IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 168
ARC 6/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND AIR LINE PILOTS' ASSOCIATION INCORPORATED Plaintiff
AND	AIR NEW ZEALAND LIMITED Defendant

Hearing: 9 and 10 June 2014
(Heard at Auckland)

Appearances: R Harrison QC and C Abaffy, counsel for plaintiff
R Towner and SL Maxfield, counsel for defendant

Judgment: 11 September 2014

JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] This is a challenge by hearing de novo to a determination of the Employment Relations Authority about the interpretation, application or operation of a provision in a collective agreement.[1] It concerns the passing on to employees of better terms and conditions of employment as may be settled with equivalent employees subject to another collective agreement.

[2] Pilots employed by Air New Zealand Limited may elect to be subject to either of two collective agreements, depending on which union they are members of. Pilots may elect not to be a member of either union, in which case the collective agreements will not affect their employment, at least not directly.

[1] *New Zealand Air Line Pilots Association Inc (NZALPA) v Air New Zealand Ltd* [2014] NZERA Auckland 11.

[3] The larger and older-established union of pilots is the plaintiff to which I will refer as NZALPA. A newer and numerically smaller union is the Federation of Air New Zealand Pilots Inc to which I will refer as FANZP.

[4] The provision in dispute between NZALPA and Air New Zealand is cl 24.2 of the NZALPA collective agreement which provides:

> 24.2 During the term of this Agreement any agreement entered into by the Company with any other pilot employee group which is more favourable than provided for in this Agreement will be passed on to pilots covered by this Agreement on the written request of the Association.

[5] The current NZALPA collective agreement came into force on 5 November 2012 and will continue in force at least until its expiry on 4 November 2015. Among other provisions, the NZALPA collective agreement sets remuneration rates for pilots subject to it.

[6] In early 2013, Air New Zealand entered into a new collective agreement with FANZP. In respect of some pilots of comparable rank, experience, aircraft type operated, and other remuneration-determining factors, the FANZP collective agreement provides for higher rates of pay than the NZALPA collective agreement. These are for B737-type first officers and all second officers. On 24 April 2013, 10 days after the FANZP collective agreement was executed, NZALPA wrote to Air New Zealand purporting to invoke cl 24.2 of the NZALPA collective agreement. It asked that those two particular higher rates of pay be passed on to equivalent NZALPA pilots. On 3 May 2013 Air New Zealand responded to NZALPA rejecting any suggestion that cl 24.2 was applicable. The parties' dispute is whether cl 24.2 entitles the relevant NZALPA pilots to have the higher remuneration passed on to them as NZALPA has asked for.

[7] It is now agreed that if the plaintiff's interpretation of cl 24.2 is correct, the remuneration provisions for B737 first officers and for all second officers under the FANZP collective agreement are more favourable than those for these pilots under the NZALPA collective agreement.

The Employment Relations Authority's determination

[8] The Authority decided the dispute in favour of Air New Zealand. The Air New Zealand case was that cl 24.2 meant that its entry into the FANZP collective agreement provided NZALPA the opportunity to "pick up the totality of the [FANZP collective agreement]" but not selected parts of it.[2]

[9] Analysing what the parties meant by the use of the words "any agreement" in cl 24.2, the Authority concluded that this was intended to be a reference only to a collective agreement, and then not to parts but, rather, to the whole of a collective agreement. The Authority concluded that the clause was plainly worded and that NZALPA's interpretation did "violence to the plain words of the relevant clause".[3]

Approach to interpretation

[10] It is appropriate to record the Court's task in this dispute and the way that it should and should not go about settling it. It must not either substitute its subjective interpretation of what it thinks the parties may have agreed on, or approve an interpretation that the Court considers to be the fair or right thing to do in all the circumstances.

[11] The most recent, authoritative and binding statement of the Court's role in interpreting collective agreements is to be found in the judgment of the Court of Appeal in *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc*.[4] The Court of Appeal referred to, and relied on, the judgment of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*[5] and a series of important decisions of the House of Lords (now the Supreme Court of England and Wales) and the New Zealand Court of Appeal over a long period. The Court acknowledged, however, that *Vector Gas* was concerned with the construction of a commercial agreement, and also noted that *Vector Gas* was concerned principally with the question whether evidence of negotiations leading to the agreement could

[2] At [9].
[3] At [38].
[4] *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc* [2010] NZCA 317, [2010] ERNZ 317 at [32-[34].
[5] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

be taken into account in its construction. That was not the position in *Silver Fern Farms*, although it was common ground between the parties in the Court of Appeal that it was permissible to consider prior instruments between the parties or their predecessors in construing the collective agreement.

