IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 297
5548018

	BETWEEN	CTC AVIATION TRAINING (NZ) LIMITED Applicant
	AND	TREVOR HOLMAN Respondent

Member of Authority:	Vicki Campbell
Representatives:	Erin Burke for Applicant Richard McCabe for Respondent
Investigation Meeting:	22 September 2015
Submissions Received:	22 September 2015
Determination:	28 September 2015

DETERMINATION OF THE AUTHORITY

A. CTC Aviation Training (NZ) Limited's application for an order that Mr Holman make payment of the balance of $6,457.50 of the training contract is declined for lack of jurisdiction.

B. The training fee was not a "premium" on employment and Mr Holman's application for recovery is declined.

C. Mr Holman's application for recovery based on misrepresentation is declined for lack of jurisdiction.

Employment relationship problem

[1] CTC Aviation Training (NZ) Ltd (CTC) claims Mr Holman owes the balance of a training fee under his employment agreement which has now terminated and claims payment of $6,457.50.

[2] Mr Holman disputes he should have to pay the money owed to CTC and counter-claims that the training fee was a "premium" on employment which is prohibited by section 12A of the Wages Protection Act 1983. Mr Holman seeks recovery of all money paid to CTC related to his selection and training for his C Cat rating undertaken by him in 2012. Initially Mr Holman sought the imposition of a penalty in the sum of $20,000 but this claim was withdrawn at the investigation meeting.

[3] By way of alternative Mr Holman claims he was induced to enter into the training agreement by a misrepresentation on the part of CTC. He seeks to cancel the contract and claims damages.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from CTC and Mr Holman but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[5] CTC provides pilot training to New Zealand and foreign cadets and employs a number of flight instructors to carry out the training.

[6] CTC has two main divisions, the European division which provides training which complies with the European Aviation Safety Authority (EASA) and the International Division (ICAO) which trains the majority of New Zealand cadets in compliance with the Civil Aviation Authority (CAA) in New Zealand.

[7] According to CTC approximately 85% of its cadets are enrolled in the European division with the remaining 15% enrolled in the ICAO division.

[8] CTC also provides instructor courses to qualified pilots which certifies them to become flight instructors. To become a flight instructor a pilot must hold a C Cat rating which is an instruction rating. For CTC having a C Cat rating allows a flight instructor to teach the ICAO course. Flight instructors teaching in the European division must also have completed an EASA course in addition to holding their C Cat rating.

[9] For many pilots being a flight instructor assists in building up the number of hours required to become a pilot for major airlines and can be considered to be part of a pilot's career pathway.

[10] In 2012 CTC was experiencing a particularly high turnover of flight instructors as major airlines were recruiting large numbers of pilots. In a nine and a half month period CTC recruited 35 new flight instructors.

[11] Mr Holman made contact with CTC on 31 January 2012 and advised Ms Jennifer Liddle, Head of Line Operations, of his interest in securing a position as a flight instructor with CTC. At that time Mr Holman had commenced training towards his C Cat rating with Southern Wings but did not hold a C Cat rating as he had not completed his training.

[12] In his 31 January 2012 email to Ms Liddle Mr Holman suggested two options to CTC, either he could finish his rating at Southern Wings and then move to CTC or alternatively he could complete his C Cat rating with CTC so that CTC could have some input into his development.

[13] Ms Liddle responded that same day advising Mr Holman that at that point in time (January 2012) flight instructors were required to have at least 200 hours instructional experience. In the event that Mr Holman completed his C Cat rating with Southern Wings he would still need to achieve 200 hours instructional experience before he could be considered for employment with CTC.

[14] In response to Mr Holman's second suggestion, Ms Liddle advised that completing the C Cat rating with CTC would be more feasible and advised Mr Holman that a new course was due to commence on 25 June 2012. Ms Liddle advised

Mr Holman that, if all went well throughout the training, Mr Holman would be guaranteed employment on completion of the course.

[15] On 9 May 2012 Mr Holman was offered a place on CTC's combined C Cat EASA course and was advised that the total cost of the course was $15,000 if paid for upfront or $17,000 if payments were made over time. Mr Holman was offered the option to pay a deposit of $5,000 and to pay the balance through deductions from his salary payments once he had completed the course and subject to the following terms being met:

a) Position availability (an offer would be made within three months);

b) An employment agreement was signed and agreed between Mr Holman and CTC;

c) Mr Holman passed the course;

d) Positive feedback was received from Mr Holman's instructor.

