

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 55
3120132

BETWEEN GARTH MCGEARTY
Applicant

AND AIR NEW ZEALAND
LIMITED
Respondent

Member of Authority: Sarah Blick

Representatives: Richard McCabe, counsel for the applicant
Andrew Caisley and Kevin Thompson, counsel for the
respondent

Investigation Meeting: 20 and 21 September 2023 and 31 October 2023 in
Auckland

Submissions received: On 13 October 2023 and at the investigation meeting on
31 October 2023

Determination: 1 February 2024

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] This determination concerns a very experienced and highly regarded pilot employed by Air New Zealand Limited (Air NZ), Garth McGearty. At the time Cpt McGearty turned 65 years of age in 2017, he was performing the roles of Check Captain and Standards Pilot on Air NZ's wide body Boeing 777 (B777) fleet. Cpt McGearty is a long-time member of the New Zealand Airline Pilots' Association Incorporated (NZALPA), and his and many pilots' work has been covered by successive collective agreements (CEAs).

[2] In 2016 Air NZ, in accordance with a practice utilised since about 2005 for pilots turning 65 years of age (known as age-restricted pilots or ARPs), asked Cpt McGearty to stipulate whether upon turning 65 he intended to transfer from the B777 fleet to its narrower body A320 fleet. Cpt McGearty declined to make any stipulation after a number of requests to do so, and in February 2018 he formally advised his belief that he could be accommodated on the B777 fleet and expected to return to the fleet after a period of retirement leave. Although Cpt McGearty ultimately returned to the B777 pursuant to an “ARP trial” in October 2019, when COVID-19 seriously affected Air NZ’s operations in March 2020, the trial was suspended. Cpt McGearty was not part of the ARP trial when it resumed in 2022, and he remains on leave without pay (LWOP).

[3] Cpt McGearty pursues personal grievances under s 103(1)(b) of the Employment Relations Act 2000 (the Act) that he was unjustifiably disadvantaged on the grounds that Air NZ would not roster him duties on the B777 and by electing to take leave without pay which he says was under duress. He has also raised a grievance under s 103(1)(c) of the Act that he was unlawfully discriminated against because Air NZ would not roster him duties on the B777 on the grounds of his age. He is seeking reimbursement of lost wages, compensation for humiliation, loss of dignity and injury to feelings, and compensation for lost benefits.¹ He no longer wishes to be reinstated to the B777 fleet, having intended to retire by the age of 70.

[4] Air NZ denies Cpt McGearty’s claims. It says by reason of international and foreign law restrictions which prohibit pilots from operating as pilots once they have turned 65, Cpt McGearty was not able to perform most international pilot duties for Air NZ. It says age is a genuine occupational qualification for pilots operating to territories affected by age-related restrictions, and it reasonably accommodated Cpt McGearty once he no longer held the genuine occupational qualification of age. Air NZ says its actions and how it has acted are what a fair and reasonable employer could have done in all the circumstances at the time those actions occurred.

The Authority’s process

[5] Cpt McGearty first lodged his application with the Authority back in September 2020. Over a long period the parties attempted to resolve their employment relationship

¹ These include loss of superannuation benefits, annual leave used, and loss of medical expense benefits as a result of the discrimination.

problem themselves, but by 2022 Cpt McGearty confirmed he wished to pursue his application. An investigation meeting due to take place in February 2023 was adjourned in light of effects on counsel resulting from the 2023 Auckland Anniversary floods.

[6] Cpt McGearty gave evidence, along with the following for Air NZ:

- (a) Nicola Dines, Chief People Officer (formerly Head of Pilot Enablement and General Manager for Pilots)
- (b) David Wilson, Senior Fleet Manager for B777 and B787 aircraft.

[7] This determination states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and specifies orders. It has not recorded all evidence and submissions received, which have been considered.² After discussion with the parties, the Authority confirmed that this determination would determine issues regarding liability and provide the parties an opportunity to resolve the issue of remedies (if liability was found).

Issues

[8] The following are the issues for investigation and determination:

- (a) Whether Cpt McGearty has a personal grievance(s) under s 103(1)(b) for unjustified disadvantage;
- (b) Whether Cpt McGearty has a personal grievance under s 103(1)(c) for being unlawfully discriminated against on the grounds of age.

Background

[9] The majority of pilots employed by Air NZ have been and are covered by collective agreements (CEA or CEAs) between it and NZALPA. A smaller number of pilots are members of the Federation of Air New Zealand Pilots (“FANZP”) and are and have been covered by Air NZ and FANZP CEAs, and an even smaller number of pilots are covered by individual employment agreements.

[10] Cpt McGearty has worked for Air NZ since 1983. Over the years he was an active NZALPA member, holding elected positions at NZALPA of Industrial Director, Board of Management Member, Admin Head and as a negotiator for a number of CEAs.

² As permitted by s 174E of the Employment Relations Act 2000.

He has experience in relation to rostering, having been involved in the team that introduced Air NZ's computer-based rostering system. It is fair to say he is very experienced in industrial matters concerning Air NZ pilots. He has also been a member of the Rostering & Scheduling Committee which is made up of both Air NZ and NZALPA representatives.

[11] Cpt McGearty turned 65 years of age on 24 July 2017. As stated above, in addition to his Check Captain flying duties, he held a Standards Pilot position which attracted incentive pay and a margin in addition to his pilot salary.

