IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 172
ARC 87/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	AVIATION AND MARINE ENGINEERS ASSOCIATION INC Plaintiff
AND	AIR NEW ZEALAND LIMITED Defendant

ARC 90/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND AMALGAMATED ENGINEERING, PRINTING AND MANUFACTURING UNION INC Plaintiff
AND	AIR NEW ZEALAND LIMITED Defendant

Hearing:	29, 30 and 31 January, 1, 4, 5, 7, 8 and 22 February and 7 March 2013 and by memorandum filed on 28 March 2013 (Heard at Auckland)
Appearances:	Jim Roberts and Jodi Clark, counsel for plaintiffs Andrew Caisley, counsel for defendant
Interim Judgment	4 June 2013
Final Judgment:	13 September 2013

JUDGMENT OF CHIEF JUDGE G L COLGAN

A **Line maintenance work of aircraft engineers (as defined at [1]-[4] of the interim judgment)[1] is not covered by the Blue or Green Books collective agreements.**

B **Collective agreement coverage is determined by the terms settled in the collective agreements, which terms do not include the job descriptions of, or other unilaterally determined documents affecting, individual employees who are members of the plaintiff unions.**

C **The defendant was and is not entitled in law to direct employees who are members of the plaintiffs and covered by the Blue and Green Book collective agreements to carry out line maintenance work (as defined in [1]-[4] of the interim judgment) except in accordance with the temporary transfer clauses of those collective agreements.**

D **The plaintiffs' applications for compliance and injunctive orders are adjourned sine die to enable the parties to negotiate (if necessary with the assistance of a mediator) variations to the relevant collective agreements including to enable the defendant's proposed restructuring to take place lawfully.**

E **The plaintiffs' applications for penalties for breaches of ss 41(3), 43, 62(2) and (3) of the Employment Relations Act 2000, and for compliance orders to prevent such future breaches, are adjourned sine die on the same basis as D above.**

G **The defendant is estopped in law from asserting that the Green Book collective agreement covers the performance by members of the New Zealand Amalgamated Engineering, Printing and Manufacturing Union of line maintenance work (as defined in [1]-[4] of the interim judgment).**

H **Pursuant to s 188(2)(c) of the Employment Relations Act 2000 the parties are directed to engage in further mediation with a view to resolving the issues between them not yet decided by this judgment and relating to the defendant's proposed restructuring of its aircraft engineering operations.**

I **The plaintiffs are entitled to orders for costs but the determination of the amounts of such orders is adjourned until either there is a settlement of the balance of the litigation or, if not, when the Court makes final orders and in accordance with a timetable to be determined by the Court.**

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[1] [2013] NZEmpC 99.

Introduction

[1] The question before the Court is essentially whether collective agreements governing the employment of members of the Aviation and Marine Engineers Association Inc (AMEA) and the New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc (the EPMU) constrain or prohibit their employer from restructuring its aircraft engineering operations as it proposes to do. The cases are challenges by the AMEA and the EPMU to a determination of the Employment Relations Authority issued on 14 November 2012[2] finding in the defendant's favour. The AMEA's and the EPMU's challenges are separate but have been amalgamated in the same hearing for convenience and are likewise both dealt with in this judgment.

[2] Resolution of the issues in this case will not, however, determine all questions about the lawfulness of the employer's restructuring proposals. In that sense, these proceedings might be likened to a battle or battles in a war, albeit important ones. For that reason, and also because these are matters best resolved by the parties if at all possible, I directed mediation or further mediation on all issues of Air New Zealand's proposed restructuring during the course of the hearing.

[3] It was disappointing to learn that after a further opportunity had been given to the parties to engage in mediation between 7 and 27 March 2013, the Court was advised on 28 March 2013 that no further mediation had been engaged in by the parties over that period and a judgment was required. The Court expects its directions to mediation to be complied with. Although the Court is not aware of where the responsibility for the absence of mediation may lie between the parties, and will not speculate on that for the purpose of this judgment, they should be aware that it may nevertheless be a factor in making or declining or otherwise affecting any order for costs that the Court may subsequently be asked to make. Mediation was court-directed and so is a relevant factor when it comes to costs.

[4] Also very regrettably, repeated and substantial under-estimates of the hearing time required meant that the case was unable to concluded in the four days originally set down beginning in the Court's vacation beginning in January 2013. Even a

[2] [2012] NZERA Auckland 399.

doubling of that hearing time in the following week did not conclude the case. Then, counsel's estimate of one day for hearing submissions doubled. The time that the Court was able to allocate originally for deciding the case by starting it in the Court's vacation was subsequently lost with the pressure of other work in April and May. I regret the consequent delay in delivering judgment

[5] This is not a case about the operational or economic senses of Air New Zealand's intended changes to its aircraft engineering operations. Those are matters properly for its judgment. Rather, the case concerns whether and, if so how, such changes can be achieved without the agreement of the affected employees and, because their unions are parties to the collective agreements, those unions as well.

[6] Air New Zealand's aircraft engineering workforce currently totals about 1,000 of whom about 200 are both members of the AMEA and employed in part under the terms of a collective agreement that the parties know as the Purple Book. Affected employees work on line maintenance engineering at the Auckland International, Auckland Domestic, Wellington and Christchurch Airports. Since the restructuring plans were first developed, the defendant has abandoned these in respect of its Wellington operations. So it now proposes that AMEA members at Wellington will continue to be engaged on the terms of what will be referred to in this judgment as "the Purple Book".

[7] In the early 1990s, Air New Zealand restructured its aircraft engineering operations into different specialised workforces, each of which focused on particular aspects of engineering work on aircraft. As a result of recent and prospective aircraft fleet configurations, Air New Zealand now wishes to have again a generic aircraft engineering workforce in which employees can be allocated to work across a greater range of aircraft which now require less maintenance than their predecessors and to have an engineering workforce which can undertake all forms of aircraft maintenance. These range from minor inspections of and repairs to aircraft at terminals between flights (generally known as "line maintenance") to what has traditionally been known as "heavy" maintenance in which individual aircraft are taken out of service for long periods for substantial scheduled engineering refurbishment.

[8] Other than line maintenance, Air New Zealand's aircraft maintenance can be categorised as either "light" or "heavy" depending essentially upon the degree of complexity of the maintenance and, therefore, the time that a subject aircraft is taken out of service for this purpose.

[9] Until now, aircraft engineers covered by the Purple Book have performed exclusively line maintenance of aircraft, that is the short ad hoc repairs to and checks of otherwise operational aircraft in service. This has included associated tasks affecting aircraft in service arriving at and departing from airports. Those employees doing so are designated as aircraft maintenance engineers known as AMEs, (aircraft maintenance engineers), licensed aircraft maintenance engineers (known as LAMES) and team leaders, who are in the apparently unusual position of not being acronymed.

[10] Just as line maintenance work on Air New Zealand aircraft at overseas airports is carried out by others on contract to Air New Zealand, so too do many of the employees in this case carry out line maintenance at some New Zealand airports on other airlines' aircraft. That contract work is also covered by this dispute.