[12] The Court of Appeal in *Silver Fern Farms* regarded as "helpful" the five principles of interpretation propounded by Lord Hoffman in *Investors Compensation Ltd v West Bromwich Building Society*[6] the first of which was summarised by McGrath J in *Vector Gas* as follows:[7]

> … interpretation of a commercial agreement is the ascertainment of the meaning it would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract. The language the parties use is generally given its natural and ordinary meaning, reflecting the proposition that the common law does not easily accept that linguistic mistakes have been made in formal documents. The background, however, may lead to the conclusion that something has gone wrong with the language of an agreement. In that case the law does not require the courts to attribute to the parties an intention which they clearly could not have had. The natural and ordinary meaning should not lead to a conclusion that flouts business common sense.

[13] Tipping J in *Vector Gas* also noted:[8]

> … generally speaking, issues of contractual interpretation arise in three circumstances: mistake; ambiguity; and special meaning. A mistake can represent either a drafting error or a linguistic error. Errors of this kind are primarily the subject of rectification. But a clear drafting or linguistic error, combined with equal clarity as to what was intended, can be remedied by way of interpretation, and in that respect context can and should be taken into account. An ambiguity arises when the language used is capable of more than one meaning, either on its face or in context, and the court must decide which of the possible meanings the parties intended their words to bear. A special meaning exists when the words used, even after the contractual context is brought to account, are linguistically still capable of only one meaning or are wholly obscure; but it is nevertheless evidence from the objective context that the parties, by custom, usage or agreement, meant their words to bear a meaning which is linguistically impossible (for example, black means white), or represents a specialised and generally unfamiliar usage.

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[6] *Investors Compensation Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL).
[7] At [61].
[8] At [33].

[14] As the judgment of the Court of Appeal in *Silver Fern Farms* noted, *Vector Gas* and other cases were about the interpretation of commercial contracts in commercial litigation. I consider the distinction significant as this is a case about a collective agreement in employment law. Collective agreements are not contracts, at least in the traditional sense of the word. Nor are they "commercial" in the sense of regulating a relationship of seller and purchaser of goods or services in commerce. Collective agreements, as successors to collective contracts and awards, are rarely either generic or unique instruments. Rather, they represent the development of a particular employment relationship between an employer and a union over a long period, which is confirmed and altered from time to time in collective instruments which must and do expire and are renegotiated. So, not only must the Court consider the relevant context in which the parties agreed originally to what is now known as cl 24.2, but regard must also be had to its adoption and re-adoption in successor collective agreements which have been settled in evolving circumstances.

[15] For the most part, also, collective agreements are not drafted, negotiated and settled by practising lawyers, although there may sometimes be lawyer input into both the interpretation of existing terms and conditions and the wording of new provisions. In this case the clause at issue was drafted by a legally qualified and experienced employment adviser employed by the Union and was probably examined, albeit perhaps cursorily, by legal advisers to the employer, before agreement on it was reached.

[16] It is important also to acknowledge and be guided by the nature of the instrument being interpreted. A collective agreement is a statutory creature. Although it is entered into between an employer (or employers) and a union (or unions), its provisions for the most part do not govern an operative employment relationship on a day-to-day basis with that union or unions. Rather, the persons affected principally by a collective agreement's provisions (apart from the employer or employers), are employees who are or may become members of the signatory union or unions.

[17] Nor is a collective agreement, generally, a one-off contract. Rather, albeit with exceptions, collective agreements are instruments in a series of collective

instruments which allow for periodic changes to some of the terms and conditions of employment between employers and employees. That employment generally precedes and succeeds the life of each collective agreement.

[18] Collective agreements are not commercial contracts for the sale and purchase of goods or services between willingly contracting parties in a free marketplace. They are relational agreements which must comply with a significant number and range of statutory minima and exclusions. In many instances, especially in longstanding and highly unionised sectors such as commercial aviation, they are the product of compromise and opportunism.

[19] All of these factors give collective agreements a unique character. That uniqueness can and does extend both to collective agreements in a particular sector (for example, airline employment agreements) and to individual agreements in a sector or with the same employer.

[20] Parliament has left the responsibility for interpreting such agreements with specialist tribunals and courts, now the Employment Relations Authority and the Employment Court. As the Court of Appeal noted in *Silver Fern Farms*, that Court's jurisdiction does not extend to "a decision on the construction of any … collective employment agreement":[9] Particular care needs to be taken, therefore, in interpreting such agreements.

[21] The parties did not disagree substantially on the proper approach to interpreting the collective agreement. Rather, their divergence is on the result produced by the application of that methodology, explained most recently and authoritatively in the judgment of the Court of Appeal in *Silver Fern Farms.* The principles distilled from that judgment can be summarised as follows.[10]

- Prior instruments between the parties or their predecessors may be considered.