International regulatory requirements and restrictions

[12] New Zealand is a contracting state to the International Civil Aviation Organisation (ICAO) which promulgates international Standards and Recommended Practices and Procedures (SARPs) with which Air NZ is required to comply. Air NZ is relevantly required to comply with Standard 2.1.0 (the Standard), which has changed over time. Initially the Standard prevented all pilots aged 60 or over from piloting an aircraft, then it permitted a pilot in command to be up to 65 years of age if the co-pilot was under 60 years of age. An amended Standard was adopted on 3 March 2014, which remains in force (and was in force when Cpt McGearty turned 65 on 24 July 2017):

2.1.0 Limitation of privileges of pilots who have attained their 60th birthday and curtailment of privileges of pilots who have attained their 65th birthday

A Contracting State, having issued pilot licences, shall not permit the holders thereof to act as pilot of an aircraft engaged in international commercial air transport operations if the licence holders have attained their 60th birthday or, in the case of operations with more than one pilot, their 65th birthday (the age restriction).

[13] The amended Standard essentially prevented any pilot being aged over 65 years even on multi-pilot operations, including the co-pilot (first officer) role. It is common ground that unless an ICAO member State files a "Difference" to a Standard, the Standard applies to the territory of that State. New Zealand, Australia and a small number of Pacific Island countries have, as member states, filed Differences to the Standard in relation to their territories.

[14] Air NZ is not permitted to use ARPs in areas outside of where the filed Differences applies. Air NZ says the Standard applies in the majority of territories which its fleets fly to, from, or through - about 80% of the destinations serviced by Air

NZ's wide body aircraft fleet. ARPs also cannot use alternate airports in the case of diversions where the Standard applies at those alternate airports.³

CEAs

[15] Air NZ and NZALPA entered into a CEA on 16 May 2016 (2016 CEA). A long-standing clause, Section 2 states:

SECTION 2: AREA AND INCIDENCE OF DUTY

The Company shall employ its pilots and the pilot shall serve the Company in the capacity of pilot within New Zealand or any other part of the world where the Company may from time to time be operating, or to or from which the Company may require aircraft to be flown and shall perform such other duties in the air and on the ground relating to their employment as a pilot as the Company may reasonably require.

[16] Air NZ says this is understood by all involved to be a contractual obligation that pilots agree to be able to fly anywhere in the world as a pilot where Air New Zealand may be operating or require its aircraft to be flown. It is commonly referred to, and well known as, as "all pilots, all ports." On behalf of Cpt McGearty, this is stated to be a "key aspiration" as many pilots do not operate to all ports for various reasons.

[17] Section 3, headed "Terms of Employment" contains subsection 3.2 called "Retirement, Superannuation and Pension Scheme". Clause 3.2.3 is the clause that is central to the dispute between the parties. It was drafted as follows when Cpt McGearty reached the age of 65 years (namely, July 2017):⁴

3.2.3 Captains Precluded from Certain Destinations

Where, by virtue of the effect of domestic or foreign legislation relating to the pilot's age, a Captain is **prohibited from operating aircraft as pilot in command to sufficient of the destinations and/or destination alternates** of the fleet on which he is employed as to preclude his being able to be rostered in his current fleet in accordance **with the prevailing rostering provisions**, then the following shall apply:

³ Another example given was that Air NZ cannot operate services to the United States of America using ARPs not only because this is in contravention of the Standard which applies outside of New Zealand, but also because of the Foreign Operator Specifications issued by the Federal Aviation Administration of the United States (FAA) which requires Air New Zealand to comply with the Standard as a condition of operating air services into the territory of the United States.

⁴ Emphasis added.

[18] Where 3.2.3 applies, the rest of the clauses state:

- 3.2.3.1 The **Company shall seek from the Captain a stipulation** as to the fleet and rank not sufficiently affected by the legislation **to which he wishes to be transferred**. The pilot may elect to take all leave due to him from the age relevant to the legislation, being remaining Annual Leave followed by Retirement Leave. In that case, the stipulation by the pilot shall be made by six months before the end of that leave. If no leave election has been made, the pilot must make his stipulation by six months before reaching the age relevant to the legislation.
- 3.2.3.2 **The Company shall create a position, if no vacancy meeting the stipulation is available at that time, for the Captain in accordance with his stipulation**. This position, whether created or by virtue of an existing vacancy, shall not constitute a “vacancy” for the purposes of bypass and bypass pay for any other pilot.
- 3.2.3.3 Subject only to 3.2.3.5, on successfully completing his final simulator exercise (or aircraft circuits if required) relevant to the new equipment category the pilot will take up the position at the rank and on the aircraft type stipulated and be paid that applicable rate of remuneration. Where a change of aircraft type is involved the applicable bond and lock-on provisions shall apply.
- 3.2.3.4 Should the Captain fail to stipulate by the date of his reaching the age relevant to the legislation, or should the Captain fail to successfully complete any training necessary to take up the stipulated position, the Captain **shall be appointed to a First Officer position** on the fleet on which he held his command and shall be paid at that applicable rate of remuneration.
- ...
- 3.2.3.6. ...
Once affected by 3.2.3 a pilot may not, except in the event the relevant legislation changes removing the age related prohibition, exercise bid rights for Cpt positions to which the legislation applies.

[19] Air NZ and NZALPA entered a further CEA which came into force on 16 May 2018 (2018 CEA). Clause 3.2.3.4 was amended in the 2018 CEA, and remains the same under successive agreements as follows:⁵

- 3.2.3.4 Should the **pilot fail to stipulate** in accordance with 3.2.3.1 by the date of reaching the age relevant to the legislation, or fail to successfully complete any training necessary to take up the stipulated position, **the pilot shall be appointed to the highest rank on the largest aircraft type** to which the **pilot’s seniority** would provide an entitlement and to which that pilot can be appointed and still comply with the **relevant legislation** and shall be paid at that applicable rate of remuneration.

Other relevant employment documents

[20] In addition to CEAs, Crew Scheduling Rules (“CSRs”) are agreed by Air NZ and NZALPA and are said to provide a common set of scheduling rules for all pilots, which it is said is collated from various sources including CEAs in force at the time.

