealand for the purposes of this seventh cause of action, including reference to the manner in which it was raised.”

[144] The plaintiffs oppose the request and, in my view, justifiably. As in the other instance where this point has been taken, the pleading provides a date and detail of the manner in which the plaintiffs say they raised their personal grievances. If, as seems likely from advice from counsel, the defendant asserts that the personal grievances were not raised with the employer within time, more detail of that can be provided in the course of an appropriate interlocutory application. For the same reason, therefore, the application to particularise para 11.9 is dismissed.

[145] Although the majority by number of the defendant’s applications to particularise have been dismissed, some have been allowed and, in respect of others, the plaintiffs have provided information that I consider satisfies the requests. As I have noted already, the plaintiffs’ amended statement of claim is unsatisfactory in a number of respects and they should have the opportunity to consider re-pleading their causes of action more economically and to include those changes which will be necessary as a result of this judgment. Although it is a lengthy document, word processing software should not make that an unduly prolonged or difficult exercise.

[146] The plaintiffs may have the period of one month from the date of today’s judgment to file and serve a second amended statement of claim if they wish to do so. In any event, the defendant’s time for filing a statement of defence, whether to the current amended statement of claim or any second amended statement of claim, will commence at the expiry of that period of one month.

[147] In an attempt to ensure that the case progresses, any interlocutory applications of the sort signalled by Mr Thompson in the course of argument should be filed and served within the period of two months from the date of this judgment. It is likely that there will then be a further directions telephone conference with counsel for the parties about how such interlocutory applications are to be dealt with and the case otherwise prepared for trial.

[148] Both parties have sought substantial orders for costs on this application. It will already be apparent that in my view neither emerges from this battle covered in glory. I will reserve costs on this application to be dealt with at the same time as other issues of costs for decision in the litigation.

GL Colgan

Chief Judge

Judgment signed at 10.30am on 29 March 2011

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[1] CC20/07, 2 November 2007.

[2] *Commerce Commission v Qantas Airways Ltd* (1992) 5 PRNZ 227, 230.

[3] CA179/98, 30 November 1998.

[4] HC Auckland CIV-2004-133, 21 December 2012 at p39.

[5] [2008] NZHC 41; (2008- 23 NZTC 21,821 at [45].

[6] HC Auckland CIV-2004-404-1333, 21 December 2004 at [39].

[7] [1974] 3 All ER 205 (CA) at p213.

[8] [2009] NZSC 78.