[11] As already noted, unionised aircraft engineers undertaking principally or exclusively most of the airline's line maintenance work, are covered by the Purple Book collective agreement. Other unionised aircraft engineers who undertake heavy and light maintenance, as well as some line maintenance, are covered under two other collective agreements known to the parties as the Blue and Green Books depending upon the union to which the employees belong. The Blue Book is the AMEA's collective agreement whilst the Green Book is the EPMU's. Whilst most line maintenance work has been undertaken by the Purple Book members of the AMEA, generalist aircraft engineers (under the Blue and Green Books) have undertaken some line maintenance engineering work as well as covering, exclusively, light and heavy maintenance.

[12] In August 2012 Air New Zealand presented to its employees a proposal to disestablish the specialist line maintenance positions in favour of a single generalised aircraft engineering workforce. The company's proposal is that about 219 specialist

line maintenance positions will be disestablished but about 186 new generalist roles created, which roles will be covered by the Blue and Green Books. It expects that those new roles will be taken up by engineers who are currently line maintenance engineers operating under the Purple Book.

[13] Air New Zealand wishes most of its AMEs, LAMEs and team leaders in Auckland and wellington but now not Wellington, to become generalist aircraft maintenance staff whose work will be covered by the Green or Blue Books, depending on their union membership. Blue and Green book coverage currently is of employees whose job titles are Lead Hand, 2 IC, Certifying Engineer – QCA/RTS, Certifying Engineer – QC, Aviation Engineer 3 (AE3), Aviation Engineer 2 (AE2), and Aviation Engineer 1 (AE1). When needing to refer to these engineers collectively, I will do so by the shorthand title "Blue/Green Book employees". I will do so similarly for LAMEs, AMEs and team leaders by referring to them generically as "Purple Book employees".

[14] Air New Zealand says that its proposal is to eventually offer continuing employment to all but about 20-30 Purple Book employees based in Auckland and Christchurch. It proposes that those Purple Book employees will be declared to be redundant but, barring the 20-30 or so who will lose their employment, re-engaged, appropriately, as Lead Hands, 2 ICs, QCA/RTSs, Certifying Engineers – QC, and AE3s, in effect as Blue Book employees.

[15] The proposed restructuring is taking place during the currency of the respective collective agreements. Despite that, the defendant does not intend to bargain about these questions either for new collective agreements, or to vary the existing agreements. It says it does not need to bargain for, or otherwise negotiate about, these proposed changes although it accepts that it must consult about them, and says it has done so. The Unions want to know from the Court whether Air New Zealand is able to do what it wishes, unilaterally, with the employment of those employees.

[16] The AMEA says Air New Zealand is not able to restructure in the way it asserts it is entitled to because the coverage clauses in the Blue and Green Books do

not extend to the work performed by the line maintenance engineers under the Purple Book, and seeks a declaration from the Court accordingly. The AMEA also seeks compliance orders requiring Air New Zealand to refrain from instructing relevant employees to do line maintenance work outside the coverage of the Blue and Green Books, and a permanent injunction to prevent Air New Zealand from proceeding with the proposed restructuring.

[17] This is not a case about the operational or economic benefits or otherwise of Air New Zealand's intended changes to its aircraft engineering operations. Those are matters ultimately and properly for its judgment. Rather, the case concerns whether and, if so, how, such changes can be achieved without the agreement of the affected employees and, because their unions are parties to the collective agreements, those unions.

Causes of action

[18] In ARC 87/12, AMEA has three causes of action. The first is a dispute about the interpretation, application or operation of the Blue Book. The AMEA says that it covers light and heavy maintenance work but does not cover line maintenance work. It seeks the following declaratory remedies.

- a declaration in resolution of the dispute that line maintenance work is not included within the Blue Book's coverage;

- a declaration that Air New Zealand has breached the coverage provisions of the Blue Book by directing employees covered by that collective agreement to carry out line maintenance work.

- a compliance order directing Air New Zealand to refrain from instructing employees whose employment is covered by the Blue Book from performing line maintenance work other than in accordance with the specific transfer clauses in the Blue Book; and

- finally, (except for costs) a permanent injunction to prevent Air New Zealand from proceeding with its proposed restructuring on the basis that this will constitute a breach of the Blue Book.

[19] The AMEA's second cause of action is pleaded in the alternative in the sense that if the Court finds that the Blue Book does cover line maintenance work, then the Union says that Air New Zealand has breached ss 41(3), 43, 62(2) and (3) of the Act. Remedies sought for these breaches include penalties under s 133 of the Act for breach of s 62 and compliance orders requiring Air New Zealand to comply with its obligations under each of the sections set out above said to have been breached.

[20] The AMEA's third cause of action is another alternative but is also in addition to the second cause of action. It says that if the Court concludes that the Blue Book does cover the employment of employees engaged on line maintenance work, Air New Zealand is not permitted to determine by which collective agreement its employees are, or are to be, covered. The remedies claimed for this cause of action include:

- a declaration to that effect and that employees performing line maintenance work are entitled to elect by which of the Blue or Purple Books they will be covered; and

- a declaration of Air New Zealand's proposed restructuring will breach the principle that an employee can choose coverage by one of multiple collective agreements covering their work.

[21] In ARC 90/12 the EPMU also has three causes of action. The first is a dispute about the interpretation, application or operation of the Green Book and whether it does or does not cover employees engaged on line maintenance work in addition to those on light and heavy maintenance and on other associated work that is otherwise irrelevant to this proceeding. The remedies claimed by the EPMU in this dispute are:

- a declaration that the Green Book does not cover line maintenance work;

- a declaration that Air New Zealand has breached the Green Book by directing its employees to carry out line maintenance work;

- a compliance order directing Air New Zealand to refrain from instructing employees covered by the Green Book to perform line maintenance work other than in accordance with its transfer clauses; and

- a permanent injunction prohibiting Air New Zealand from proceeding with its proposed restructuring on the basis that the Green Book does not cover line maintenance work.

[22] The EPMU's second cause of action is also in the alternative to the first and asserts that Air New Zealand is estopped from asserting that the Green Book is to be interpreted to cover line maintenance work. The remedies claimed for this cause of action include:

- a declaration that the Green Book does not cover line maintenance work; and

- a finding that Air New Zealand is estopped from contending that the collective agreement does cover line maintenance work.

[23] The EPMU's third cause of action is also in the alternative. It says that if the Court concludes that the Green Book does cover line maintenance work, Air New Zealand has breached ss 41(3), 43 and 62(2) and (3) of the Act.

[24] The remedies claimed for this third cause of action pleaded by the EPMU include:

- penalties under s 133 of the Act for breach of s 62; and

- compliance orders requiring the defendant to comply with its statutory obligations under ss 41(3), 43 and 62(2) and (3) of the Act.

Relevant facts

[25] Air New Zealand undertakes engineering inspections and maintenance of, and repairs to, its own aircraft within New Zealand and is contracted to undertake those functions for aircraft operated by some other airlines operating both within or from New Zealand, and based overseas. This engineering work (inspection, maintenance and repair) covers broad spectrums of complexity and time, although in a limited number of locations. At the minimal end of those spectrums are aircraft in service and between flights. Such engineering work occurs principally "on the ramp", shorthand for where an aircraft is parked temporarily at an airfield between flights to enable the loading and unloading of passengers and cargo, and for refuelling. This "on the ramp" engineering work consists principally of inspections of fuselages, flaps, doors, wheels, engines, fluid levels and the like. The time available for this engineering work can be as little as 30 minutes between scheduled flights although aircraft may be on the ramp for as long as several hours in the case of long haul international aircraft. Although regular maintenance work is not now usually undertaken in such circumstances, minor repair work can be performed on aircraft on the ramp. This work is well known in the industry as "line maintenance". The reference to "line" is because such aircraft are parked temporarily between line flying duties. "Maintenance" includes inspections and certifications as well as repairs to, and replacement of, parts.