[9] *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc*, above n 3, at [32], citing Employment Relations Act 2000 s 214(1).
[10] At [26], [36] and [42].

- The Court's task is to ascertain the meaning that the agreement would convey to a reasonable person having the background knowledge reasonably available to the parties in the situation in which they were at the time of reaching agreement.

- The language used is generally to be given its natural and ordinary meaning, recognising that it is unusual and/or difficult to accept that linguistic mistakes may have been made in a formal document. Relevant background information may, however, lead to such a conclusion.

- In these circumstances, a court should not attribute to the parties an intention which they clearly could not have had.

- The natural and ordinary meaning of the words used should not lead to a conclusion that flouts employment relations commonsense.

[22] Taking the foregoing principles into account, I now set out the relevant evidence about cl 24.2 in the context of the collective agreement and on which I will base my interpretation.

Relevant background

[23] NZALPA was, for a long time, the only union of airline pilots in New Zealand. It preceded in time the corporation now known as Air New Zealand Limited. During those past periods it had, as members, the vast majority of airline pilots in New Zealand. NZALPA was the union party to a long succession of awards, collective contracts, and collective agreements with Air New Zealand, its predecessors, and more latterly with its wholly-owned subsidiary companies that operate the Air New Zealand Link brand of regional airline services.

[24] FANZP (originally the Air New Zealand Pilots' Society) came into existence around 15 years ago as a union specifically for Air New Zealand pilots. It was established as an alternative to NZALPA and for a time there was a competitive and

sometimes conflicting relationship between the two unions. There was a perception on the part of NZALPA that Air New Zealand favoured FANZP over NZALPA. The former has survived although its membership has remained numerically smaller than NZALPA's.

[25] In the early years of the 21st century, there was a belief amongst some pilots that, in return for other productivity concessions by Air New Zealand pilots, those who were FANZP members could achieve higher remuneration than NZALPA pilots in materially identical circumstances. NZALPA feared that in these circumstances it would lose members to FANZP and wished to minimise that possibility.

[26] The last collective employment contract negotiated and ratified under the Employment Contracts Act 1991 between NZALPA and Air New Zealand expired on 13 March 2001. By then, the current (2000) Act was in force and applicable. On 12 March 2001 NZALPA notified Air New Zealand of its initiation of bargaining for a new collective agreement to be the successor to the about-to-expire collective contract. That initiation of bargaining was pursuant to s 42 of the 2000 Act. The negotiating parties met on 5 May 2001, although this was for preliminary purposes and no bargaining took place at that meeting. Plans were made to commence the actual negotiations over two days at the end of May 2001 but this did not take place until late June 2001.

[27] NZALPA's claims in bargaining which were presented to Air New Zealand on 25 June 2001 did not include initially what would become the subject of this case, cl 24.2. At the time, Air New Zealand was also bargaining with FANZP's predecessor, the Air New Zealand Pilots' Society, although in a separate process. The bargaining with FANZP concluded on about 3 August 2001 with agreement for a one year collective agreement. The duration and ease of the bargaining with FANZP were in sharp contrast to that with NZALPA. During bargaining with NZALPA, Ansett Australia, then a wholly-owned subsidiary of Air New Zealand, encountered severe financial and operational difficulties and eventually collapsed, resulting in a governmental financial bail-out of Air New Zealand. The events in the United States of America known colloquially as '9/11', together with fears about SARS/bird flu, significantly affected Air New Zealand's operational prospects and, also during the

course of the bargaining, the company appointed a new Chief Executive Officer. These events combined in a withdrawal by Air New Zealand of its commitments and offers in collective bargaining with NZALPA and they suspended temporarily all bargaining.

[28] When bargaining recommenced eventually in July 2002, NZALPA gave Air New Zealand notice of its intention to take strike action commencing on 19 July 2002 principally over issues of security of employment of its pilot members.

[29] By this time, also, FANZP's collective agreement was shortly to expire and collective bargaining with that union for a replacement collective agreement recommenced from about 25 July 2002.

[30] By then, late July 2002, NZALPA had become concerned that if it settled a collective agreement with Air New Zealand, the company could reach a subsequent agreement or agreements with FANZP providing for more advantageous terms and conditions of employment for pilots which would make membership of FANZP more attractive than of NZALPA and this could, in turn, undermine the plaintiff.

[31] Air New Zealand was then (in mid-2002) focused on plans for a recovery of its operations and wished strongly to eliminate the threat of strike action by the majority of its pilots (NZALPA members) which would have compromised those plans significantly. It is probably no exaggeration to say that Air New Zealand was then prepared to consider concessions which it might otherwise have dismissed out of hand, if that meant that pilot strike action was avoided.