⁵ Emphasis added.

[21] Air NZ and NZALPA on occasion also agree to “Letters of Agreement” which are not subject to a ratification process by NZALPA members, as CEAs or variations to CEAs would be.

[22] There are also a range of policies and regulations set out in Air New Zealand’s “Exposition”. The exposition comprises all of Air New Zealand’s policies, manuals, and the like. This includes an Airline Systems Management Manual which states Air NZ’s policy that:

No pilot who has attained the age 65 can hold the position of pilot on the B777, B787 or B767 aircraft while the predominant operation of the aircraft is to, or through, territories and alternates that have adopted the ICAO standard in relation to the age of pilots.

Wide body fleets

[23] It is only larger aircraft (i.e. the B787 and the B777, referred to as “wide body” aircraft) that undertake mid-haul and long-haul flying. A pilot’s rank and the type of aircraft that they fly are generally the key factors in determining the pilot’s base salary and opportunities to other remuneration. In general, the larger the aircraft and the higher the rank, the higher the remuneration is. Moving to a higher rank or a larger aircraft is generally considered a promotion, with the most senior line pilot position being a Captain on the B777.

Wide body rostering system

[24] Pilots operate in a seniority system, which determines many of a pilot’s rights to a role, or to the work they do through the bidding system. An integrated bidding system for the allocation of work is agreed, which can mean that one pilot’s request for a particular line of work can result in another pilot’s request being declined. Air NZ and NZALPA (and also FANZP) have agreed a bidding system for pilots which is called the Seniority Biased Rostering System (SBS) which is how pilots’ express preferences for work. Once all pre-assignments of work have been completed, for example required training flights for pilots, pilots are able to bid for the remaining work by placing bids using the SBS. Again, with reference to seniority, the way this works is that the more senior a pilot is, the more weight is given to the pilot’s bid. This is the bias toward seniority but in relation to all bids, these are only preferences expressed by the pilots and Air NZ determines which work is allocated to which pilots, but guided by the SBS and the bids lodged.

[25] Once all bids are lodged, the rostering system runs an optimiser to produce a feasible roster. A feasible roster is one which allocates all the available work and it does so within the agreed parameters. The parameters are around meeting contractual requirements such as mandatory days off, weekends off, hours limitations, rostering rules – and ensuring that the overall roster comes within a certain roster hours window and a targeted balanced days off window. Air NZ says it was not possible for an ARP such as Cpt McGearty to be rostered as a Captain on the B777 in accordance with the prevailing rostering provisions without there being changes and accommodations made for him as an ARP.

Practice of ARPs transferring narrow body fleet

[26] Utilising clause 3.2.3 in successive CEAs, Air NZ says that from 2005 onwards there was an agreed and established position on handling the problem faced by the Standard. This was to allow them to transfer off the wide body fleet which predominantly flies to age restricted destinations, to the narrow body fleet, which predominantly flies to non-age restricted locations. When the Standard changed in 2014 to prohibit any pilot operating past age 65, Air NZ says it agreed to amend the relevant provisions to allow pilots, on turning 65, to elect (or stipulate) to move to the A320 fleet. Air NZ is required to accommodate this regardless of whether there is a vacancy on the A320. ARPs would be “down-trained” to the narrow body fleet (latterly A320). No witnesses for NZALPA have given evidence to suggest it disagreed with the practice. Rather, the evidence demonstrates it was a very well-known and understood practice. It is said a great many pilots turning 65 were “accommodated” in this way under clause 3.2.3.

Cpt McGearty nears and reaches 65 years

[27] In July 2016 Air NZ wrote to Cpt McGearty about changes to his employment conditions as he turned 65 and cited the relevant clause of the Airline Management Systems Manual. Air NZ wrote its first preference would be for Cpt McGearty to transition to the A320 as that fleet was able to reasonably accommodate him as either a Captain or First Officer, or alternatively he may choose to retire at any time. The letter cited the CEA saying Cpt McGearty was obliged to notify of his decision six months before he turned either 65 years old or by the time he completed retirement or other leave. It needed to know his decision by 24 January 2017.

[28] As noted, Cpt McGearty reached the age of 65 on 24 July 2017. He was number 44 on the pilot seniority list at the time. Cpt McGearty says shortly after turning 65, Air NZ required him to use all his leave. An email notification dated 31 May 2017 records that as per clause 3.2.3.1 Cpt McGearty requested leave be allocated from 27 July 2017 as days off, annual leave and retirement leave, which took him through to 10 March 2018. The notification identified his final date to make a stipulation would now be 10 September 2017.

[29] In October 2016 Air NZ sent another letter to Cpt McGearty saying the Standard meant Air NZ would not be in a position to employ Cpt McGearty's services once he reached 65. The letter stated the CEA enabled Cpt McGearty to bid for alternative positions at any time they are advertised and referenced its offer to facilitate an A320 position. The letter asked Cpt McGearty to advise in writing of his intentions before 24 January 2017.

[30] In November 2017 Air NZ wrote to Cpt McGearty by email asking him to formally stipulate what his intentions were after 65 years and that information was needed to start planning his A320 course. Cpt McGearty says he responded by phoning one of Air NZ's fleet managers saying there was no requirement for him to make a stipulation because there was sufficient flying on the B777 consistent with clause 3.2.3 of the CEA. He says further communications followed, although the Authority has only been provided with communications involving Cpt McGearty from 1 February 2018.