[26] Air New Zealand's domestic flying operations generally cease each night between about 2300 hours and 0600 hours on the following day. During these times, almost all of its domestic flying aircraft and some of its longer haul aircraft are not engaged in line flying, although they are expected to be ready to do so at the end of that period of about seven or eight hours. In such circumstances, some, but not all, aircraft are taken to an engineering hangar where they will be worked on by aircraft engineers who, in addition to undertaking inspections, are able to perform maintenance and repair tasks. That is both with a greater range of specialised tools and equipment than might be possible on the ramp, but also with a greater emphasis

on more specialised and time-consuming maintenance. This engineering work is known as "light engineering", although that term also encompasses some inspections and maintenance of, and repairs to, aircraft taken out of service for longer periods than several hours.

[27] Finally, aircraft must be taken out of service from time to time for longer periods, either when a scheduled major service requires this or a defect requires a repair that will take longer than several hours. Such engineering work is known as "heavy maintenance" and will frequently see aircraft partially dismantled, sometimes refurbished, and the testing and replacement of such major parts as engines. Heavy maintenance occurs in engineering hangars.

[28] Irrespective of the sort of maintenance work undertaken by engineers and described above, however, each aircraft must be certified by an appropriately qualified aircraft engineer as being fit for resumption of flying duties after such maintenance, that is formally handed over to its captain with appropriate documentation. Although now decreasingly for newer aircraft, such certifications are also required for some aircraft engaged in line flying even where no maintenance or repair may have been performed.

[29] Aircraft engineers are an integral part of all important aspects of the airline's operation: aircraft safety, timely departures, and efficient use of resources that are very expensive to have and to operate.

[30] Aircraft engineers are based at the airline's three principal New Zealand bases, Auckland, Wellington and Christchurch and, in the case of Auckland, separately at domestic and international engineering hangar facilities.

[31] In the cases of contract engineering work performed on other airlines' aircraft, not all Air New Zealand engineers are appropriately qualified to undertake and/or to certify the completion of such work, particularly where the aircraft types involved are not ones that Air New Zealand has in its fleet. So, some aircraft engineers have additional qualifications and certifications (which are referred to colloquially as "tail colours") which allow them to perform this contract engineering

work for Air New Zealand on other airlines' aircraft and to certify their return to flying operations.

[32] Until the early 1990s, Air New Zealand had a unified aircraft engineering workforce. So long as they were qualified to do so, aircraft engineers could and did work across a range of engineering inspection, maintenance and repair work, including line maintenance, what later came to be known as light maintenance, and heavy maintenance.

[33] It was then thought, however, to be a better business operating model to focus on workforces that were location based rather than function based. A new division or business unit of the airline was then established known as Terminal Services which operated separately from the airline's other divisions. Whilst light and heavy engineering remained with the division known as Air New Zealand Engineering Services (ANZES) based in hangars and areas adjacent to them away from passenger and cargo terminals, aircraft engineers performing line maintenance duties on or around the ramp came under the management and control of the Terminal Services division. This led to line maintenance engineers being engaged solely on line maintenance duties and rarely, if ever, performing light or heavy maintenance in hangars. Conversely, line maintenance engineering work was originally the sole preserve of line maintenance engineers.

[34] This business model is now seen to be inefficient and Air New Zealand considers that the best use of its engineering resources is to return to an amalgamated engineering workforce in which, again subject to their qualifications to do so, aircraft engineers can be allocated to the full range of engineering duties, line, light and heavy maintenance. Combined with the airline's acquisition of a more modern fleet of fewer aircraft types, and less frequent scheduled maintenance on them, this strategy is intended to save the labour costs of about 20-30 aircraft engineers currently engaged in line maintenance work. Also contributing to this decision is the less frequent need for many aircraft to be certified as air worthy between short haul flights, and the ability of less qualified employees to undertake many operations associated with the arrival and departure of aircraft in service.

[35] Before 1993, aircraft engineering work performed in both hangars (light and heavy maintenance), and on aircraft on "on the ramp" (line maintenance) was covered by a single collective instrument.3 In the period leading up to changes in 1993, what was then the relevant collective employment contract was with the Engineering Business Unit of the company. However, even in those days of all aircraft maintenance coming under a single business unit, there was a specialised group of engineers who worked solely on line or ramp maintenance.

[36] In 1993 the company announced its intention to transfer that group of specialist line maintenance engineers to its Terminal Services Business Unit so that they would no longer be part of the separate Engineering Business Unit. The latter business unit, however, retained light and heavy maintenance work which was performed predominantly in hangars. The Terminal Services Unit, to which the line maintenance engineers were transferred, handled the arrivals and departures of aircraft and included such different aspects of a broad range of activities as ticket sales, baggage checking and aircraft loading. I infer from this, as the plaintiffs say, that at that time the defendant considered line maintenance engineering work was sufficiently different to base engineering work performed in hangars by the Engineering Business Unit, to separate it out into another business unit.

[37] The Air New Zealand Engineering Business Unit later became part of ANZES. In turn, ANZES and the Terminal Services Business Unit were incorporated subsequently into a new expanded business unit, Technical Operations (ANZTO). The defendant's case is that all engineering work, including light and heavy maintenance and line maintenance, is now performed by ANZTO. The defendant still, however, uses the ANZES 'brand', including signage at hangar engineering premises, and ANZES is generally considered to refer to the airline's engineering bases as distinct from the ramp areas at airports where most line maintenance work takes place.

[38] The Blue and Green Book collective agreements have been renegotiated regularly (about two yearly) since 2004. The most recent negotiation and settlement

[3] Depending on the legislative regime, an award, a registered agreement, or a collective employment contract.

of those collective documents was in 2012. On occasions, there have been variations to the previous Blue and Green Books other than for remuneration. Significantly for this case, during the 2008 collective negotiations, there was settled a new or different provision, when compared to the previous collective agreement (2006-2008), affecting transfers of employees to line maintenance work. This new provision has continued through to the current Blue and Green Books and appears at cl 10.9 of them. The plaintiffs say that the effect of this clause is to limit Air New Zealand's ability to allocate aircraft engineers covered by the Blue and Green Books, who work usually on light maintenance, to perform line maintenance work.

[39] Coincident with this structural change effected by Air New Zealand in 1993, the AMEA bargained for and entered into a collective contract under the Employment Contracts Act 1991, for those of its members who were line maintenance engineers. The first collective contract (the original Purple Book) was entered into by the AMEA and Air New Zealand in 1995 and, since that time, collective contracts, and later collective agreements, have treated separately the base maintenance functions of hangars, and the line maintenance functions including in separate collective employment documents.