[32] NZALPA then proposed the wording of what is now cl 24.2 and its inclusion in the parties' first collective agreement to be made under Employment Relations Act 2000 (the Act). It did so in an attempt to protect the terms and conditions of its Air New Zealand pilot members and, indirectly, its own membership strength, by seeking to have a ratchet arrangement included in its collective agreement. It intended that if, following settlement of its collective agreement, Air New Zealand entered into arrangements providing for more favourable terms and conditions of

employment than enjoyed by NZALPA pilots, those enhanced terms and conditions could be passed on to affected NZALPA members on request.

A mutual intention?

[33] There was little or no negotiation about what is now cl 24.2's existence or contents, and no amendments to the clause as drafted by NZALPA. The parties agreed to its inclusion in their 2002 collective agreement. What is now cl 24.2 was agreed to on day 54 of the collective bargaining, 10 October 2002. Strike action by pilots was avoided by the settlement of the collective agreement including this clause. Clause 24.2 has continued effectively unamended in subsequent collective agreements between the parties and has not been the subject of any proposed change during those 10 or so years, or of any bargaining about its existence or content. It has not been the subject of interpretive litigation until now.

[34] Despite the particular facts of this case focusing on remuneration, cl 24.2 is broadly worded so that terms and conditions other than remuneration are potentially covered by it.

[35] There is no doubt that Air New Zealand bargaining representatives agreed to the inclusion of what is now cl 24.2 in the original and subsequent collective agreements without discussion, negotiation or change. The controversial issue is the meaning to be ascribed to that clause.

Micro-analysis of cl 24.2

[36] Although the meaning of cl 24.2 must be ascertained both as a whole and in the context of the collective agreement in which it appears, it is useful, as part of that exercise, to break it down into its various components, even if only to identify which interpretations of them are in issue and which are agreed.

[37] First come the opening words: "During the term of this Agreement …". It was common ground that this refers to the stated duration of the NZALPA collective agreement. Whether that includes its potentially statutorily extended duration under

s 53 was not addressed in argument but does not need to be decided because that point has not yet been reached.

[38] Next are the words "… any agreement …". The defendant's case is that this is a term of art meaning a collective agreement under the Act. The plaintiff's case is for a broader interpretation of those words meaning more generally any agreement that may be reached between persons in employment relationships. It is common ground between the parties that "any agreement" can encompass a collective agreement but, that being so, the parties are also at odds about whether such a collective agreement means the undivided whole of such an agreement (the defendant's case) or any of a collective agreement's constituent provisions (the plaintiff's case).

[39] Next is the phrase "… entered into by the Company with any other pilot group …". Again it is common ground that this includes another union (including specifically in this case FANZP) but there is no consensus whether the phrase may mean other groups such as non-unionised pilots (as a group) who the evidence suggests are all on materially identical individual employment agreements with Air New Zealand. That is a hypothetical argument in this case because FANZP is agreed to be "another pilot group".

[40] The next phrase in sequence is "… which is more favourable than provided for in this Agreement …". It is now common ground that favourability is to be determined from an employee perspective. That is, that it provides better or more generous terms and conditions of employment to employees than were previously enjoyed by them. In particular, it is agreed that greater employee remuneration per se is "more favourable".

[41] Penultimately, there is the phrase "… will be passed on to pilots covered by this Agreement …". The plaintiff's case is that the words "passed on" means the provision of those more favourable terms and conditions of employment to such pilots as are identified by NZALPA, whose employment is governed by the NZALPA collective agreement. That is to be contrasted with Air New Zealand's interpretation of these words which is that the FANZP collective agreement, in its

entirety, is to become the collective agreement applicable to all pilots covered currently by the NZALPA collective agreement. Again, "this Agreement" refers to the current NZALPA collective agreement.

[42] Finally, the phrase "… on the written request of the Association" is self-evident and non-controversial. It is common ground that a written request of Air New Zealand by NZALPA will trigger whatever the Court determines is the obligation on Air New Zealand when so notified.

The FANZP collective agreement

[43] Next is the evidence about the 2013 FANZP collective agreement. This portion of the evidence focuses on questions of greater favourability of terms and conditions of employment. The defendant was at pains to portray the FANZP collective agreement of 2013 as "a total package deal". This was in the sense that changes to the predecessor FANZP 2011 collective agreement reflected both benefits claimed by that union for its members, and concessions by the union to Air New Zealand's claims.

[44] The benefits now sought by NZALPA to be passed on to its members were claims made in collective bargaining by FANZP but were only agreed to by Air New Zealand in return for a package of concessions agreed to by FANZP, some of which were regarded by those parties as being advantageous for Air New Zealand. The evidence establishes that Air New Zealand would not agree to the remuneration increases for B737 first officers and second officers claimed by FANZP (and now claimed as an entitlement for its members by NZALPA) unless and until Air New Zealand's claims (which might be described as claw-backs or new provisions which would increase its revenue and decrease its costs) were agreed to by the FANZP negotiators in bargaining. More specifically, the evidence is that remuneration increases for B737 first officers and all second officers came at a cost to other more senior FANZP member pilots who may otherwise have expected to receive a greater increase in their percentage remuneration improvement.