[16] Mr Holman accepted this offer in writing on 2 June 2012 and duly paid his deposit on 19 June 2012.

[17] Mr Holman successfully completed the training course in October 2012. Mr Holman was offered employment by way of a written employment agreement in November 2012. He commenced employment as a flight instructor on 13 November 2012.

[18] In 2014 Mr Holman was questioning the costs of the training course and other matters associated with his employment. In June 2014 Mr Holman requested and was granted a period of six months leave without pay. During the period of leave without pay Mr Holman failed to make any payments toward his training fee and ultimately resigned from his employment. From the agreed training fee of $17,000 the sum of $6,457.50 remains outstanding.

Issues

[19] The issues for determination are:

a) Is CTC's claim an employment relationship problem or a debt resulting from a commercial contract?

b) Is CTC entitled to payment of the debt sought plus interests and costs?

c) Should Mr Holman's counter-claims succeed?

Is CTC's claim an employment relationship problem or a debt resulting from a commercial contract?

[20] On 9 May 2012 Mr Holman was formally offered a place on CTC's C Cat EASA course commencing on 25 June 2012. Mr Holman signed the letter of offer on 2 June 2012 accepting the terms set out in the letter as well as the terms and conditions attached to it. The terms and conditions attached to the letter deal with matters relating to the training course and refer to the "the trainee" which I have taken to mean Mr Holman. Of particular importance in this matter is that the terms and conditions include a requirement that Mr Holman will make full payment of the fee for the training within 5 days of the date of an invoice being received by him.

[21] The letter of offer varied the terms and conditions document attached to the letter. CTC offered and Mr Holman agreed to accept the offer of a placement on the course by paying a fee of $17,000 made up by a $5,000 deposit (to be paid prior to the commencement of the course) and deferring all further payments until after Mr Holman had been offered and accepted employment.

[22] In accordance with the variation Mr Holman paid the requisite deposit on 19 June 2012. After commencing employment and from 4 December 2012, the sum of $115.00 was deducted from Mr Holman's salary payments. These deductions continued until Mr Holman proceeded on leave without pay, at which time Mr Holman discontinued making any contribution to his course fees.

[23] CTC has variously described the arrangement with Mr Holman regarding the payment of his course fee as a "loan" and "bonding arrangement". At the investigation meeting I raised with CTC the fact that the letter signed by Mr Holman

makes no reference to a loan and the employment agreement signed by the parties in November 2012 does not address either there being a loan requiring repayment or any type of bonding arrangement being in place.

[24] In order to be successful in its application CTC is required to establish that the training fee had become a term and condition or other incident of Mr Holman's employment.

[25] CTC has relied heavily on the Employment Court decision of *Glenmavis Farms v Todd*[1] to support its contention that on 13 November 2012 the balance of $12,000 owed by Mr Holman to CTC for his training course became a term and condition or incident of his employment with CTC.

[26] I have distinguished *Glenmavis* with the facts of this case. In particular Mr Todd was already an employee of Glenmavis when the partners of Glenmavis loaned Mr Todd money to enable him to purchase land. Mr Holman was not an employee at the time he entered into the agreement to pay for the course.

[27] Further the Court found that the money was loaned to Mr Todd by his employer and the employer benefited by securing the services of Mr Todd as an employee in circumstances where it was recognised that Mr Todd worked harder and longer than a manager of that farm might reasonably have been expected to work for the specified salary, largely because of the absence from the region of the owners. There was a clear nexus between the loan and the employment relationship.

[28] At the time the training agreement was entered into, Mr Holman was not an employee of CTC. At best there was a promise of a job if Mr Holman successfully completed the course and other conditions were met although neither party had any doubt that Mr Holman would meet all conditions. The training fee was not a "loan" as contended by CTC. It is a fee for undertaking training. The fee was not paid to a third party. The agreement was between Mr Holman and CTC. CTC's side of the bargain was to provide training to enable Mr Holman to achieve his C Cat rating. Mr Holman's side of the bargain was to pay the fee.