[31] Air NZ says Cpt McGearty had many conversations with Air NZ about his situation, and he was told consistently that its position was that the provisions of 3.2.3 applied, and that he had an option to either stipulate that he wanted to take up an A320 role, or that he could elect to take leave without pay while it considered the issue. Cpt McGearty was rostered onto an A320 course due to commence on or about 16 March 2018. Air NZ says it did not consider it appropriate to unilaterally put Cpt McGearty on leave without pay (LWOP), but that it could appoint him to an A320 role, which it proposed to do by scheduling the course.

Air NZ writes to pilots updating on ARPs

[32] By 27 December 2017 Ms Dines, as Head of Pilot Enablement at the time, and other Senior Fleet Managers saw fit to send a memorandum to all pilots providing an

“Update on Pilots turning 65”. The memorandum referred to discussions about restrictions on pilots once they reach 65 years. It outlined what it saw as the current position, and referred to reasonable accommodation requirements reached with both pilot unions which involved assured access to the opportunity to continue as a pilot on the A320 fleet. It referred to a number of pilots recently asking whether reasonable accommodation could be extended to pilots who reach the age of 65 on the B777 and B787 fleets. The memorandum committed to looking into whether material changes to the operation could be made and said Air NZ needed to gather data, share it with the unions and work through the data to determine what may or may not be possible. Pilots were told they would be updated and were invited to share information and feedback with their unions or one of the Senior Fleet Managers.

Cpt McGearty does not make a stipulation

[33] Cpt McGearty did not stipulate an alternative fleet and rank. On 1 February 2018 he wrote to a Senior Fleet Manager citing clause 3.2.3 stating his position that clause 3.2.3.1 (regarding stipulation) only comes into effect if pilots cannot be accommodated on their current fleet. He stated his belief that the B777 fleet “was not sufficiently affected by the legislation to an extent that would require me to make such a stipulation”. He said he was aware Air NZ was reviewing the matter and said he was happy to advise on how the current roster system could be used to establish the number of pilots that could be rostered to avoid the destinations affected and said it was “not a complicated task”. The Manager wrote back saying he would respond in due course.

[34] The next email communication from Cpt McGearty on 28 February 2018 says he was surprised and distressed that his roster showed what appeared to be a “transfer or direction to the A320”, and that nobody had been in touch to discuss the matter. He advised his medical certificate was currently suspended.

[35] The Manager responded acknowledging Cpt McGearty’s medical situation. He confirmed Air NZ was looking at the issue of reasonable accommodation once more and this was underway with the assistance of the Rostering & Scheduling Committee. The Manager stated:

At this point though, nothing has changed in terms of the agreed arrangements for pilots who reach the age of 65. In the absence of a formal stipulation from you, we are proposing to handle your situation in the same way as other pilots in these circumstances, and this involves a move to the A320 resource group.

The issue of the review has been afforded priority because issues are being raised across the spectrum of the pilot group generally, and not just those who have reached the age of 65.

[36] On 2 March 2018 Cpt McGearty wrote to the Manager referring to being rostered on the A320 course and asked if he was being directed to the A320. He stated his belief that the “B777 is not sufficiently affected by the legislation to an extent that would require me to make a stipulation in accord with Section 3.2.3”. He questioned whether the “proposal” was really a proposal. He stated he retained his current position of B777 Check Captain until he qualified in a new position, and to ensure he was paid correctly. He contended that Air NZ now knew he could be rostered in accordance with prevailing rostering provisions. He also stated clause 3.2.3.4 applied (appointment to a First Officer position on the fleet on which he held his command). He advised that if Air NZ continued down its path of forcing him to fly the A320 he would have little alternative to initiate legal proceedings.

[37] Cpt McGearty says once all his leave had been used up, Air NZ put him on B777 base pay, without average incentive pay and without his Check Captain margin.

R&S Committee Report

[38] Following requests by Cpt McGearty and other ARPs, Ms Dines says the R&S Committee undertook modelling on past rosters to ascertain the feasibility of rostering ARPs pilots. Air NZ flight management had tasked the R&S Committee to determine if it would be possible to accommodate some ARPs as Captains (not First Officers) on B777 aircraft and what the likely impact upon pilots under 65 years would be. The Committee issued a brief two-page report on 19 March 2018, saying feasible rosters were produced that accommodated ARPs.

[39] Air NZ says while the R&S Committee analysis was useful to show that it may be “theoretically possible” to accommodate ARPs on the B777 it did not show that ARPs could continue to fly “within the prevailing rostering provisions”. Because of this, it needed to consider a range of other factors to understand if it was actually possible to practically accommodate ARPs without significant disruption to Air NZ’s business. It says accommodating ARPs on the B777 when so little of its flying is available for ARPs was very complicated, compared with the relative simplicity of accommodating ARPs on the A320 fleet, with the majority of A320 flying being

unaffected by the Standard. More work was undertaken, and Cpt McGearty was invited to and gave a presentation in early June 2018 about rostering ARPs on wide body fleets.

[40] It is indeed apparent that the age issue became an emotive one, which generated disharmony among pilots and between the unions themselves. Air NZ says not only did some younger pilots take issue with what they see as preferential treatment for ARPs in the allocation of work and potentially poorer bid satisfaction for them, they also saw this as a block on their progression to more senior roles. NZALPA clearly had members who were ARPs such as Cpt McGearty who were advocating for change, and it had members who did not want change and who were opposing it.

[41] By way of example, on 12 July 2018 NZALPA's Principal Officers sent a communication to its members acknowledging member feedback and comments regarding ARPs flying on the B777 and B787. It said the circumstances put NZALPA "in a very invidious position as we try to represent the needs of ALL our members whilst respecting the democratic nature of the organisation and the need to remain united as a group". It said:

We can assure you no final decisions or agreements have been made as to whether +65 pilots would be accommodated on the 777/787. We are currently working through all the legalities and possible options as we try to find outcomes that are fair to all pilots. Ultimately, any decision is the Company's to make, but NZALPA must ensure we advocate the needs of all our members.

