

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 234
3182779

BETWEEN PHILIP TIGHE-UMBERS
Applicant

AND JETCONNECT LIMITED
Respondent

Member of Authority: Andrew Gane

Representatives: Richard McCabe, counsel for the Applicant
Michael O'Brien, counsel for the Respondents

Investigation Meeting: 10 October 2023 at Auckland

Submissions and further 12 January 2024
Information received from 23 January 2024
Applicant and Respondent

Date of Determination: 22 April 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Philip Tighe-Umbers was employed by Jetconnect Limited (Jetconnect) as a pilot until the date of his dismissal on 24 April 2022. He held the position of Captain.

[2] Mr Tighe-Umbers lodged a statement of problem with the Authority claiming he was unjustifiably dismissed by Jetconnect. He seeks a declaration that Jetconnect was required to give three months' clear notice and failed to do so. He says his notice period was a day short. He states his final day of employment should have been 25 April 2022.

[3] Mr Tighe-Umbers also seeks reinstatement, reimbursement of lost wages, compensation for hurt and humiliation, and reimbursement of costs.

[4] Jetconnect responded to Mr Tighe-Umbers' statement of problem with a statement in reply, denying the claim that Mr Tighe-Umbers was unjustifiably dismissed. Jetconnect states that they correctly interpreted and applied the termination clause giving Mr Tighe-Umbers three months' notice. His final day of employment was 24 April 2022

[5] Mr Tighe-Umbers' claim for unjustified dismissal centres around a dispute between the parties which has arisen over the application, operation, and interpretation of the termination clause 3.4.1 of the collective agreement (the CA) between the New Zealand Air Line Pilots' Association Industrial Union of Workers Incorporated (NZALPA), and Jetconnect. Clause 3.4.1 requires Jetconnect to provide three months written notice of termination of employment.

The Authority's investigation

[6] During the investigation meeting I heard evidence from Mr Tighe-Umbers who has considerable experience in the industry.

[7] Witnesses for Jetconnect were Matthew Thomas McKenzie, former deputy manager flight crew operations and currently a Boeing 737 captain, and Katelyn Brady, senior manager people for Qantas Airways Limited (Qantas).

[8] In my investigation meeting, under oath or affirmation, these witnesses confirmed their statements and gave oral evidence in answer to questions from myself and the parties' representatives.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[10] The issues requiring investigation and determination were:

- (a) What is the correct interpretation of clause 3.4.1 of the CA?
- (b) Whether Jetconnect failed to give Mr Tighe-Umbers proper notice of termination, under clause 3.4.1 of the CA?
- (c) If Jetconnect failed to give Mr Tighe-Umbers proper notice of termination, whether a declaration Jetconnect is required to give 3 months clear notice, and failed to do so, should be made?
- (d) If Jetconnect failed to give Mr Tighe-Umbers proper notice of termination, whether a declaration Jetconnect is required to give 3 months clear notice, was Mr Tighe-Umbers unjustifiably dismissed by Jetconnect?
- (e) If Jetconnect is found to have acted unjustifiably, what remedies should be awarded, considering:
 - i Reinstatement under s123(1)(a) of the Act; and
 - ii Reimbursement of lost wages under s123(1)(b) of the Employment Relations Act 2000 (the Act) subject to evidence of reasonable endeavours to mitigate loss; and
 - iii Compensation under s123(1)(c)(i) of the Act?
- (f) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Tighe-Umbers that contributed to the situation giving rise to the grievance?
- (g) Should either party contribute to the costs of representation of the other party?

Background

[11] Jetconnect provides pilots and cabin crew for some flights that Qantas operates under its Australian Air Operating Certificate.

[12] Jetconnect and NZALPA are parties to a CA, which binds Jetconnect pilots who are NZALPA members. Mr Tighe-Umbers' employment was covered by the CA.

[13] Due to the impact COVID-19 had on Jetconnect's operations, Mr Tighe-Umbers was stood down, without pay (with his consent) from or about May 2020.

[14] From 8 December 2021, Jetconnect advised it would return pilots to the payroll with a view to resuming normal operations (i.e. pre COVID-19 schedules).

[15] As a result of the time that Mr Tighe-Umbers (and all other Jetconnect pilots) had not being operating on Jetconnect's aircraft. Mr Tighe-Umbers was required to receive recurrency training in Melbourne, Australia on an undisclosed date in preparation of normal operations resuming.

[16] Mr Tighe-Umbers declined to receive a COVID-19 vaccination and was therefore prohibited from travelling to (and from) Melbourne to receive recurrency training due to border restrictions.

[17] Jetconnect declined to accept a proposal that Mr Tighe-Umbers remain on leave without pay until border restrictions ended. No other work was available at Jetconnect for Mr Tighe-Umbers to perform until border restrictions ended.

[18] By a letter dated, sent and received 24 January 2022, Jetconnect purported to give three months' notice of termination, with the termination date being 24 April 2022.

What is the correct interpretation of clause 3.4.1 of the CA?

[19] Termination of employment was dealt with in clause 3.4.1 of the CA which reads:

3.4.1 Termination of employment

Three (3) months written notice of termination of employment is required, except for a Pilot within their Probation period where two weeks applies, but dismissal without notice may occur for serious misconduct. However, pilots employed prior to the ratification of this agreement may only give two (2) months written notice of termination of employment except that Pilots accepting a Command Upgrade or appointment to a Standards Position which was advertised after ratification of this agreement will thereafter also be subject to the three (3) month notice period.