[45] This was recorded in cl 13.1 of the FANZP collective agreement which states: "The rates of remuneration and changes thereto are in consideration for and conditional on the totality of the changes agreed to in this Collective Employment Agreement ."

[46] For example, FANZP captains on comparable aircraft types received a 2 per cent remuneration increase, lower than the 2.8 per cent increase that NZALPA had negotiated for its captain members in 2012. Although this concession was not a direct or sole trade-off for the 12.6 per cent remuneration increase for B737 first officers and all second officers under the FANZP collective agreement, it was one element of that trade-off.

[47] The defendant's unchallenged evidence discloses other gains and concessions made by Air New Zealand in its FANZP collective bargaining which it says were constituent elements of the "package" which included its agreement to significant remuneration increases for B737 first officers and all second officers. Without lengthening the judgment by recounting all these achievements and concessions in detail, they included such things as:

- the removal of probationary periods (to the advantage of FANZP members);

- an undertaking by FANZP that it and its members would not take legal proceedings in relation to the disputed interpretation of a meal allowance clause (to Air New Zealand's advantage);

- the inclusion of a special scheduling agreement for Auckland-Rarotonga services allowing Air New Zealand to reposition pilots in either direction on this sector (to the defendant's advantage);

- agreement with FANZP to give Air New Zealand access to flight data (to the defendant's advantage by aligning current NZALPA practice);

- increasing destination-prohibition notification periods (to Air New Zealand's advantage by aligning with current NZALPA practice);

- allowing discretionary appointment of standards pilots (to the defendant's advantage although not implementable practicably without NZALPA agreement);

- increasing pilots' roster window hours and outliers' numbers (to Air New Zealand's benefit although not implementable practicably without NZALPA agreement);

- greater flexibility of transfers and secondment to overseas bases, limits to numbers of management pilots assignable by fleet other than on the basis of seniority, and removal of a numerical cap on management pilots able to operate out of seniority (to the defendant's advantage but in the last respect, inconsistently with NZALPA pilot practice) and so not yet implementable;

- removal of what are known as 35/7 flying hour restrictions (to Air New Zealand's advantage);

- loosening of time restrictions for flight simulator training at night (NZALPA pilots can only be required to do so after 10 pm or by ad hoc individual agreement); and

- allowing preliminary employment investigations (arguably an Air New Zealand gain).

[48] The defendant's case lists a number of other similar examples of gains and concessions (from Air New Zealand's viewpoint) including duty travel standards, commuting and staff transport, and consecutive-night Perth operations.

[49] Whilst some of these other concessions and gains may be related directly or even indirectly to the work performed by B737 first officers and all second officers,

a substantial number of them either do not affect those particular pilots any more or less than any other pilots, or may be unrelated at all to those FANZP pilots who benefited significantly in percentage salary increases. One example of that phenomenon would be the changes affecting management pilots, none of whom are B737 first officers or second officers.

[50] What this evidence does show, however, is that in 2013 the FANZP collective agreement was regarded by Air New Zealand as a package deal. In return for increased remuneration for some pilot groups, the company was able to achieve a number of operational efficiency gains, the monetary benefit from which was regarded by it as offsetting or at least compensating in part for the increased costs of employing FANZP B737 first officers and second officers.

[51] I understood Air New Zealand's evidence about the nature of the 2013 FANZP collective agreement to have been led to persuade the Court that it would be unrealistic to deal with the remuneration increases for the two particular pilot groups in isolation from other terms and conditions of that collective agreement which might be considered, individually, as advantageous or disadvantageous to individual employees. I accept that this was the nature of the 2013 FANZP collective agreement although there is no evidence that this was so at the time what is now cl 24.2 was agreed to originally. If the defendant's case is that cl 24.2 should be interpreted in accordance with the "package deal" nature of the 2013 FANZP collective agreement, then I do not agree. The 2013 FANZP collective agreement was negotiated and settled against the background of cl 24.2 and not vice versa. Put another way, Air New Zealand structured, or agreed to the structuring, of the 2013 FANZP collective agreement in the knowledge of the existence of cl 24.2, and with the risk of an adverse interpretation of that clause. The answer to Air New Zealand's problem now is not to re-interpret cl 24.2 to suit the nature of the 2013 FANZP collective agreement but is, rather, to re-negotiate cl 24.2 when the NZALPA collective agreement expires.

