

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

|                              |  |
|------------------------------|--|
| <b>BETWEEN</b>               | Trevor Palin   |
| <b>AND</b>                   | Air New Zealand Limited  |
| <b>REPRESENTATIVES</b>       | Richard McCabe, advocate for Trevor Palin<br>Kevin Thompson, counsel for Air New Zealand Limited |
| <b>MEMBER OF AUTHORITY</b>   | R A Monaghan   |
| <b>INVESTIGATION MEETING</b> | 2 November 2006  |
| <b>SUBMISSIONS RECEIVED</b>  | 7, 10 and 24 November 2006   |
| <b>DATE OF DETERMINATION</b> | 8 January 2007   |

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Trevor Palin says his employment has been affected to his disadvantage by an unjustified action of his employer, Air New Zealand Limited ("Air New Zealand").

[2] Captain Palin is employed as a pilot. His terms and conditions of employment are contained in a collective employment agreement ("cea") negotiated between his union, NZ Air Line Pilots' Association ("ALPA"), and Air New Zealand. The cea relevant to this problem was in force from August 2002.

[3] In June 2004 Captain Palin raised personal grievances concerning matters not unconnected with the operation of that cea. He says the grievances were resolved in June 2005, and Air New Zealand subsequently 'renege'd on the agreement embodying the resolution. He says he has been disadvantaged as a result. The employment relationship problem before the Authority has been framed as a personal grievance arising out of the failure to observe the terms of the alleged agreement.

[4] The statement of problem included an alternative claim that the agreement was an individual agreement under s 61 of the Employment Relations Act 2000, the agreement was breached, and a compliance order should be issued.

[5] Air New Zealand says there was no agreement reached in settlement of Captain Palin's original grievances.

[6] Since no dispute was raised regarding the interpretation and operation of the cea, the grievance before the Authority concerned only the alleged failure to observe the alleged agreement, and there was the further argument based on

s 61, the investigation was driven to focus on whether there was an agreement settling the original grievances.

### **The collective employment agreement**

[7] In general career progression for Air New Zealand's pilots - as well as pilots' remuneration - is closely related to the type of aircraft (or equipment category) a pilot flies. Rank (whether the person holds a position as captain or first officer) also plays a part but is not relevant in this problem. Access to vacant positions is underpinned by a system of seniority, which is in turn determined largely by the length of time a pilot has spent in the company's employ. A seniority list is maintained according to an agreed set of rules. Broadly speaking, when a vacancy occurs it is awarded to the most senior qualified pilot who bids for it, provided the pilot is suitable for appointment. There are variations and exceptions, and sometimes a more senior pilot who has placed a bid is 'bypassed' by a less senior pilot in an appointment to a vacancy.

[8] All of this is provided for in the cea.

[9] The cea also provides for a 'lock on' period which requires pilots to remain in a new position for a specified period after the position has been secured. There are special arrangements regarding lock on periods when a pilot has been bypassed for appointment to a vacancy. The present problem arises out of such a situation.

[10] The cea included the following provisions:

"12.7.1 Bypass pay will be paid to all pilots who hold a valid standing bid and have been bypassed by a junior pilot ... except that no bypass pay will be paid:

- (a) where an instructor is appointed to an equipment category with a high rate of annual salary during the first 12 months of operation of the new aircraft type ...
- (b) ..
- (c) where a pilot will still be serving a lock on period under 12.6 at the time training for the advertised vacancy is due to commence.

[11] Clause 12.6 read in part:

"12.6.1 A lock on period is a period of time following a change in rank, equipment category transfer or appointment to a check or instructor position during which a pilot is frozen in that new rank, equipment category or position ...

12.6.2 ... a lock on period of 20 months from the date of commencement of training for the relevant position shall apply to any pilot being appointed through the standing bid system ...

12.6.3 In the case of a pilot being bypassed for a promotion in rank or equipment category transfer, who is subsequently promoted or transferred to that position, the lock on period will be deemed to have started on the date of commencement of training of the more junior pilot for the position bypassed from.

12.6.4 ...

12.6.5 The Company may remove or reduce any lock on period at its sole discretion. It will do so in an even-handed manner, which will be promulgated to all pilots prior to removal or reduction of such lock-on period."