[40] The current Purple Book collective agreement commenced on 3 October 2011 and expires on 6 October 2013. It is the successor to the first line maintenance collective agreement negotiated and settled in 1995 after Air New Zealand changed its engineering operations to isolate line maintenance engineers from other aircraft engineers, the former being considered part of its Terminal Services Business Unit and the latter its Engineering Business Unit.

[41] The background to the duplication of collective agreements may be traced to the company's announcement, in October 2005, that it proposed to outsource overseas its heavy maintenance on wide bodied aircraft which could have resulted in the redundancy of about 600 employees engaged in that work. The Unions resisted these proposals, court proceedings were filed, but the parties eventually resolved their differences.

[42] Part of the terms of settlement included the negotiation and settlement of what are now known as the Blue and Green Books for a term from 1 April 2006 to 31 March 2008. Bargaining for the 2006 Blue and Green Books took place in the latter part of 2005 and the first part of 2006, with a settlement eventually being signed on 13 February 2006. The restructuring did result in job losses from the Auckland hangars although numbering between 70 and 100 rather than the 600 initially of concern to the Unions. The settlements also saw the Unions making a number of concessions including a reduction in remuneration for the vast majority of employees in Auckland and Christchurch, especially those engaged in light maintenance. The Purple Book and employees covered by it were not, however, affected by those events because the dispute concerned heavy and light maintenance rather than line maintenance of aircraft.

[43] In 2006 the coverage clauses of the Blue and Green Books changed. Previously, cl 4.1 (of the 2002-2004 collective agreements) provided:

> This collective employment agreement applies to all employees of Air New Zealand Ltd and Air New Zealand Engineering Services hereinafter referred to as ANZES employed under the classifications of work contained in this document, and who are members of, or who become members of, the union party of this agreement …

[44] "ANZES" was then defined to mean "Air New Zealand Engineering Services".

[45] In the 2006 collective agreements, the coverage clauses were changed to read: "This agreement applies to all employees of the Company who are employed in ANZES and … in any classification specified in Schedule 1." The definition of "ANZES" was changed to mean "Air New Zealand Engineering Services, a division of the Company".

[46] Collective agreement coverage was also discussed in the negotiations for the 2008 Blue Book. This was initiated by the Unions in an effort to define more clearly the coverage of the different collective agreements. It emanated from a concern on the part of the Unions that if there were strikes or lockouts, the company would

attempt to use broad or uncertain coverage clauses to justify the engagement of strike breakers.

[47] In the same negotiations the Unions also claimed to expand coverage of the Blue and Green Books by including an area of work undertaken by aircraft engineers known as Gas Turbines or M&I. This work had been removed from the agreements' coverage in the 2006 collective agreements and the company opposed adamantly the re-inclusion of Gas Turbines/M&I as part of the coverage clauses in 2008. The company was, however, less resolute in regard to the Unions' more general claim to clarify the coverage clauses and sought further information about those proposals from the Unions before taking a stance on them.

[48] Although the plaintiffs' case is that they provided further information about these coverage claims including proposing a revised coverage clause wording, the two terms of settlement documents generated at the conclusion of the negotiations (documents V and X) must speak for themselves on this issue. The first contained no reference to coverage change. Indeed, on 17 March 2008 during bargaining the Unions withdrew their coverage claims and the terms of settlement dated 9 May 2008 (document V) do not refer to these. The first terms of settlement were rejected by union members and bargaining resumed, resulting in a further record of further terms of settlement reached on 30 May 2008 (document X). The significance of what was contained in those finally agreed terms of settlement in the 2008 bargaining and what appeared as a result in the collective agreements which were executed on this basis, is both controversial and important for the decision of the proceeding. I deal with it subsequently in this judgment.

[49] The collective agreements were subsequently renegotiated in 2009 and 2011 although the important changes included in the 2008 bargaining remained unaltered for the purposes of this case. The evidence is, also, that these issues were not the subject of claims in those subsequent bargainings.

[50] One of the Unions' proposals in 2008 was to refer specifically to light maintenance in the coverage clause. Air New Zealand's response was that to include reference to light and heavy maintenance in the definition of ANZES would achieve

the same thing as excluding line maintenance from the coverage definition itself which was one of the Unions' proposed ways of addressing the coverage clarity issue. That definition ("for the purposes of the CEA means ANZES including light and heavy maintenance a division of the company") was already in the definition clauses of the collective agreements (cl 1.4.1) and remained unchanged. The 2008 collective agreements were settled and signed off by the negotiating parties on 3 July 2008.

[51] The 2009 collective agreement negotiations essentially involved a roll-over of the 2008 agreement but with some minor variations and a wage increase. The same applied to the 2011-2012 negotiations. In neither of the last two sets of negotiations was there any bargaining about the coverage clauses.

[52] In addition to the background facts set out previously, the following additional circumstances are relevant to the decision. The defendant's case relies significantly on what it says is the now longstanding and significant performance of line maintenance work by what light and heavy maintenance engineers covered by the Blue and Green Books. The plaintiffs say, however, that such arrangements are examples of exceptional circumstances, and that the majority of line maintenance work is carried out by line maintenance engineers covered by the Purple Book. Because that disputed categorisation of the work will have to be resolved by this judgment, it is necessary to describe the nature and frequency of the performance of traditionally line maintenance work by other aircraft engineers.

[53] Addressing the examples of line maintenance work performed by non-line maintenance engineers, relied on by the defendant, the plaintiffs say that the arrivals and departures of VA (Virgin Australia), VANZ (Virgin Australia/New Zealand) and Hawaiian Airlines aircraft dealt with by light or heavy maintenance engineers, are not of scheduled or line flights. Rather, they are "ferry flights" arriving at Auckland or Christchurch (and subsequently departing) solely for light or heavy maintenance checks and servicing, so that the arrivals and departures of these aircraft cannot be said to include line maintenance work. These aircraft are not, the plaintiffs say in short, engaged in line flying so that work performed on them at arrival and departure times is not line maintenance.

[54] So, too, the plaintiffs say that occasional work performed by light or heavy maintenance engineers on the arrivals and departures of aircraft in service are exceptional and so infrequent as to not amount to the performance of line maintenance work by non-line maintenance engineers. These instances occur where light or heavy maintenance engineers relieve line maintenance engineers at another airport, travel to overseas airfields to perform ad hoc line engineering duties, accompany charter flights for line maintenance purposes overseas and the like. In addition, these assignments only affect Air New Zealand's own aircraft, unlike its line maintenance work conducted in Auckland and Christchurch airports for other "customer" airlines' aircraft that are in service.

[55] The plaintiffs' case is also that, over the last few years especially, engineering management has slowly, but steadily and opportunistically, provided increasing amounts of line maintenance work to heavy, and especially light, maintenance engineers. This has occurred particularly at times when line maintenance engineers may have been unable to complete such work in the timeframes necessary to keep aircraft in service and, therefore, earning revenue. The plaintiffs say that the goodwill of line maintenance engineers has allowed this to happen initially and, when repeated, it has come to be portrayed by the company as a regular work practice that has not been objected to, at least not frequently or strongly, by line maintenance engineers.