...

NZALPA realises that any decision made to support these +65 members may be unpopular and divisive to the Union. This naturally creates a trick situation – something we are very aware of...

...NZALPA representatives have met with the Company firstly to establish whether there is a common legal interpretation of the legislation and, secondly, to discuss whether a trial would be appropriate to confirm, or not, whether 2 to 3 pilots could be accommodated in the C7, F7, C8 and F8 fleet ranks, with negligible or minimal disadvantage to other pilots in these fleet ranks.

[42] On 13 July 2018 Air NZ Fleet Management sent a memorandum to all pilots updating them following the 27 December 2017 memorandum. The update said in relation to "Next Steps" Air NZ was looking at a number of options, including running a trial with a small number of ARPs. As a first step though, it said it to "gain more clarity" on the legal position it had approached NZALPA and the other union involved, FANZP, about jointly approaching a Queens Council (QC) to provide a legal opinion. Air NZ has given unchallenged evidence that NZALPA asked not to commence the proposed trial and in the end, and it was NZALPA who obtained legal advice.

[43] By 16 July 2018 FANZP updated its members referring to Air NZ's recent Memorandum saying:

Currently the A320 option for ARPs meet the Company's legal requirements under NZ legislation but the question has now been raised by pilots as to whether there is the opportunity for ARPs to be reasonably accommodated on limited widebody aircraft operations.

Consequently, the Company has been in joint discussions with both Unions on this matter; however, the FANZP position has now been clearly stated following the recent Committee meeting that the Federation considers the current A320 option for ARPs is sufficient to meet the Company's reasonable accommodation legal requirements.

...

We will shortly be advising the Company that FANZP does not support the proposal to seek an opinion from a QC.

...

...this new ARP wide body suggestion is a complex issue that needs careful consideration to find the most appropriate course of action. Unfortunately, emotions are now running very high amongst the pilot group when sensible, logical, and considered thoughts are required at this moment more than ever.

[44] Throughout the following months, FANZP did not support an extension of reasonable accommodation arrangements.

[45] It is clear the lead up to an ARP trial ended up involving a considerable amount of work, including comprehensive analytical work to determine whether an ARP trial was possible. In addition Air NZ faced many questions which arose in the discussions with the pilot unions and individual pilots.

[46] There were delays in NZALPA receiving legal advice, and NZALPA wanted to seek the advice independently and on its own account. Air NZ says it assisted NZALPA with briefing a QC on the issues. The QC ultimately provided the advice to NZALPA on 5 February 2019 and 31 May 2019. Air NZ took from the advice that the existing policy for ARPs had acceptance by NZALPA and its members through the current CEAs. It would, however, be permissible for the parties to now explore whether it was possible to accommodate any ARPs on wide body aircraft. As the matter was complex, and the outcome of such exploration would be uncertain, Air NZ said a conservative approach was appropriate to ensure problems did not arise.

Development of the widebody ARP trial framework

[47] Following that advice, and after many more meetings with NZALPA and FANZP, Air NZ undertook what it says was a significant amount of modelling and

analytical work to determine if ARPs could be accommodated on the B777 and B787 fleets, and if so, how many could be accommodated.

[48] In summary, the steps involved to work out whether any ARPs could be accommodated on the widebody fleets, and if so how many, were:

- (a) Understand the number of pilots on the relevant fleet and available to perform the flying each roster.
- (b) Discount this number of pilots for a range of factors including leave, flexi flying (which effectively involves pilots job-sharing), training, management duties, meeting time, ad hoc absences etc, to arrive at the number of pilots actually available for each roster.
- (c) Place port blocks, call line restrictions and optimisation restrictions on one pilot on the relevant fleet (the individual restrictions/ accommodations) and attempt to build a feasible roster (that complies with all of the remaining rostering provisions).
- (d) If a feasible roster was possible with one restricted pilot on the fleet, then add one more restricted pilot and continue this process until it was not possible to build a feasible roster with restricted pilots.
- (e) Undertake this process for a period of 12 months using actual past rosters and forward rosters based on assumptions to build a 12-month picture (13 x 28-day rosters).
- (f) Once the numbers were determined based on the actual pilots available, but using “clean” lines of work (i.e. without any necessary pre-assignments etc.), a percentage reduction was needed to account for the pre-assignment of work which would be unavailable for bidding. For example, training flights, currency flights, management pilot duties.
- (g) An agreed discount figure of 30% was applied to B777 ARPs Captains - this meant four ARPs could be accommodated on the B777 fleet, but only once the operating and rostering restrictions were put in place for those four pilots.

[49] Air NZ said based on the analysis undertaken, it was considered it may be possible, based on the flying available at that time, to initially trial the accommodation of four Captains on the B777 fleet and two Captains on the B787 fleet and then to analyse whether, in light of individual restrictions to be applied to ARPs, this would cause unreasonable disruption to its activities.

[50] In many discussions with NZALPA and FANZP, Air NZ came up with a complex ARP trial framework which set out how the trial would work, how the number of ARPs would be arrived at, and how the allocation of ARP roles would occur, and how that number of ARPs would be managed.

[51] In September 2019, Air NZ and NZALPA agreed to an ARP trial framework, but FANZP declined to agree and maintained that the ARP trial framework would disadvantage non-ARP pilots.

ARP Trial is finally confirmed

[52] On 18 September 2019 Air NZ entered into a formal Letter of Agreement (LOA) for the Trial with NZALPA which outlined a detailed framework for accommodating over 65 years pilots on wide body aircraft. It stated ARPs would be required to sign a fixed term agreement with Air NZ outlining the terms of the trial. There was also a “bumping” arrangement in the LOA which was there to respect seniority, and meant that if a more senior pilot on the particular fleet turned 65 and wished to continue flying, that more senior pilot could “bump” a more junior pilot who had already turned 65.