[29] CTC met its side of the bargain and in October 2012 Mr Holman achieved his C Cat rating. By November 2012 Mr Holman had partially met his side of the bargain as he

[1] [2012] NZEmpC 127.

had paid the $5,000 deposit in June 2012. Mr Holman's obligation after he entered into the employment relationship was to allow CTC to make a specified deduction from his regular salary payments until such time as the balance of his training fee had been paid.

[30] The quantum of the payment for the training fee had been agreed between CTC and Mr Holman when he signed the training contract in June 2012. The training contract is a commercial contract and is not founded on an employment agreement.

[31] At the time Mr Holman entered into the employment relationship with CTC the only matter requiring completion was the method by which the balance of the training fee $12,000 would be paid. By signing the contract Mr Holman consented to regular deductions being made from his salary payments. I find it is the methodology of the payment that was incident to the employment relationship and not the quantum. If Mr Holman had not been employed by CTC he would have been contractually obliged to pay the outstanding amount in full.

[32] When Mr Holman went on leave without pay his obligation to pay the balance of the fee remained. However, as he was no longer in receipt of regular salary payments, the term allowing deductions from his salary was no longer effective. Mr Holman was bound, at that point, to discuss and seek agreement from CTC on how he would meet his obligation to pay the outstanding balance to meet his contractual obligations.

Is CTC entitled to payment of the debt sought plus interests and costs?

[33] The agreement to pay the training fee was a commercial arrangement between Mr Holman and CTC. The outstanding balance of the training fee was not a term and condition of employment although Mr Holman's consent to allow deductions from his pay became a condition of his employment, incidentally.

[34] The non-payment of the balance of the training fee is not an employment relationship problem and therefore the Authority has no jurisdiction to order payment of the balance of $6,457.50. CTC's application is declined.

Counter-claims

[35] Mr Holman counter-claims that the training fee was a "premium" on employment which is prohibited by section 12A of the Wages Protection Act 1983. Mr Holman seeks recovery of all money paid to CTC related to his selection and training by way of lump sum and/or salary deduction. Initially Mr Holman also

sought the imposition of a penalty in the sum of $20,000 but this claim was withdrawn at the investigation meeting.

[36] By way of alternative, Mr Holman claims he was induced to enter into the training agreement by a misrepresentation on the part of CTC. He seeks to cancel the contract and claims damages.

Was the training fee a premium on employment and if so is Mr Holman able to recover all monies paid by him

[37] Mr Holman claims CTC's requirement that he pay for his training on the promise that he would be employed by CTC was in effect a "premium" on employment.

[38] Mr Holman says he could have completed his C Cat rating for less than $10,000 and that the extra $7,000 charged by CTC ($17,000) was equivalent to a premium of $7,000 to secure employment with CTC.

[39] Section 12A of the Wages Protection Act 1983 prohibits the charging of a premium for employment. In *Sears v Attorney-General* the Employment Court defined a premium as consideration paid or demanded as a price of a contract.[2]

[40] There is no dispute that in order for Mr Holman to be employed by CTC as a flight instructor in New Zealand he had to first and foremost hold a C Cat rating. There is also no dispute that Mr Holman did not have a C Cat rating before undertaking the training course with CTC. There were a number of ways Mr Holman could achieve his C Cat rating through other training organisations including, as he was doing prior to January 2012, with Southern Wings.

[41] As notified to Mr Holman on 31 January 2012, to be considered for employment by CTC Mr Holman was also required to have completed 200 hours instructional experience.

[42] Until he completed his C Cat rating and subsequently completed the 200 hours experience Mr Holman was not eligible to be employed by CTC as a flight instructor.

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[2] [1994] 2 ERNZ 39 at page 61.

[43] On the evidence presented to the Authority during this investigation I note that course fees for achieving a C Cat rating range between just under $10,000 to over $19,500.

[44] Mr Holman approached CTC in January 2012 as he was aware CTC would guarantee employment if he successfully completed the C Cat training with CTC. It was common ground that CTC undertake a rigorous selection process before making offers of training to potential candidates. As a result most of CTC's trainees are successful in completing their training.

[45] Mr Holman says that it was the employment he was seeking not the training course and that by agreeing to pay the fee he was essentially buying his job. I do not accept this is an accurate reflection of the reality of the situation.