### **The original grievances and the attempts to settle them**

[12] In November 2002 Gerald Dunn, at the time Air New Zealand's fleet manager for the international airline, formally advised pilots of relevant practical aspects of company plans to introduce the A320 aircraft into its fleet. The plans included arrangements for training the pilots who would fly the aircraft, and

training for the pilots who were to provide that training (standards pilots or instructors). Captain Dunn issued a series of memoranda explaining these arrangements, one of which was dated 3 August 2003. A passage on which Captain Palin focussed referred to the fact that the application of Civil Aviation Authority rules had resulted in bypasses for a number of pilots in the introduction phase. In addressing an anomaly that might result from the operation of the lock on provisions in those circumstances, the memorandum said:

“For [pilots appointed to the A320 out of seniority] their lock ons are completed 20 months after [the first day of their training course].... If an equipment category transfer [in practice an upgrade to the B767 aircraft] becomes available at this time these pilots would have an advantage over perhaps more senior pilots who have joined the A320 fleet later in seniority (and are therefore locked on).

This clearly was not the intent when these pilots were appointed as temporary standards pilots.

Therefore the course of action to fix this anomaly is to ensure any pilot who joins the A320 in seniority will be locked on the aircraft type only as long as any more junior pilot. For example if you join the fleet in October 2003 and are more senior to a standards pilot who joined the fleet in January 2003 then your lock on commences from the January course commencement date.”

[13] In December 2002 Captain Palin had lodged a bid for a captain's position on the A320. On 23 July 2003 a Captain Forster, who was less senior than Captain Palin, began training as a temporary standards pilot on the A320, bypassing Captain Palin.

[14] Captain Palin's bid remained standing until he withdrew it on 6 April 2004 without having secured an A320 vacancy. He withdrew the bid because he believed the obligatory training course associated with a vacancy he was in line to secure would occur during a period when he had annual leave scheduled.

[15] On 29 April 2004 Captain Palin lodged a new bid for an A320 vacancy. On 21 June 2004 he began an A320 training course.

[16] In the interim, Captain Forster was appointed to a permanent A320 command vacancy. Captain Palin was not entitled to be considered for the vacancy because he had no bid current at the time.

[17] By letter dated 13 June 2004 Captain Palin raised 'personal grievances' reasserting an earlier claim to bypass pay in respect of Captain Forster's temporary appointment, and expressing his requirements concerning the date of completion of his lock on period. The company declined bypass pay under cl 12.7.1 of the cea, but its initial response regarding the lock on period reiterated some of the points in the earlier memoranda and was made without knowing of the withdrawal of Captain Palin's bid. Its corrected response advised that the 20 month lock on would commence on 21 June 2004. Captain Palin asked the company to reconsider its view bearing in mind the circumstances in which he had withdrawn his bid. It declined to do so.

[18] It seems nothing more happened until December 2004, when ALPA and Air New Zealand were in the process of renegotiating the cea and were meeting for that purpose. During a break in negotiations Captain Palin and Adam Nicholson, a legal officer for ALPA, had a discussion with Captain Dunn and Chris Hancock, a human resources manager with Air New Zealand. They addressed Captain Palin's concern about the date of commencement of his lock on period, with Captain Palin saying in evidence that he decided not to pursue the claim for bypass pay. He did, however, want Air New Zealand to accept that his lock on period commenced on 23 July 2003.

[19] Since Captain Dunn remained of the view that Captain Palin's lock on commenced on the date Captain Palin's own A320 training began (21 June 2004), he saw ALPA's position as involving a request for an amendment by way of reduction of the lock on period. In turn he believed any amendment had to be dealt with in terms of cl 12.6.5 of the cea, particularly because of the flow on effect for other pilots and the implications for the lock on system. For those reasons he advised that, if he was to consider Captain Palin's request, the matter would have to be raised with ALPA's Air New Zealand Pilots Council and its endorsement obtained. He also sought an assurance that there would be no claims from other pilots affected. If the Council responded in that vein, Captain Dunn would consider Captain Palin's request.

[20] At the investigation meeting Messrs Nicholson and Palin indicated they saw the matter differently. For example the position they seemed to be advancing was that there was no question Captain Palin's lock on period commenced when Captain Forster began training on 23 July 2003. Accordingly they did not see any scope for the exercise of a discretion, nor did they consider cl 12.6.5 was applicable.

[21] As Captain Palin put it in a letter to Captain Dunn dated 14 July 2004:

"In your letter of 21 June 2004 you indicated to me that no-one in my situation (as you then understood it) would be disadvantaged by Captain Forster's advancement, which I accepted but about which sought to gain some certainty. You went and researched, or were advised of, my bid history and, on the strength of a short hiatus in my bid history, have exempted me from a general, if vague, rule you apply to others bypassed by Captain Forster."