[53] FANZP refused to sign a trial agreement.

[54] Air NZ wrote to Cpt McGearty stating it would be advertising four B777 Captain positions and two B787 Captain positions and pursuant to the ARP framework he was eligible to bid for one of the positions. On 25 September 2019 Cpt McGearty agreed to the individual terms governing his participation in the ARP trial. It was termed an “age-restricted widebody fixed term opportunity/appointment”. Cpt McGearty commenced his training course on 30 October 2019, and thereafter resumed operating trans-Tasman duties as part of the ARP trial. His agreement stated the terms were accepted without prejudice to his personal grievances already filed and any future grievances that arise. Air NZ says Cpt McGearty was appointed as the most junior of the four ARP Captains on the B777.

The ARP Trial goes live but COVID-19 interrupts it

[55] The Trial went live in October 2019, and ran for five months up until the end of March 2020 when it was suspended due to COVID-19 which resulted in the grounding of all B777 aircraft, and a reconfiguration of the remaining wide body flying schedule.

Air NZ says even if the ARP trial had not been suspended in March 2020 due to COVID-19, Cpt McGearty would have been the first ARP bumped, which would have occurred as soon as a more senior B777 Captain turned 65.

[56] By way of response to Air NZ's advice on 23 March 2020, Cpt McGearty advised:

Under the circumstances we all now face and the dire situation Air NZ is now in I would like to change my position on taking annual leave. I have been allocated backlog leave from the 16th of April. At the end of that leave I wish to take all leave of any form remaining. Because of the rapidly changing situation I will then review my decision about my future employment with Air NZ.

[57] In or about June 2020, Air NZ offered a COVID-19 retirement package to "active" pilots. Cpt McGearty says that as he had been unilaterally placed on LWOP, he was not deemed as an active operating pilot and so was denied the opportunity to accept the COVID-19 retirement package. From or about June 2020, Air NZ also determined it would not operate the B777. As a result, B777 pilots were "down-trained" to operate the B787 in reverse order of seniority. Air NZ did not offer to down-train Cpt McGearty to the B787.

[58] In or about August 2020 Cpt McGearty agreed to commence an A320 course and Air NZ appointed him to an A320 course commencing on 12 October 2020. Cpt McGearty says he was placed on an A320 course. He says this was while more junior pilots who would normally under the CEA have been directed to the course prior to Cpt McGearty, they were allowed to remain on the B777. Cpt McGearty says he was forced to take annual leave to avoid the A320 course and subsequently was placed on LWOP when he had used all leave entitlements.

[59] Prior to the commencement of the A320 course on 12 October 2020, Air NZ says Cpt McGearty changed his position and instead agreed to a period of leave without pay, with the notation "Signed under duress and without prejudice".

Trial recommences

[60] From or about March 2022, Air NZ finally resumed operating the B777 and resumed the ARP Trial. Air NZ did not offer Cpt McGearty another ARP trial position on the B777, as by the time the ARP trial restarted in 2022 he did not have seniority to

continue as a Captain on the B777 as an ARP – in other words, there were now pilots more senior who had turned 65.

[61] Cpt McGearty was later appointed to a course to train as a Captain on the B787, but withdrew from the training course in June 2022, prior to its commencement. It is common ground McGearty had decided not to return to flying as he did not wish to do so once he reached 70 years of age.

Relevant law

Discrimination

[62] Section 103(1)(c) of the Act provides that an employee may have a personal grievance where they have been discriminated against in the employee's employment. Section 104 provides:

104 Discrimination

- (1) For the purposes of section 103(1)(c), an employee is **discriminated against in that employee's employment** if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, or the employee's union membership status or involvement in union activities in terms of section 107,—
 - (a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
 - (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or
 - (c) retires that employee, or requires or causes that employee to retire or resign.
- (2) For the purposes of this section, **detriment** includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.
- (3) This section is subject to the exceptions set out in section 106.

[63] The prohibited grounds of discrimination in s 105 include age. Section 106 requires s 104 to be read subject to s 30 of the Human Rights Act (HRA). References in s 30 to s 22(1)(a) or (d) are required to be read as if they were references to s 104(1)(a) and (c) respectively. Section 30(1) of the HRA relevantly provides:

30 Further exceptions in relation to age

- (1) Nothing in section 22(1)(a) or section 22(1)(d) of this Act shall apply in relation to any position or employment where being of a particular age or

in a particular age group is a genuine occupational qualification for that position or employment, whether for reasons of safety or for any other reason.

[64] Section 30 is subject to a qualification in s 35 of the HRA, subject to which s 106(1)(l) of the Act requires s 104 to be read:

35 General qualification on exceptions

No employer shall be entitled, by virtue of any of the exceptions in this Part of this Act, to accord to any person in respect of any position different treatment based on a prohibited ground of discrimination even though some of the duties of that position would fall within any of those exceptions if, with some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer), some other employee could carry out those particular duties.

McAlister case

[65] There are a number of authorities (which are now rather historic) in which the issue of discrimination in relation to ARPs was considered. Most recently, the Supreme Court allowed an appeal by the appellant in *McAlister v Air New Zealand Ltd*.⁶ Mr McAlister was a senior pilot-in-command on the B747-400 and fleet flight instructor who when he turned 60 was demoted to a First Officer, as his age meant he could no longer fly to the USA. On appeal, the Supreme Court concluded that Air NZ had a defence under the s 30 exception to s 104(1)(a) on a provisional basis because it was subject to Air NZ establishing under s 35 that it was, reasonably, unable to adjust its activities to accommodate the restriction placed on McAlister by the rule.⁷ That was a matter not considered by the Employment Court and as such the Supreme Court remitted the case back to the Employment Court. The Authority understands the parties settled before any further consideration by the Employment Court.