[46] Mr Holman wanted to become a flight instructor. The only way he could do that was to achieve his C Cat rating. To do that required him to pay to complete his training. Depending on where he completed his training that would cost him between $10,000 and $19,500.

[47] Mr Holman chose to undertake his training with CTC because he knew, as did CTC, that he was extremely likely to be offered employment at the end of his training. It is not uncommon in the industry for training providers to select and recruit new flight instructors from their own courses.

[48] In a document published by Air New Zealand in 2012, Air New Zealand notes specifically in relation to flight instructors:

> Many flight training organisations prefer to hire graduates of their own programmes as instructors, so when choosing a place to train, it is worthwhile asking them about your eventual job prospects.

[49] The request from CTC to Mr Holman for a training fee to cover the costs associated with him achieving his C Cat rating was not a request for a premium to secure employment. Mr Holman was aware he required the C Cat rating in order to be considered for employment as a flight instructor. Whether he completed that training at CTC or through some other training organisation was Mr Holman's choice.

[50] I decline to conclude that a premium was sought and/or paid. Mr Holman's application for recovery of all monies paid by him on the basis that CTC is in breach of section 12A of the Wages Protection Act 1983 is declined.

Did CTC induce Mr Holman to enter into the training agreement by misrepresentation?

[51] Mr Holman says CTC misrepresented itself in order to induce him to enter into the training contract. This claim is outside the jurisdiction of the Authority given my finding that the training contract did not form part of an employment agreement. I have, however, addressed Mr Holman's submissions for the sake of completeness.

[52] Section 7(3) *Contractual Remedies Act 1979* provides (amongst other things) that a party to a contract may cancel it if he has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to that contract.

[53] Mr Holman says the misrepresentation occurred when Ms Liddle emailed him on 31 January 2012 and advised him the following:

> We are currently hiring flight instructors but we now require the applicants to have at least 200 hours instructional experience due to JAA regulations we operate under.

[54] It is not disputed that Mr Holman could not be employed as a flight instructor in January 2012. Mr Holman did not have his C Cat rating at that time so, not only could he not be a flight instructor, he could not have completed 200 hours instructional experience.

[55] In support of his allegation that Ms Liddle misrepresented the situation to him Mr Holman pointed to explanations provided by Mr Peter Stockwell, Chief Operating Officer, on 28 May 2014 which he says differed from the explanation provided by Ms Liddle.

[56] Mr Stockwell wrote an email to Mr Holman answering claims Mr Holman had made that CTC had employed flight instructors with less than 200 hours instructional time. Mr Stockwell states:

> While the situation you describe is correct, it appears that, at the time, there was an urgent need to acquire additional FIs so the company adjusted its employment requirements as it is

> entitled to do. While unfortunate for those like you who were employed under a different policy setting, this type of situation is not unusual in the aviation industry where market conditions dictate changes in circumstances, sometimes at quite short notice. Air NZ's recent decision to reduce flying hour requirements on recruitment is a prime example.

[57] I have accepted the evidence of CTC that in September 2012, while Mr Holman was still undergoing training for his C Cat rating, the newly formed EASA which replaced JAA, changed the rules and removed the requirement for 200 hours instructional experience.

[58] The changes in September 2012 adequately explain the differences in policy from January 2012 to May 2014. At the investigation meeting Mr Stockwell confirmed that even though the requirement of 200 hours was removed in September 2012, the requirement to hold a C Cat rating never changed and was the reason Mr Holman needed to undertake the training course.

[59] Mr Holman also argued that when the requirements in September 2012 changed, CTC had a duty to notify Mr Holman and that its failure to do so resulted in, at best, a half-truth. I do not agree with Mr Holman's position on this. Mr Holman and the other three trainees who completed their training in October 2012 became the first flight instructors in the world to be accredited as EASA flight instructors. They were able to achieve that because of the removal of the 200 hours instructional experience requirement.

[60] In the event that I am wrong as to jurisdiction Mr Holman has failed to establish misrepresentation on the part of CTC, Ms Liddle or Mr Stockwell that induced him into entering on the training agreement or his employment with CTC.

Costs

[61] Costs are reserved. I am of a mind to let costs lie where they fall, however, the parties are invited to resolve the matter between them. If they are unable to do so they should file and serve a memorandum on the matter within 28 days of the date of this determination. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell
Member of the Employment Relations Authority