[22] That passage suggests Captain Palin did not consider the withdrawal and renewal of his bid had any relevance. He seems to have focussed on the broad statements in Captain Dunn's correspondence and memoranda to the effect that no-one in his situation (as Captain Dunn 'then understood it') would be disadvantaged by Captain Forster's advancement. He should not have minimised the possible significance of his own action in withdrawing his bid, or Captain Dunn's previous lack of awareness of that withdrawal, particularly in the light of the provisions of the cea.

[23] During the investigation meeting Captain Palin accepted Captain Dunn's account of the explanations given in the December discussions. He developed his position a little further by saying it was in his mind that he was not in a position to dispute the application of the cea and he envisaged going 'extra' the cea. It seems to me that is what he really wanted by December 2004, and any grievance could have addressed the fairness of a decision not to go 'extra' the cea.

[24] For his part, during the investigation meeting Mr Nicholson suggested an argument in support of the lock on commencing on 23 July 2003 and based on the cea. However nothing of that kind was raised with the company at the time. What might have been a dispute about the interpretation and operation of the cea did not crystallise in that form.

[25] As for the nature of the understanding reached in December 2004, Mr Nicholson said in his written statement of evidence that there was agreement the employment relationship problem could be resolved by Air New Zealand acknowledging the lock on commencement date was earlier than 'had previously been recognised by the employer', in return for Captain Palin agreeing not to pursue claims for lost earnings (including bypass pay) and compensation. There was a proviso to the effect that Air New Zealand wanted some certainty from

ALPA that such a settlement would not form the basis for any further claims from other pilots.

[26] In his oral evidence Mr Nicholson asserted there was agreement that the lock on commenced on 23 July 2003, and that Captain Palin's grievance would be resolved by recognition that his lock on commenced on that date provided the company was satisfied no other personal grievance would arise from the circumstances.

[27] Much of Mr Nicholson's disagreement with Captain Dunn's account of the December discussions concerned his understanding of what was meant or intended rather than what was actually said. For example he agreed that Captain Dunn expressed unease about the proposal regarding the earlier commencement of Captain Palin's lock on, although he was not prepared to accept the reason given for that unease (namely the flow on effect on pilots and the implications for the lock on system). Nor, although there was some equivocation, did he disagree that Captain Dunn said he wanted the Council's view on the proposal. Rather he said he thought Captain Dunn was seeking 'knowledgeable ALPA support.' However I find Captain Dunn was very clear about wanting Council support. Finally, Mr Nicholson was not prepared to accept that Captain Dunn spoke in terms of 'reconsidering' the issue once he received that support, rather he said he believed Captain Dunn sought reassurance about the downstream consequences of a settlement. Again, however, I find Captain Dunn was clear that he sought such support before he was prepared to consider a settlement.

[28] After the December discussions Mr Nicholson discussed the agreement as he understood it with ALPA officials, including the industrial director to whom he reported and the administrative head of the Air New Zealand Pilots Council. He believed all were comfortable with the proposal.

[29] He said in evidence it was not the role of the Council to discuss proposed settlements of personal grievances in any detail, as Council activities were focussed on the day to day administration of the cea. Captain Dunn, however, saw the matter as concerning the day to day administration of the cea in respect of lock on periods. In accordance with his view of his responsibilities Mr Nicholson reported to the Council on the existence of the proposed settlement, but did not brief it in detail or obtain a statement of the kind Captain Dunn had sought.

[30] Messrs Nicholson and Hancock discussed the matter during May and June 2005. The result was a letter from Mr Nicholson to Mr Hancock dated 27 June 2005, which read:

"We confirm that Captain Palin's grievance is resolved by the commencement of his lock on being calculated from the time he contends he was bypassed."

[31] The accounts of the background to this letter were different. Mr Nicholson said the subject of the lead-up discussion was how best to address the company's requirement for certainty that any settlement would not form the basis for further claims from other pilots. He covered the lack of any approach from other pilots arising from the circumstances giving rise to Captain Palin's problem, his discussions with ALPA officials, the difficulty inherent in providing a letter giving a promise not to raise grievances on behalf of members, and the minimal likelihood of another pilot being able to rely on the same facts as Captain Palin. He put it to Mr Hancock that, in the light of those factors, it was inconceivable that the proposed resolution would create a precedent for other pilots. He said Mr Hancock agreed.

[32] Accordingly Mr Nicholson asked whether a letter on ALPA letterhead stating the basis on which the problem was resolved would meet the 'proviso to the settlement' – referring to what he said was the December settlement. He said Mr Hancock agreed. Indeed he said in a statement of evidence in reply that:

"In the end I very clearly recall saying to Chris Hancock words along the lines of 'the Council is not the right group under the Rules of ALPA to deal with this matter. It is a matter for ALPA to deal with because it is a grievance. If I write you a letter on letterhead signed by me as legal officer stating that the acknowledgement of the earlier date of commencement of lock on would satisfy Captain Palin's grievance do we have a settlement?' Mr Hancock replied with words along the lines of 'Yes. Send it now before Captain Dunn changes his mind.'"