[66] Although the Supreme Court in *McAlister* expressed its view that although the drafting of the relevant Act and HRA provisions was hardly a model of clarity, in analysing the relevant provisions, it considered each paras (a), (b), and (c) of s 104(1) are directed at different circumstances in which discrimination on a prohibited ground is unlawful:⁸

- Section 104(1)(c) is a straight prohibition on any termination of employment by reason of age. In particular, it abolishes compulsory retirement ages.

⁶ *McAlister v Air New Zealand Ltd* (2009) 9 NZELC 93, 242; [2009] NZSC 78.

⁷ *McAlister* at [44].

⁸ *McAlister* at [26].

- Section 104(1)(a) prevents inequality in conditions of employment by reason of age when the employee is compared with other employees with the same qualifications, experience, etc.
- Section 104(1)(b) prevents dismissal or detriment (which, as s 104(2) makes clear includes anything that impacts on job satisfaction or performance) where others employed on work of the same description would not be dismissed or subjected to such detriment.

[67] Only s 104(1)(b) of the Act was noted as not being subject to the s 30 HRA exception by s106(2) of the Act.

Unjustified disadvantage

[68] In accordance with s 103(1)(b) of the Act, an employee may have a personal grievance where one or more conditions of employment is or was affected to their disadvantage by some unjustifiable action by the employer. Here, the Authority is required to consider on an objective basis whether Air NZ's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the relevant time.

Discussion

The timing of Cpt McGearty's grievance(s)

[69] An issue arose at the investigation meeting as to when Cpt McGearty first raised his personal grievance. Cpt McGearty submits that he validly raised a personal grievance in his letter of 2 March 2018. The letter from NZALPA counsel in 28 September 2018 made it clear the grievances were made pursuant to s 103(1)(b) and s 103(1)(c) of the Act on the grounds Air NZ refused to roster him to fly or to perform standards pilots duties on the B777 solely due to his age. Given the content of the letter in the context of other communications between the parties, the Authority agrees that Cpt McGearty validly raised a grievance on 2 March 2018, and as such, Air NZ's actions in the 90 day period prior are assessed as part of the Authority's investigation.

Whether Cpt McGearty has a personal grievance under s 104 of the Act

[70] Cpt McGearty's discrimination grievance is said to be under s 104(1)(c) of the Act. That provision does not appear to be applicable to Cpt McGearty's situation, as it relates to a situation where an employer retires an employee or requires or causes that employee to retire or resign. Cpt McGearty remains employed by Air NZ, albeit on LWOP. As found by the Supreme Court in Mr McAlister's case, it appears Cpt McGearty's complaint would more properly have been brought under s 104(1)(a) of the

Act. The parties have not addressed this point, but the Authority considers it is appropriate to address the claim as if it were brought under s 104(1)(a) of the Act.⁹

[71] The starting point is clearly that it is, prima facie, discriminatory to treat Cpt McGearty differently from a pilot aged under 65. Applying the interpretation in *McAlister*, if Air NZ treated age as a qualification for Cpt McGearty's position on the B777, it would have to justify the treatment as both a genuine occupational qualification and as one not able reasonably to be accommodated by requiring other employees to undertake the work for which age is a genuine occupational qualification.¹⁰ If Cpt McGearty's circumstances could be reasonably accommodated under s 35 of the HRA, then s 104(1)(b) would prevent him being unequally treated by reason of age by comparison with other employees who undertake that work.

[72] As in *McAlister*, the Authority is satisfied the Standard was and is a genuine occupational qualification for the purposes of s 30 of the HRA. As Cpt McGearty held the position of Check Captain on B777, the majority of his duties were operational flying duties. The B777 fleet predominantly flew to and from ports (and to alternate ports where necessary) as well as through territories which had not filed Differences to the Standard. The Standard therefore had a significant impact on his ability to perform the majority of tours of duty on the B777 fleet. The exception in s 30 applied, subject to s 35 of the HRA.

[73] The s 30 exception would only have applied in Cpt McGearty's situation if some adjustment of Air NZ's activities could not be made without it involving unreasonable disruption of those activities. In other words, the test for determining what was a "reasonable accommodation".

[74] What constitutes a "reasonable accommodation" in terms of s 35 may well change over time in the context of a particular employment relationship. Here, the long-standing agreed position was that ARPs were unable to continue operating as pilots on the wide body fleet but that they had a contractual entitlement to transfer under clause 3.2.3 in successive CEAs to the narrow body fleet.

[75] I accept the rostering provisions agreed between Air NZ and NZALPA are complex and comprehensive – Air NZ is contractually required to allocate work

⁹ Employment Relations Act 2000, section 122.

¹⁰ *McAlister* at [29].

according to a highly prescribed rostering system. It was not reasonable to expect Air NZ to build a bespoke roster for Cpt McGearty or assign him (and/or other pilots aged 65 or over) unrestricted flying without breaching the rostering provisions of its CEA(s). Whilst there was sufficient work available so that a bespoke roster for Cpt McGearty – that did not mean that Air NZ had sufficient work for all ARPs, or that it could, in a contractually compliant way, create one for Cpt McGearty. Accordingly, I accept that Cpt McGearty could not be rostered in accordance with the prevailing rostering provisions which included important seniority and bidding rights.