[56] My impression of that gradual incursion into the traditional work of line maintenance engineers by heavy and especially light maintenance engineers, has been as the plaintiffs portray it, that is as a product of a willingness to assist the company rather than taking a stand as a matter of principle on each occasion to oppose it occurring. As the plaintiffs and line maintenance engineers see it, the defendant has traded on their goodwill and now seeks to use the result against them in this litigation. That view is held justifiably in my conclusion.

[57] Turning to what is known as the "AOG" (Aircraft On Ground) team of light and heavy maintenance engineers in Christchurch, the plaintiff's case is that their role is to perform work when a line maintenance engineer or station engineer classifies an aircraft as "AOG", that is having a defect which will take more time

than line maintenance engineers have available, or is of greater complexity than can be dealt with by line maintenance engineers. So, the plaintiffs say, AOG teams are not engaged in line maintenance or, if they are, they should not be doing this work.

[58] Another example given by the defendant of light or heavy maintenance engineers undertaking line maintenance work, concerns the Sunday arrival in Christchurch of a daily Qantas freighter aircraft. This is a scheduled cargo service but in the early hours of a Sunday morning when this aircraft arrives, no line maintenance engineers are rostered at work, so its arrival checks and other procedures are carried out by light maintenance engineers who are otherwise undertaking light maintenance duties in a hangar. This alleviates any obligation on Air New Zealand to pay overtime rates to line maintenance engineers and the practice has occurred for about the past two years.

[59] In Auckland the defendant has in recent times developed what it calls "hit teams". Whereas previously overnight engineering work on domestic service aircraft was carried out by line maintenance engineers from the Terminal Services Business Unit, light maintenance (Blue and Green Book) engineers have more recently been directed to carry out this work since line maintenance was brought back into what is known as the ANZTO (Air New Zealand Technical Operations) business unit.

[60] For about the last three years, and especially at Auckland, the defendant has directed light maintenance engineers to perform line maintenance work in these hit teams. These are not contractually recognised entities but are, rather, a management tool devised by the airline which now says that the light maintenance engineers who are members of such teams can, and already do, perform line maintenance work.

Relevant collective agreement provisions

[61] The coverage provisions in contention under the Blue and Green Books (which are materially identical and differ only as to union membership), these are at cls 1.4.1-1.4.3 as follows:

1.4 Coverage

1.4.1 This Agreement applies to all Employees of the Company who are employed in ANZES and:

a. In any classification specified in Schedule 1; or

b. As apprentices / trainees

1.4.2 This Agreement also applies to Engineering technicians employed to work on the Flight Simulators. The terms and conditions for those Employees shall be those set out in the Simulator Variation Agreement attached as Schedule 9.

1.4.3 The parties agree that if, during the currency of this Agreement, the Employer engages Employees in types of work within the coverage of the Agreement for which no classification or rate is specified, the parties shall negotiate, and the Agreement shall be varied to incorporate new classifications and rates as required.

[62] Clause 3.1 defines "ANZES" as follows: ""ANZES" for the purpose of this CEA means Air New Zealand Engineering Services, including Light and Heavy Maintenance, a division of the Company."

[63] The "classifications" specified in Schedule 1 to the collective agreements consist of brief descriptions of positions ("Lead Hand", "2IC", "Aviation Engineer 3 AE3" and the like), together with a "Definition" attributable to each "Classification". These definitions are, however, not uniform and include such elements as incorporation of remuneration into annualised rates, the permanence of the position, the qualifications held, whether competency evaluations are required to remain within the classification, and a variety of other applicable comments covering an inconsistent variety of factors affecting the position holder.

[64] At cl 10.9 of the Blue and Green books under the heading "Temporary Transfer to Line Maintenance", the following appears:

10.9.1 An Employee may from time to time, for periods up to 1 calendar week, agree to temporarily carry out the duties and responsibilities of an Employee in Line Maintenance to cover short term absences, provided that Employee is suitably qualified and competent. In these instances, they will remain on their current terms and conditions.

10.9.2 For periods of more than one calendar week or, if the Employee is required to change shifts, the Employee shall be paid for the entire

period at either the terms and conditions of the Line Maintenance CEA, or their current terms and conditions, whichever is the greater.

10.9.3 Secondments for longer periods to Line Maintenance will be by agreement with the Employee concerned and in accordance with clause 10.5 of this CEA.

[65] For the sake of completeness, cl 10.5 of the collective agreement referred to in 10.9.3 above under the heading "Secondments" provides:

10.5.1 Secondment is primarily for temporary staffing requirements, or for Employee or organisational development and is not an alternative to permanent appointments.

10.5.2 The duration of any secondment shall be a specified period by mutual agreement of the Employee and the Company. The Union shall be notified.

10.5.3 Employees in secondment positions shall become permanent in those positions upon twelve months of secondment, unless the term of secondment is otherwise agreed at the establishment of the secondment.

10.5.4 A period of secondment will form part of qualifying time for progression through salary grades should the Employee be confirmed as a permanent appointment in that position or grading.

[66] The comparable provision in the Purple Book is found at its cl 39 ("Temporary Transfer To Light or Heavy Maintenance") as follows:

39.1 An Employee may from time to time, for periods up to 1 calendar week, agree to temporarily carry out the duties and responsibilities of an Employee in Light or Heavy Maintenance to cover short term absences, provided that Employee is suitably qualified and competent. In these instances, they will remain on their current terms and conditions.

39.3 Periods of more than one week will be by agreement. Should there e a need for the Employees shift pattern to change, the Employee shall be paid for the entire period at either the terms and conditions of the Aircraft Workers CEA, or their current terms and conditions, whichever is the greater.[4]

39.3 Secondments for longer periods to Light or Heavy Maintenance will be by agreement with the Employee concerned and in accordance with normal company secondment processes.

[4] The parties agree that this should read 39.2.

Principles for interpretation and application of collective agreements

[67] Although collective agreements are not the same as individual employment agreements or certainly commercial contracts, the rules for their interpretation are nevertheless closely aligned to the rules for interpretation of employment agreements which are, in turn, informed by the rules for interpretation of contracts generally. The essential questions in the case are ones of compliance with the statute but also with these collective agreements that are statutory instruments. Principles of commercial contractual interpretation cannot divert the Court from that task and cannot override the principles applicable to the interpretation of statutory provisions and of collective agreements as statutory instruments.

[68] Nevertheless, the plaintiffs invite the Court to follow and apply the principles of statutory interpretation most recently and authoritatively stated by the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.[5] Those principles, applicable to this case, are said to be four. First, the Court must start with the ordinary meanings of the collective agreements. Second, the Court is to establish the meaning the parties intended their words to bear. Penultimately, the plaintiffs say that extrinsic evidence is admissible where there is a mistake, ambiguity or special meaning, or where the ordinary meaning makes no commercial sense, or there is an estoppel by convention. Finally, the plaintiffs adopt the principle in *Vector Gas* that where lawyers were involved in the drafting of the collective agreements, strong and unequivocal evidence is required to support an understanding that is inconsistent with what is expressly recorded in the collective agreement.