The defendant's interpretation of cl 24.2

[52] As decided by the Authority, at the heart of Air New Zealand's case is that the use of the words "any agreement" means any collective agreement in its entirety, but not any selected parts of it.

[53] I have been left in no doubt that this is not what the parties in 2002 intended then cl 24.3, now cl 24.2, to mean, so that the Authority's determination cannot be correct. It was, with respect, an unrealistic conclusion at odds with the context of, and circumstances surrounding, the parties' initial adoption of what is now cl 24.2 and its subsequent re-adoption in successor collective agreements. That is not to say that the correct interpretation is the absolutely plain and indisputable one advanced by NZALPA. However, I do not agree with the Authority's statement that the plaintiff's interpretation did "violence to the plain words of the relevant clause". It does not. Both interpretations contended for by the parties are at least tenable because of the unclear wording of the clause, but in the final analysis the defendant's interpretation is sufficiently improbable that it must be discounted. The plaintiff's interpretation is preferable in the context in which the clause was agreed upon, originally and subsequently.

[54] When what is now cl 24.2 was first included in a collective agreement between these parties, the only other union representing pilots (and therefore capable in law of entering into another collective agreement with the company) was the Air New Zealand Pilots' Society, later renamed FANZP. There was, at that time, a particularly competitive relationship between the two unions which descended into hostility from time to time. Cases heard by this Court at that time illustrated this. They include *Julian v Air New Zealand Ltd.*[11] NZALPA did not want its opponent to settle terms and conditions of employment for its members that were more favourable to pilots than NZALPA's.

[55] Both the initiative for what was to become cl 24.2, and its content, emanated from NZALPA. It is therefore so unlikely that NZALPA would have proposed a term that could have negated completely its collective agreement with Air New

[11] *Julian v Air New Zealand Ltd* [1994] 2 ERNZ 612. See the first full paragraph on p645.

Zealand (the potential consequence in practice of the defendant's interpretation of cl 24.2), that Air New Zealand's position cannot be right. Not only is the defendant's position generally so improbable, but the NZALPA interpretation is supported independently.

[56] The following factors favour the plaintiff's interpretation rather than the defendant's about the question whether individual terms and conditions can be passed on upon request (the plaintiff's position) or whether it can only be the whole of a collective agreement (the defendant's position and the Authority's conclusion).

The words used in cl 24.2

[57] The phrase in cl 24.2 "… which is more favourable than provided for in this Agreement …" uses the word "in" rather than, for example, the word 'by'. The use of the word "in" tends to suggest that individual terms or conditions found "in" the agreement (and which is or are more favourable) may be the subject of a request to pass on. Had the phrase '… provided for by this Agreement …', for example, been used, this would have favoured the defendant's interpretation that it is the whole of "any agreement" (meaning any collective agreement) which may be the subject of a request to pass on.

Constraints on passing on

[58] It is correct, as Mr Harrison QC submitted, that when what was to become cl 24.2 was first proposed and agreed to, the Act did not make provision for breaches of good faith or the undermining effects on an existing collective agreement, of subsequent negotiations or agreements reached in subsequent collective bargaining with another union. Sections 59A-59C, which address the undermining of collective bargaining or a collective agreement, were not introduced into the Act until an amendment took effect on 1 December 2004. However, this is not a strong argument in favour of the plaintiff's interpretation of cl 24.2 and certainly not a determinative factor.

The 'business commonsense' case for the plaintiff

[59] Between [44] and [45] of the Authority's determination, it upheld the defendant's argument of the "business common sense" of its interpretation of cl 24.2. That focused on what the Authority concluded would be the consequences in practice in an exercise that it described as "*"cross checking"* its conclusions by reference to business common sense".[12] The Authority was persuaded by Air New Zealand's interpretation and concluded:[13]

> …As Air New Zealand said, it entered into complete bargains with FANZP and with NZALPA and each of them was a bargain which resulted from each party making concessions in order to gain benefits and it was simply not sensible, in a business sense, to contemplate a situation where an employer would willingly agree to increasing its costs in the unquantifiable way that would result if NZALPA's interpretation were to be preferred.

[60] The Authority reasoned that:[14]

> This is because no matter how well the airline planned and budgeted, it could never accurately estimate what numbers of staff would seek to exercise their option of picking up some of the provisions in the alternative collective employment contract. Not only is it impossible to predict the number of staff who would make the election but it is also impossible to predict how much the cost would be because staff making the election to pick up some provisions from the alternative document might decide to take some but not all of the alternative provisions, thus further complicating the position. …

[61] The Authority accepted the employer's case that a consequence of NZALPA's interpretation would be that the airline would carry an unquantifiable contingent liability on an open-ended basis. By this I understand it to mean the defendant is unlikely to have agreed to leave uncertain its costs of complying with the NZALPA collective agreement, in the event that it subsequently agreed more favourable terms and conditions of employment for other employees. This argument was not at the forefront of the defendant's case in this Court, but because the Authority considered

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[12] *New Zealand Air Line Pilots Association Inc (NZALPA) v Air New Zealand*, above n 1, at [44].
[13] At [44].
[14] At [45].

it determinative, I should nevertheless address it. The operation of the clause in practice, as far as foreseeable at the time it was agreed to, is an appropriate mechanism to cross-check apparent meaning.