[76] In my view, having carefully considered the evidence, what Cpt McGearty was suggesting would have been at the time an unreasonable adjustment to Air NZ's activities. Unless and until new arrangements were able to be made in consultation with the pilot unions, making a one-off accommodation for Cpt McGearty on the B777 would have been at odds with long-standing stipulations within successive CEAs, which was well-understood by the unions and pilot community alike. The Authority is of the view that doing so would have involved an unreasonable disruption to the activities of Air NZ. Although admittedly lengthy time was undertaken by Air NZ and NZALPA in considering and finally implementing an ARP trial, in my view, the work was both reasonable and necessary. It was only after the work was done, could a reasonable accommodation of ARPs on the B777 and B787 fleets be made.

Whether Cpt McGearty has a personal grievance under for unjustified disadvantage

[77] The Authority's consideration of the claim for unjustified disadvantage is necessarily informed by its findings on the s 104 claims.

[78] As a starting point, the evidence showed that at the time Cpt McGearty turned 65 in July 2017, clause 3.2.3.4 of the 2016 CEA stated that in the event of failing to stipulate the fleet to which he wished to transfer, the "Captain shall be appointed to a First Officer position on the fleet on which he held his command and shall be paid at that applicable rate of remuneration". The clause was internally inconsistent with the earlier stipulation provisions in 3.2.3, Air NZ's long-standing practice with which NZALPA agreed, and Air NZ's Airline Management Systems Manual. The Standard had changed by the time Cpt McGearty had reached 65 to prohibit any pilot flying after the age of 65, so any appointment to a First Officer role on the B777 would have similar restrictions on flying as for Captains. Cpt McGearty was also well aware of the

practice. Clause 3.2.3.4 was amended by agreement with effect from May 2018, to reflect the updated Standard.

[79] Cpt McGearty gave evidence that it was never a consideration of his that he should be offered a First Officer position – it has always been he was entitled to stay on B777 as a Captain in his existing position. Given the above the Authority is not satisfied Air NZ acted in breach of clause 3.2.3.4 of the 2016 CEA.

[80] Even if I am wrong on that, the Authority is of the view that Air NZ's actions in not rostering Cpt McGearty to the B777 fleet (and instead rostering him on the A320 fleet) were those a fair and reasonable employer could have taken in all the circumstances. Rostering Cpt McGearty on the B777 fleet was contrary to the practice among its pilots and the unions. Following his paid retirement leave, and despite not being required to perform any duties between March 2018 and October 2018, Cpt McGearty continued to paid, after which he (albeit reluctantly) agreed to go on LWOP, which preserved his seniority rights. He retained an ongoing opportunity to fly on the A320 fleet as per Air NZ's earlier arrangement, and was ultimately afforded the opportunity of participating in the ARP trial.

[81] Cpt McGearty suggested the long process Air NZ followed created or at least exacerbated the reactions of pilots. Although Cpt McGearty has a clear view that putting him on the prevailing roster was not at all as complicated as Air NZ's suggests, I prefer Air NZ's evidence on this point. Evidence was given that hundreds of hours of analyst work, many hours of meetings with the unions and time spent drafting, and the securing of complex legal advice.

[82] Although it is very unfortunate that the process of accommodating ARPs into wide body rosters took much longer than anyone involved planned or expected, in all the circumstances I am not satisfied it was unreasonable in all the circumstances. A portion of the period before the trial ultimately went live can in part be attributed NZALPA's wish to be clear about the legal position, having sought legal advice which was subject to delays. Air NZ also conducted extensive modelling given the complexities involved.

[83] Further, once both Air NZ and NZALPA were satisfied on their legal positions, it was reasonable that arrangements regarding ARPs was formalised. The unchallenged evidence was that NZALPA willingly took part in negotiations around the trial

framework which resulted in the LOA, and which ultimately involved engaging ARPs on fixed-term agreements. Given the complexity of the arrangements Air NZ, unions and pilots operate in, including the terms of CEAs and CSRs, it is understandable that it took significant time to resolve the issue Cpt McGearty raised.

[84] The number of employment relationships involved and the diverging views and interests of the parties involved created further complexity. Air NZ was obliged to act fairly and reasonably to all pilots, both ARPs and those under 65 years. A collaborative approach with the unions was called for, and in the Authority's view, was entirely reasonable.

[85] The Authority has considered Air NZ's actions and what it did in the aftermath of suspending the ARP trial in March 2020 and recommencing it in around March 2022. The ARP trial was subject to the agreed LOA and the formal framework created under it which governed the terms of the trial which included respecting seniority rights of pilots who could participate. Although Cpt McGearty reserved his right to pursue his personal grievance claims in signing an ARP fixed term agreement, his employment in the trial was subject to the LOA framework. When Cpt McGearty did become eligible for the trial again, he was offered a position on the B787, he declined.

[86] For completeness, the Authority notes it has not been persuaded by arguments that the LOA and fixed term ARP agreements are "void", being inconsistent with the CEA. The trial scheme was negotiated in good faith between Air NZ and NZALPA, and the Authority understands it continues on the same or similar terms beside the relevant CEA.

[87] Applying the statutory test under s 103A requires an assessment of substantive fairness and reasonableness rather than minute and pedantic scrutiny to identify any failings, which could get in the way of a direct application of the statutory test.¹¹ The Authority has considered Cpt McGearty's criticisms of what Air NZ did and its actions, including upon and after suspending the ARP trial, but has not addressed all of the criticisms where they were either pedantic, minor, or not established on the information before me, and did not result in unfairness.

¹¹ *A Limited v H* [2016] ERNZ 501 (CA) at [46].

Outcome

[88] Cpt McGearty does not have personal grievances under either s 103(1)(b) of the Act or s 103(1)(c) of the Act. Air NZ's actions, and how it has acted, are what a fair and reasonable employer could have done in all the circumstances at the time those actions occurred.

Costs

[89] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed the party may lodge, and then should serve, a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum the other party would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.

Sarah Blick
Member of the Employment Relations Authority