[69] In the field of employment law, the interpretation of collective agreements has been addressed most authoritatively and recently in the judgment of the Court of Appeal in *Silver Fern Farms Ltd v New Zealand Meatworkers and Related Trades Union Inc*.[6] The Court of Appeal followed the judgments of the Supreme Court in *Vector Gas* and what it described as a series of important decisions of the House of Lords (now Supreme Court) of the United Kingdom and the New Zealand Court of Appeal over a lengthy period. The Court accepted (and it was not argued otherwise

[5] [2010] NZSC 5.
[6] [2010] ERNZ 317.

before it) that it was proper to consider prior instruments between the parties to a collective agreement or their predecessors and found helpful the summary of McGrath J in *Vector Gas* and Hoffman LJ's five principles of interpretation in his judgment on behalf of the majority of the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society*:[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.

[70] The Court of Appeal in *Silver Fern Farms* also approved of the analysis of Tipping J in *Vector Gas* as follows:[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 evident 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.

[71] Only limited assistance in interpreting a clause introduced into an agreement, or the significance of its non-amendment, can be gleaned by hearing evidence of what happened and did not happen in the bargaining. That is not only because of the subconscious wishes of the negotiating parties to put the best light on their actions or omissions at a time when the current issues had not assumed their importance in

[7] [1998] 1 WLR 896 (HL) at [61].
[8] At [33].

litigation. Collective agreements are frequently the product of compromises, acceptances of some proposals to achieve the rejection of others, and rejections of some to maintain the status quo. It is often a leap too far to ascribe to those events in the bargaining, a meaning to a clause which was or was not the subject of bargaining. The simple facts of inclusion, exclusion, or continuation of a provision are often better and more reliable indicators of the parties' mutual intentions rather than what tend to be self-serving accounts of the parties' intentions given at trial with the benefit of hindsight. Unions and employers settling collective agreements have long been on notice that they need to take care with what they agree upon by expressing it clearly in their document. Concessions by compromise are just that and cannot be revisited in a later attempt in litigation to attain what may have been conceded as part of a complex strategy to achieve settlement.

[72] Nor is it always a reliable conclusion that making a claim in bargaining seeks to change the status quo ante. A claim may be made to clarify an arguably ambiguous provision for the sake of future certainty and to eliminate one area of disputation. The absence of a claim to amend a provision, or the withdrawal of a claim to amend a provision, does not thereby mean that the provision is to be interpreted other than in the way sought to be altered. This, too, illustrates the potential danger of attempting to examine, too minutely or critically, parties' motivations for doing what they did in bargaining.

The statutory requirements of collective agreement coverage

[73] Section 54(3) provides that one of the necessary constituents of a collective agreement is that it contains a coverage clause. "Coverage clause" is defined in s 5 of the Act as:

> (a) in relation to a collective agreement,—
>
> (i) means a provision in the agreement that specifies the work that the agreement covers, whether by reference to the work or type of work or employees or types of employees; and
>
> (ii) includes a provision in the agreement that refers to named employees, or to the work or type of work done by named employees, to whom the collective agreement applies:
>
> (b) in relation to a notice initiating bargaining for a collective agreement, means a provision in the notice specifying the work that

> the agreement is intended to cover, whether by reference to the work or type of work or employees or types of employees

[74] Broken down, those constituents are:

- "a provision" (not necessarily in the form of a separate clause);
- specifying the work that the agreement covers;
- that specification being by reference to the work, or the type of work, or to employees or types of employees; and
- that provision may include one that refers to named employees or to the work or type of work performed by named employees to whom the collective agreement applies.

[75] In the context of this case, the definition of a coverage clause in relation to a notice initiating bargaining under (b) is not applicable because there are operative agreements.

Plaintiffs' case

[76] Applying the interpretive rules in *Vector Gas*, Mr Roberts submitted that the ordinary meaning of cl 1.4.1 of the Blue and Green Books is that they:

- cover the work carried out by employees in and around engineering hangars, what are or were known as ANZES and the definition of which (in cl 3) includes light and heavy maintenance, but do not refer to the area known as the ramp or to work known as line maintenance work;
- with one limited exception dealing with the temporary transfer of employees, noted below, do not refer to line maintenance work in relation to coverage at all but do list all areas of work associated with

light and heavy maintenance in and around engineering hangars (Schedule 1); and

- include reference to line maintenance only in cl 10 by way of exception to their work coverage by providing a means to transfer ANZES engineers to line maintenance work in certain defined and limited circumstances.

[77] Invoking extrinsic evidence, the plaintiffs say that the parties' coverage intentions can be ascertained by the contents of the statutorily required bargaining initiation notices issued for the collective negotiations that resulted in these collective agreements. Those for the Blue Book collective bargaining contained no references to line maintenance work and, accordingly, Air New Zealand did not notify line maintenance engineers of proposed bargaining for the Blue Book. The plaintiffs claim this creates, or at least contributes to, an estoppel preventing the defendant from contending that line maintenance work is covered by the Blue and Green Book.

[78] Next, the plaintiffs say that in the 2008, 2009 and 2011 bargaining for the Blue and Green Books, the defendant never made any claim to include line maintenance work which was previously within the company's Terminal Services Business Unit. Not unconnected with this, the plaintiffs say that the line maintenance work that was formerly within the Terminal Services Business Unit never formed part of the bargaining for the Blue and Green Books.

[79] The plaintiffs say that the defendant cannot claim that line maintenance work was omitted inadvertently from inclusion in the Blue and Green Books (which might support a claim to rectification) because this was never bargained for at all.

[80] Finally, in relation to extrinsic evidence, the plaintiffs say that this establishes that only one lawyer was involved in drafting the coverage changes to the definition of ANZES in 2008, the defendant's Philip Doak. Although Mr Doak in evidence-in-chief denied a role in that drafting, there was evidence that Caroline Haley presented the amendment to union representatives advising them that she believed Mr Doak

had done the drafting. Later in evidence Mr Doak did agree that amending the coverage definition in relation to ANZES was his idea and that he drafted that amendment to include "light and heavy maintenance". I have concluded that Mr Doak was a material participant in the drafting of the 2008 collective agreements (Blue and Green), involved in this exercise for his legal expertise.

The plaintiffs' 'no coverage' argument

[81] As part of his argument that the three collective agreements do not contain compliant coverage clauses, Mr Roberts emphasised that by the use of the word "specifies" in s 53 (a)(i), Parliament has required a level of specificity greater than might be expected if words such as "describes" or "indicates" had been used. Counsel relies on the Oxford Dictionary[9] definition of "to specify" as "to speak or treat a matter in detail; give details or particulars … and … to mention or name explicitly; state categorically or particularly." Counsel submitted that for a provision to constitute a coverage clause, detail and particularity are required.

[82] Next, Mr Roberts emphasised the need for the provision constituting a coverage clause to be "in the agreement" under s 53 (a)(i) and submitted that it must be a part of the agreement and not found elsewhere or by inference. Mr Roberts submitted that the provision of a collective agreement constituting a coverage clause must specify "the work that the agreement covers".

[83] Counsel submitted that the statutory definition of a coverage clause permits the specification of the work that the agreement covers to occur in four ways, but asserted that whichever of these is relied on must necessarily specify the work. The four ways allowed for in counsel's submissions are:

- by reference to the work; or
- by reference to the type of work; or
- by reference to the employees; or

[9] Shorter Oxford English Dictionary, 5th ed pp2946-2947.