[20] The issue is what is 3 months' notice when the notice is given on 24 January 2022?

[21] The Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd* set out the approach to be used in contractual interpretation.¹ The focus is on the objective meaning

¹ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 at [19].

of the words the parties have used. Background material can be helpful as a ‘cross check’ even if the words used appear to be unambiguous. However, what was discussed in prior negotiations is only helpful if it shows what the parties objectively intended the words to mean.

[22] This approach has been carried through to collective agreements.²

[23] The starting point in analysing clause 3.4.1 of the CA is to examine the words of the clauses regarding the notice period to see whether they are clear and unambiguous.

What is the start date for the notice period?

[24] Mr Tighe-Umbers says the day notice is given cannot be considered as the day notice commences, because that is not a full day of the month. Three months’ notice of termination commenced on 25 January 2022.

[25] Clause 3.4.1 of the CA does not state that three months is to be calculated from the day notice is given or including the day notice is given. “Three months” is not defined in the CA.

[26] In *Sheridan v Pact Group*,³ the Authority in finding that a two-week notice period did not include that date the notice was given, referred to section 54 Legislation Act 2019 which states that if a period of time is to be calculated from or after a specific date the calculation does not include that day. The Authority noted that although the Legislation Act did not apply to the interpretation and application of terms of employment, it was persuasive.

[27] Mr Tighe-Umbers relies on the recent Employment Court decision *Pact Group v Sheridan*⁴ (*Pact Group*) in which Judge Smith endorsed of the Authority’s approach.

[28] It is reasonable that the notice period would be calculated with the day following notice being given as the first day, because the purpose of a notice period is to give the

² *NZ Amalgamated Engineering, Printing and Manufacturing Union v Amcor Packaging (New Zealand) Limited* [2011] NZEmpC 135 at [12]; *NZ Meat Workers & Related Trades Union Incorporated v Silver Fern Farms Ltd (formerly PPCS Ltd)*² (“*Silver Fern Farms*”) [2010] NZCA 317.

³ *Sheridan v Pact Group* [2023] NZERA 239.

⁴ *Pact Group v Sheridan* [2023] NZEmpC 135

employee or the employer the period specified as notice of the end of the employment relationship.

[29] Therefore, in this case clause 3.4.1 of the CA is clear and unambiguous, the starting date for the notice period is the day after the notice is given being 25 January 2022.

What is the last day of the notice period?

[30] Jetconnect submits that the CA does not refer to three clear months' notice. Mr Tighe-Umbers was given three months' notice on 24th January 2022. The three month notice period begins on 25 January 2022 and ends on 24 April 2022.

[31] Jetconnect refers to s 56 of the Legislation Act, which has direct relevance to the matter in providing guidance for calculating periods of months.

56 Calculating periods of months (except for commencement of legislation)

(1) A reference to 1 or more **months** in legislation is a reference to a period calculated as follows:

- (a) the period starts at the start of the relevant day in the month; and
- (b) the relevant number of months must then be counted to find the ending month; and
- (c) the period ends immediately before the corresponding day in the ending month or (if there is no such day) at the close of the last day of the ending month.

[32] The section also provides three examples. The first and third are relevant to Jetconnect's case:

Example 1 If the legislation refers to a period of 1 month starting on 15 February, the period starts on 15 February and ends at the close of 14 March (because March has a corresponding day).

Example 3 If the legislation refers to a period of 3 months after the date on which notice is sent and notice is sent on 2 August, the period starts on 3 August (under item 2 in section 54) and ends at the close of 2 November.

[33] Jetconnect submits it gave Mr Tighe-Umbers three months' notice on 24 January 2022 with a termination date of 24 April 2022. That is Jetconnect provided the required three months' notice after the date the notice was given in accordance with s54 of the Legislation Act:

- (a) 25 January – 24 February 2022 (first month);
- (b) 25 February – 24 March 2022 (second month); and
- (c) 25 March – 24 April 2022 (third month).

[34] In *Pact Group* the notice period could be calculated in days, two weeks is the equivalent of fourteen days. This differs from the present case where the notice period is measured in months. As the number of days vary in different months, days cannot be used in the calculation of notice.

[35] *Pact Group* confirms that the correct approach to interpretation is an objective one and that the Legislation Act can be of assistance in providing guidance when interpreting a notice period in an employment agreement.

[36] It is my view that the approach set out in *Pact Group* can be read as being consistent with the approach set out by the Legislation Act and adopted by Jetconnect, such that the last day of the notice period is 24 April 2022.

The period of notice

[37] By applying *Pact Group* to the current set of facts, the three month notice period starts the day after the notice was given, being 25 January 2022. Following the guidance set out in the Legislation Act, the three months' notice period ends immediately before the corresponding day in the ending (third) month, being 24 April 2022.

Conclusion

[38] Having heard the evidence of the parties and considered and analysed the parties' submissions I am persuaded that Jetconnect's approach in interpreting and implementing the notice provisions of the CA is correct.

[39] I determine that the three month notice period started on 25 January 2022, the day after the notice was given and ends on 24 April 2022, immediately before the corresponding day in the ending month.

[40] I conclude that Mr Tighe-Umbers was given the three months' notice and does not have a personal grievance of unjustified dismissal.

Costs

[41] I consider it appropriate in this matter that costs lie where they fall. However, if a party seeks costs, and an Authority determination on costs is needed, Jetconnect may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Tighe-Umbers will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[42] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.

[43] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.⁵

Andrew Gane
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1