[33] Mr Nicholson went on to say that the resulting letter was 'couched in the terms Mr Hancock and I had discussed'.

[34] Mr Hancock agreed there was a discussion about the likelihood of other pilots being in Captain Palin's position, and a consensus that this was not likely. However he said the company's concern was with the implications for all pilots of an arrangement such as the one being proposed. He said he repeated the requirement that the matter be endorsed by the Council before it could be considered, and said that matter was the thrust of the discussions. He said he did not recall being told the Council was not the right group to approach, and added that was not his impression.

[35] He accepted that Mr Nicholson referred to the company's 'acknowledgement of an earlier date of commencement', but said Mr Nicholson's account 'left something out'. That was, Mr Nicholson was to overcome the company's reservations about further grievances being raised. He understood that had been done, as Mr Nicholson told him the 'change' to the date of commencement of the lock on was within the cea so would not affect other pilots. Further to that, he told Mr Nicholson 'if that is right, we have something to go with.'

[36] As for the letter, he said he sought a demonstration of ALPA's endorsement of the solution and an assurance that other pilots would not claim to be disadvantaged as a result. The letter he received was not what he had expected. He denied telling Mr Nicholson to 'send it now ...'.

[37] The company did not respond to the letter. If the letter was as wide of the mark as the company now contends, it should have responded as a matter of urgency. Instead Mr Hancock referred the letter to Captain Dunn, saying he did so some time in July. Captain Dunn raised the matter at the next contract management group meeting between the company and ALPA officials, including the industrial director and several members of the Air New Zealand Pilots Council. From those discussions he understood that the circumstances had not been fully discussed at the Council, and that the company could expect claims from other pilots if a settlement was reached with Captain Palin. However even that did not prompt a response to Mr Nicholson's letter.

[38] Then there was a further difficulty. Captain Palin also had a standing bid for a vacancy on the Boeing 767 aircraft. He believed his seniority entitled him to appointment to a vacancy which arose in or about late July 2005. However in September 2005 another pilot junior to him began training on the B767. Air New Zealand considered Captain Palin was not eligible for the vacancy because he was still serving his 20-month lock on period. It advised him of that in or about late July. Captain Palin spoke to Mr Nicholson, who on 1 August 2005 raised with Mr Hancock his view that a settlement had been reached, and had been confirmed in his 27 June letter.

[39] By letter dated 7 September 2005 ALPA advised that Captain Palin was reopening his 'original claim', he had a new grievance in that the company had 'renegeed on the agreed terms of settlement', and that the company had acted in breach of its duty of good faith.

### **Determination**

#### 1. Whether there was a settlement agreement

[40] Both parties say their positions turn on whether there was an agreement in settlement of Captain Palin's grievance. Accordingly I address that matter first.

[41] The discussions of December 2004 were not relied on in the statement of problem as giving rise to a binding agreement in themselves, although Mr Nicholson said in evidence there was an agreement subject to a proviso.

[42] As I have indicated Mr Nicholson and Air New Zealand construed the December discussions quite differently, although overall there was relatively little dispute about the accounts of what was said. For my part I construe the discussions as amounting to explanations of their position by each party, and exchanges of statements of what they wanted. Specifically, Captain Palin wanted recognition that his lock on commenced on 23 July 2003, and Captain Dunn was concerned about the wider implications of that. He believed those implications meant the matter would have to be addressed under cl 12.6.5 of the cea, and sought an assurance from the Air New Zealand Pilots Council concerning claims that might be brought by other pilots. I do not believe any of this can be elevated to a binding agreement about the date of commencement of Captain Palin's lock on which was in turn subject to a proviso of the kind Mr Nicholson contended.

[43] Mr Nicholson's construction of the December discussions informed his approach thereafter. He thought his task was to satisfy Air New Zealand that the 'proviso' could be met. Unfortunately he set about doing so on the basis of a construction which went astray in the areas I have identified. Thus for example he gave the indications he did to Mr Hancock about his discussions with ALPA officials, and to the effect that no personal grievances would arise from the circumstances giving rise to Captain Palin's problem.

[44] Further to the latter, there were differences in the parties' approaches to the potential for any resolution to set a precedent or result in further grievances, and there was a degree of miscommunication about that. The matter is complex.