[62] Even on its own interpretation of cl 24.2, Air New Zealand could not avoid a contingent liability that, if unquantifiable, would be similar to the situation engendered by NZALPA's interpretation. That is, it could not know whether its costs of operation (or more particularly its wages bill) would be increased based on an NZALPA assessment that the collective agreement subsequently entered into was more favourable than NZALPA's. This analysis weakens the Authority's reasoning.

[63] Even then, this uncertainty argument is flawed. I do not accept that such a contingent liability would be "unquantifiable" as the Authority found. That is because Air New Zealand could, before agreeing to increase the remuneration of FANZP B737 first officers and all second officers, calculate what might be the cost of topping up the remuneration of NZALPA B737 first officers and all second officers for the balance of the term of the NZALPA collective agreement (or any other period). It is inherent in the nature of a contingent liability that there is no certainty of its occurrence. It is one that may occur if other events upon which it is contingent occur. But a contingent liability may be able to be quantified, even quite precisely, in many cases including this. I conclude that such a contingent liability is reasonably quantifiable.

[64] It is not insignificant that Air New Zealand did not rely much, if at all, on this argument which found favour with the Authority. I assess it to be a factor that does not favour the defendant's interpretation as the Authority did.

[65] Nor do I agree with the Authority's conclusion that "the word "agreement" in the context of an employment relationship is a term of art." Even if it were, its true meaning is not a collective agreement (which may be a term of art) or certainly not the totality of a collective agreement. "Agreements" referred to in the Act may take many forms and are not confined to collective agreements as are defined by it. "Agreement" means a consensual arrangement or accord in the context of employment and I concluded was intended so to mean.

[66] Looked at from another viewpoint, there is nothing in the statute or its Part 5 in particular which prevents the Court from accepting NZALPA's interpretation of cl 24.2. Section 54(3)(b) says that a collective agreement must not contain anything contrary to law or inconsistent with the Act. That is the closest the Act comes to addressing the issue in this case but NZALPA's argument does not offend against this provision and nor, of course, does Air New Zealand's.

[67] The Court is not assisted in its interpretation of cl 24.2 by Air New Zealand's evidence of what it says was NZALPA's apparent failure to invoke the clause over many years of its inclusion in successive collective agreements between the parties. This was in circumstances in which Air New Zealand says that NZALPA would have invoked the clause if it had attributed to it the meaning it now does.

[68] In any event, even if it might be thought that NZALPA would have invoked cl 24.2 as it did subsequently, those earlier instances have been explained. That was by the evidence of NZALPA's witness Garth McGearty, in a way which is not inconsistent with the union's current stance on the matter of the clause's interpretation. It is a not uncommon feature of employment relations that quite longstanding provisions are not judicially interpreted, for a variety of sound reasons.

[69] It is a logical corollary of the defendant's contention that any agreement means the totality of any collective agreement, that the favourability assessment implicit in cl 24.2 would have to be one undertaken as between all aspects of the NZALPA collective agreement and the FANZP collective agreement. I accept that this would be a very difficult, if not unworkable, exercise which would not be likely to have been an outcome intended by the parties as a matter of interpretation of the clause drawn up by the plaintiff. Workability/ unworkability in practice is difficult to argue against as a tool of interpretation and the defendant's interpretation would be impracticable in this sense.

[70] One consequence of the defendant's argument that the phrase "any agreement" in cl 24.2 means the totality of another collective agreement, is that if that subsequent collective agreement were to be passed on in whole, that would effectively bring to an end the NZALPA collective agreement, at least so far as those

pilots, to whom the subsequent agreement was passed on, would be concerned. I am confident that this counter-intuitive and telling consequence would not have been intended by NZALPA when it drafted what was to become cl 24.2 and promoted its inclusion in the series of collective agreements. This is an apt application of the aphorism that turkeys don't vote for an early Christmas.

[71] It is clear that cl 24.2 uses the words "any agreement" and not the words 'any collective agreement'. Had the parties intended the interpretation now contended for by Air New Zealand, they would, in my assessment, have used a phrase such as 'any collective agreement' or, indeed, consistently with Air New Zealand's case, 'the whole of any collective agreement'. There was no negotiation about NZALPA's proposed wording of cl 24.2 as would have been expected if Air New Zealand's interpretation was as it now claims.