- by reference to the types of employees.

[84] Mr Roberts relied on the two judgments in the same case, in this Court known as *New Zealand Amalgamated Engineering Union v APN New Zealand Ltd*[10] and, in the Court of Appeal, *APN New Zealand Ltd v New Zealand Amalgamated Engineering Union*.[11] In *APN* in the Employment Court, the full Bench confirmed that use of any of those four types of specification "must be directed at, and achieve, the purpose of specifying the work covered by the agreement."[12] Mr Roberts submitted that the Court of Appeal endorsed that conclusion of the Employment Court when, at [34], it wrote: "The definition of "coverage clause" in s 5 and the language of ss 56(1)(b)(ii) and 62(2)(a)(i) require a primary focus on the "work" which is covered."

[85] Mr Roberts submitted that so far as the third way of specifying the work that the agreement covers (by reference to employees), this is the only circumstance in which the Court is permitted (and in some cases must) look also beyond, or elsewhere than, the actual work performed or to be performed. That is said to be necessary in this single instance for the purpose of ascertaining whether new employees are to be covered by the collective agreement. In these circumstances Mr Roberts submitted that the statutory requirement of employee coverage could not be ascertained except by examination and definition of the work or type of work done by the employees named in the collective agreement's coverage clause. In other instances, however, including this case, he submitted that there is no warrant to examine the actual work done because coverage is determinable by whichever of the other three ways of specifying the work the agreement covers, has been chosen by the parties to the collective agreement.

[86] The plaintiffs' case is that it is not the role, position description or classification of, or attaching to, any particular employee that defines coverage but, rather, the work that is agreed upon in collective bargaining and is specified in the coverage clause.

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[10] [2003] 2 ERNZ 11.
[11] [2004] 2 ERNZ 281.
[12] At [40].

[87] Mr Roberts submitted that the actual work that is relevant for this case is line maintenance work. He said this is the engineering work that was associated with arriving and departing of aircraft and maintenance of, and repairs to, aircraft that are in service (on line) and on their regular schedules. Mr Roberts submitted that this line maintenance is the engineering element of the work previously part of Air New Zealand's Terminal Services Business Unit.

[88] The plaintiffs subdivide this preliminary coverage question whether the Blue and Green Books have coverage clauses, into two. The first sub-question is whether the contents of those collective agreements specify sufficiently the work to be covered by them in order to comply with the Act, or even at all. The second sub-question is, assuming that there is sufficient compliance with the statutory prerequisites, whether those coverage provisions include line maintenance work.

[89] That second question is, on the plaintiffs' cases, further subdivisible into two other questions. The first is whether the coverage clauses specify sufficiently line maintenance work to meet the requirements of the definition in s 5. The second sub-question is whether the Court can be satisfied, as the plaintiffs submit it must be for the defendant to succeed, that the parties to the bargaining for the Blue and Green Books intended to include line maintenance work within their coverages.

[90] The plaintiffs' submission on the first question (whether the coverage provisions of the Blue and Green Books specify the work sufficiently to comply with the Act at all), is enigmatic. To quote Mr Roberts's answer to the question, it was "at best, maybe". This equivocal stance was the subject of debate with counsel at the hearing including exploration of the implications for the parties in their current situation if one or both of those collective agreements were found not to contain a coverage clause.

[91] It is debatable whether the hypothetical answers would see the plaintiffs succeed in their long-term objective of either stopping the company's restructuring proposals or at least strengthening the Unions' and the employees' positions in those by requiring Air New Zealand to negotiate and settle the terms of the restructuring.

[92] One implication of failure to include a coverage clause in a collective agreement might be a determination, in law, of the absence of a collective agreement covering the work of the affected employees. In those circumstances their employment would be entirely on individual agreements but some difficulties might then be encountered in determining the relevant contents of those individual agreements affecting the airline's proposed restructuring. It is, however, unnecessary to explore these implications because of the conclusion I have reached about the validity of the coverage provisions.

[93] At the heart of the disagreement between the parties on this issue (the defendant asserts that each collective agreement contains a lawful coverage clause) is the employer's focus on the sufficiency of "types of employees" under (a)(i) of the definition in s 53, as against the plaintiffs' focus on what it says is the need for this description to also specify and identify "the work that the agreement covers".

[94] The plaintiffs' case is that the four alternatives set out in the second part of the definition simply elaborate on the ways in which the overall objective can be achieved but that the primary necessity is that the coverage clause specifies the work. Put simply, the plaintiffs say, specifying the "types of employees" is insufficient if this does not also achieve "specifying the work".

[95] Seeking assistance from the *APN* case, Mr Roberts submitted that it dealt with a coverage clause which set out only the names of the employees who were to be covered. The case turned on the ability of employees to withdraw from coverage of the collective agreement but nevertheless to remain as members of the Union.

[96] Therefore, the issue on which the *APN* case was decided is not the same as arises in this. In these circumstances Mr Roberts was driven to rely on comments or observations made by the Courts affecting the issue which arises in this case. At [40] of the Employment Court's judgment in *APN*, addressing the issue of whether a list of names of employees would be sufficient to meet the requirements for a coverage clause, the Court wrote: "We accept that a reference or references to employees must be directed at, and achieve, the purpose of specifying the work covered by the agreement."

[97] Although the judgment of the Employment Court in *APN* was appealed, that was not on the point now focused on, although the Court of Appeal did also take the opportunity to consider the requirements of a coverage clause. In the Court of Appeal the Union argued that the s 5 definition requires a coverage clause to specify the work that the agreement covers. At [33] the Court of Appeal said of the submissions of counsel that he "maintained that where this is to be effected by reference to "employees or types of employees", this must still be addressed to a specification of the type of work covered." Mr Roberts in this case argued that at [34] the Court of Appeal supported the Employment Court's approach and accepted that "The definition of "coverage clause" in s 5 and the language of ss 56(1)(b)(ii) and 62(2)(a)(i) require a primary focus on the "work" which is covered."

[98] Mr Roberts accepted that the statute allows the work to be specified in four ways including by employees or types of employees but submitted nevertheless, to use the Court of Appeal's words, the "primary focus" must be on the work. Put succinctly, Mr Roberts's submission is that the coverage is about the work, not the people or their titles (which are classifications).

[99] Mr Roberts accepted that the definition of a coverage clause was amended by Parliament following the *APN* case and s 62(1A) of the Act was added, with effect from 1 December 2004, to permit reference to named employees. However, he submitted that this did not change the fundamental point that it was an additional means of describing and identifying the work. Counsel submitted that this was a narrow amendment for the very specific situation where a coverage clause only names the employees. It was counsel's submission that, as amended in 2004, the definition now allows coverage to be determined, where the parties wish to include the names of particular employees, by referring to the work that is done by those named employees in addition to naming them.

[100] Counsel submitted that this must be so to enable the employer and a new employee to ascertain whether that new employee's work is covered by the collective agreement even although he or she is not specifically named in the coverage clause. That is a situation that may arise, at least hypothetically. Also at least theoretically, it could also be addressed by the Union and the employer varying the collective

agreement to include the specific name of a new employee who was or would be a member of the Union. In these circumstances, however, Mr Roberts had to concede that the work actually done by the employees is relevant to the question of coverage but submitted that such an examination could not be allowed for in any other instance.