[45] Regarding possible grievances, at one end of the scale it is unlikely that any other pilot bypassed during the introduction of the A320 fleet had also withdrawn and relodged a bid in the way Captain Palin had. Similarly it was possible to identify whether anyone else might bring a grievance associated with Captain Forster's appointment. That was where ALPA focussed. It concluded there was minimal or no likelihood that other grievances would flow from Captain Palin's particular circumstances, that anyone else was facing similar circumstances, or that anyone else could bring a grievance in respect of Captain Forster's appointment.

[46] At the other end of the scale, as a general principle the pilot body can be expected to be concerned about apparent departures from the agreed lock on system. Individual pilots might raise grievances of their own if they perceive themselves to be adversely affected by such a departure, or if they believe they have been wrongly deprived of one. With reference to the introduction of the

A320 fleet, pilots who were satisfied with the way matters stood might have reconsidered their positions if Captain Palin had obtained what he wanted. Moreover, with reference to Captain Palin's circumstances, the potential for them to do so would have continued until the expiry of the 20 month period beginning 21 June 2004. Air New Zealand tended to focus on that end of the scale. For its part ALPA quite correctly said it could give no promises on those wider matters.

[47] In the light of that the task Captain Dunn had set for ALPA was probably unrealistic, yet both parties sought to address it in order to obtain a resolution. This problem could have been dealt with far more efficiently if the parties had instead focussed at the outset on whether Captain Palin's withdrawal of his bid had any implications as far as the operation of the cea was concerned, and as far as the company's August 2003 memorandum was concerned.

[48] I accept that Messrs Nicholson and Hancock were genuinely attempting to achieve a resolution. That may have led Mr Hancock to be too quick to accept that the unrealistic task had nevertheless been carried out, and Mr Nicholson to try to find a way of carrying it out. For his part, Mr Hancock did not question Mr Nicholson's genuinely-made representations to the effect that the company's concerns had been addressed. Instead he seems to have accepted them, thus leaving Mr Nicholson with the understanding that a resolution had been achieved.

[49] Air New Zealand should have acted promptly to address or correct the impression Mr Nicholson conveyed in his 27 June letter. I have considered whether its failure to do so means it should be bound by the terms of the letter, and in turn that agreement was reached in those terms.

[50] Overall, and in the light of the detailed background I have set out, I do not accept that agreement was reached in the course of the conversations leading to the 27 June letter and I do not consider it appropriate to invoke Air New Zealand's failure to respond in order to impose an agreement in those terms. The key reasons for these conclusions are:

- (a) the parties' differences in approach and understanding were too fundamental to allow for a conclusion that there was any meeting of the minds; and
- (b) to construct a meeting of the minds from Air New Zealand's failure to respond to the June letter would have the potential to cut across the operation of the cea to an unacceptable extent.

[51] To answer the problem before the Authority, I find Captain Palin has not made out his personal grievance in respect of the allegation that Air New Zealand 'reneged' on a settlement of his earlier grievances. Nor do I accept there was an agreement under s 61.

## 2. The next steps

[52] ALPA provided submissions on the effect of the withdrawal of Captain Palin's bid, and as I indicated to the parties during the investigation meeting I regard that matter as involving a dispute about the interpretation and application of the cea. As I have further indicated in this determination the dispute did not crystallise in the period up to and including the alleged settlement, and it was not raised in the statement of problem. The Authority did not investigate it, and it is not appropriate to determine it as part of this investigation.

[53] Thus my rejection of the claims now before the Authority does not address any dispute there may be in terms of the definition in s 5 of the Act, and nor does

it address or resolve Captain Palin's original grievances. I considered incorporating these matters into the present investigation in the interests of the efficient and timely resolution of this problem. However they raise potentially complex issues and, if the matter proceeded in that way, an adjournment would have been necessary to allow for the preparation of further evidence and argument.

[54] For that reason I end this investigation with the finding I have made. I refer the parties to the original grievances, to embark on further attempts at resolution if they see fit. In that respect, I have the following additional comments:

- (a) the original grievances were not well-formulated in terms of s 103 of the Act and should be reconsidered and reformulated in the light of those provisions;
- (b) in particular I doubt that the original claim for bypass pay is correctly described as a grievance within the definition in s 103 at all, and observe further that Captain Palin has now said several times that he no longer seeks bypass pay; and
- (c) if Captain Palin wishes to pursue his original concerns, I recommend mediation assistance.

#### **Costs**

[55] Costs are reserved.

[56] The parties are invited to agree on the matter. If they seek a determination from the Authority they shall have 28 days from the date of this determination in which to file and serve memoranda on the matter.

**R A Monaghan**  
**Member of Employment Relations Authority**