[72] The contrast with "any agreement" is the phrase "this Agreement" which, it is common ground, refers to the NZALPA collective agreement. By their use of these different phrases and the capitalisation and non-capitalisation of the words "agreement"/"Agreement", I conclude the parties left the definition of the phrase "any agreement" sufficiently broad to include not only a collective agreement entered into with another union (or parts thereof) but also a range of less formal agreements providing for particular terms and conditions of employment entered into with employee groups. These included, but were not necessarily confined to, other unions, and to agreements which in any event were not collective agreements. So, too, I conclude that the words "any agreement" were intended to encompass constituent parts of a collective agreement.

[73] I accept, in all of the relevant contextual circumstances, that cl 24.2 was inserted primarily for the benefit of individual pilot employees of Air New Zealand who were NZALPA members. The clause was proposed and settled against two important backgrounds. The first was Air New Zealand's strong desire to avoid strike action. The second was of inter-union rivalry and the probability of FANZP's collective agreement coming up for renegotiation during the life of NZALPA's collective agreement.

[74] I accept, also, that what is "passed on" as "more favourable than provided for in" the NZALPA collective agreement must be something that is capable of being passed on as a benefit to individual affected pilots personally. Contractual content which is not "more favourable" is not within the contemplation of what the clause directs to be passed on. Remuneration rates fall within that class of more favourable terms and conditions that can be passed on.

[75] Collective agreement provisions applicable to pilots generally which operate to the benefit of the employer, are both conceptually and practically incapable of being passed on to individual pilots who are in receipt of less favourable terms and conditions of employment contained in the NZALPA collective agreement. Such provisions are, therefore, not encompassed by cl 24.2 so that its purpose is to pass on to NZALPA pilot beneficiaries particular terms and conditions which are objectively "more favourable" than those enjoyed under the NZALPA collective agreement.

[76] I agree with the plaintiff, also, that the introductory words of cl 24.2 "During the term of this Agreement …" support an interpretation which contemplates that the NZALPA collective agreement will continue in force for its term. The defendant's case would likely see it superseded by another collective agreement passed on in its totality during the term of the NZALPA collective agreement. That was not the intended outcome of an NZALPA election to trigger cl 24.2 and Air New Zealand's interpretation is inconsistent with these introductory words.

Decision

[77] What is now cl 24.2 of the current NZALPA collective agreement was introduced into its predecessor at the initiative of NZALPA. The clause was not debated or altered in negotiations and has been subsequently rolled over into successor collective agreements without discussion or amendment in collective bargaining. There is no evidence of a change of relevant circumstances between Air New Zealand and NZALPA since 2002 which may have coloured the meaning of the clause.

[78] The plain meaning of the clause to a disinterested but relevantly knowledgeable observer does not favour the interpretation now advanced for the defendant. Although some of its words and phrases are not indisputably clear and unarguable, in each case those accord more with the interpretation advanced by the plaintiff than that contended for by the defendant. What is now cl 24.2 was agreed to by the defendant at a time when its predominant objective in collective negotiations was to avoid strike action by pilots. That is not to say that Air New Zealand would then have agreed to anything and everything proposed by NZALPA in return for an assurance of no strike action. I consider nevertheless that this imperative meant that Air New Zealand was then prepared to take its chances with agreeing to a provision that it has recently come to realise may place it at a disadvantage in collective bargaining.

[79] Clause 24.2 is not set in stone. Its content or even existence may be an issue in collective bargaining upon the expiry of the current NZALPA agreement and if Air New Zealand is dissatisfied with the consequence of this provision in practice. If so, it is entitled to make that an issue in the forthcoming collective bargaining. It would appear, also, that at least some of the effect of NZALPA's request of Air New Zealand in reliance on cl 24.2 is steadily dissipating and will cease because the airline is divesting itself progressively and steadily of its B737 fleet. The Court is not aware of, and so will therefore not speculate on, the practical consequences of the balance of the request affecting second officer pilots.

[80] The consequence of this interpretation of cl 24.2 of the NZALPA collective agreement is that, with effect from 24 April 2013, Air New Zealand is required to pass on to B737-type first officers and all second officers who were or are covered by the NZALPA collective agreement, the remuneration provisions contained in the FANZP 2013 collective agreement affecting B737 type first officers and all second officers.

[81] The plaintiff is entitled to costs on the challenge and also to costs in respect of proceedings in the Authority, the determination of which is now set aside by this contrary judgment. The parties should have an additional opportunity to settle costs between them but if that cannot be achieved, the plaintiff may have the period of two

calendar months from the date of this judgment to apply by memorandum, with the defendant having the period of one month thereafter to respond by memorandum.

GL Colgan
Chief Judge

Judgment signed at 9.30 am on Thursday 11 September 2014