New classifications

[101] The plaintiffs say that it is significant to their case that both the Blue and Green Books make explicit provision for new classifications where there is no appropriate existing classification covered by the agreement. It follows, in the plaintiffs' submission, that the specified classifications cannot therefore define coverage.

[102] Clause 1.4.3 of those collective agreements provides:

> The parties agree that if, during the currency of this Agreement, the Employer engages Employees in types of work within the coverage of the Agreement for which no classification or rate is specified, the parties shall negotiate, and the Agreement shall be varied to incorporate new classifications at rates as required.

[103] The plaintiffs submit that cl 1.4.3 envisages that the coverage in the agreement may be wider than classifications set out in Schedule 1 of the Blue and Green Books, so that those classifications do not themselves define coverage, although coming within it. The plaintiffs say that if the defendant is correct that the classifications define the coverage of those agreements, then cl 1.4.3 is nonsensical. The plaintiffs' position is that coverage must focus on the work, and that this is recognised in cl 1.4.3 by use of the words "… types of work within the coverage of the agreement for which no classification or rate is specified …". It follows, in the plaintiffs' submission, that there is, or may be, coverage of work which is not specified in an existing classification.

[104] I do not agree that the ability reserved by the parties to themselves to create new classifications means that they did not define coverage from the outset. Clause 1.4.3 is not nonsensical in these circumstances. It allows for a situation that was unforeseen at the time of entering into the Blue and Green Book collective

agreements but the classifications then recorded defined their coverage. Clause 1.4.3 simply allowed for additional coverage and its presence does not invalidate any other coverage and therefore the collective agreements themselves.

Coverage under the Purple Book?

[105] Turning first to the Purple Book, Mr Roberts submitted that, at best, this refers only to "classifications" of employees but which do not specify the work covered. Although conceding that the Purple Book was negotiated for the purpose of covering the line maintenance work that was previously done within the Terminal Services Business Unit of Air New Zealand, counsel submitted that the agreement fails to specify the work as required by s 5 and cannot, therefore, be a lawful collective agreement.

[106] Mr Roberts argued that "classifications" can in some instances specify the work to be covered and gave, as an example, what is known to the parties as the White Book, the Air New Zealand Salaried Engineers Collective Agreement. In this, counsel submitted that a coverage clause is established by describing the work as "work exclusively or predominantly in the technical operations and Line Maintenance of Air New Zealand in Auckland or Christchurch (excluding the Gas Turbine business in Auckland) in the categories below …". Those categories or classifications then include: "Aviation Engineers engaged in connection with the supervision, quality assurance, planning, technical services, training process of aircraft maintenance, aircraft component maintenance, aircraft design, modification and construction and aircraft support equipment …". Mr Roberts used this as a current Air New Zealand example of description of both work areas and work, which he submitted would appear to satisfy the statutory requirements to specify the work.

[107] Counsel contrasted this compliant specification with the positions under the Purple (and Blue and Green) Books, saying that, without more, their "classifications" do not specify at all the work to be covered. Mr Roberts submitted that the closest that these classifications in the Blue and Green Books come to specifying the work is identifying "work areas" in Schedule 1 on p57 of both documents, albeit only in relation to the positions of lead hand and 2 IC. Even then,

however, counsel submitted that this is not a sufficient specification of the work to be covered.

[108] The plaintiffs' position is that these classifications alone in any of the Blue, Green or Purple Books are not compliant with the definition of a coverage clause.

Coverage under the Blue and Green Books?

[109] Counsel submitted that the Blue and Green Books do identify the work as "including Light and Heavy Maintenance" in those collective agreements' definition of "ANZES". Mr Roberts submitted that that is the only place in those collective agreements that the work is identified within them. Counsel submitted that whether that is enough to meet the specificity required by the Act "is, at best, marginal".

[110] The plaintiffs' case is that this reference to "light and heavy maintenance" does not provide specification or particulars of the type to a degree of certainty that is ordinarily associated with the word "specify". Mr Roberts opined that it might comply when read in association with the word "ANZES" including the work areas described in Schedule 1 on p57 of the collective agreements.

[111] Assuming that the definition's requirements for coverage are met, Mr Roberts asserted without equivocation that the Blue and Green Books do not specify line maintenance work in those agreements in any way which complies with the statutory requirement to specify the work. Counsel submitted that not only is line maintenance work not specified, it is not even mentioned at all other than in very limited circumstances set out in cl 10.9 (temporary transfers of employees) of those agreements which is addressed elsewhere in this judgment.

[112] Mr Roberts argued that if the defendant's case is that coverage can be implied by conduct (that is by custom and practice), this does not meet the legal test because "the work" must be particularised sufficiently within the coverage provision of each collective agreement.

[113] Counsel for the plaintiffs submitted that the defendant's case attempted to blur the difference between light maintenance and line maintenance, but that if a sufficiently specified coverage clause had existed in the agreements, the defendant would not have been able to maintain such a blurred distinction. Counsel submitted, however, that it was clear from the evidence that the line maintenance work that had been carried out within the Terminal Services Business Unit of the company, did not form any part of the bargaining for the Blue and Green Books. Mr Roberts argued that it is not open to the employer to claim that such bargaining resulted in agreement to include line maintenance work in those collective agreements. Further, Mr Roberts submitted that there was never any agreement between the parties that the Blue and Green Books would cover line maintenance so that this is not a situation in which the written document fails to capture the agreement of the parties because there was none.

[114] Drawing these various threads together, Mr Roberts advanced what he described as three very simple propositions. First, he said that if the provisions of the Blue and Green Books comply sufficiently with the statutory requirements for a coverage clause, then they specify the work covered by the agreements. They do so by referring to the areas of the employer's operations where employees are employed (ANZES) and the types of work including light and heavy maintenance, together with the specified classifications.

[115] Second, Mr Roberts submitted that the job classifications alone contained in the three collective agreements do not specify adequately the coverage of those collective agreements and, in the case of the Blue and Green Books the definition of ANZES, to be able to specify the work.

[116] Finally, Mr Roberts submitted that line maintenance work is a significant body of work but which has not been bargained to be covered by the Blue and Green Books and is a type of work which has not been specified as being part of those agreements' coverages. It follows, in the plaintiffs' submission, that line maintenance work is outside the coverage of the Blue and Green Books.

[117] So, in answer to the first question posed at the outset, the plaintiffs say that collective agreements have not been constituted because the job classifications alone do not specify the work as required by the Act.

[118] Next, assuming that these are lawfully constituted collective agreements with coverage clauses, the plaintiffs' case is then that line maintenance work is not covered by the Blue and Green Books. That is said to be for four reasons.

[119] The first is that the parties did not bargain for it to be covered by those collective agreements. The second reason is that the parties did not specify (in any way or by any method) that line maintenance work was work which was to be covered by those agreements. Third, the plaintiffs make three sub-points about line maintenance work. The first sub-point is that it was not performed in either ANZES (as a formal business unit) or within the more general current and informal ANZES, being a brand used by Air New Zealand for marketing purposes for the identifiable hangar areas of the defendant's engineering bases. The second sub-point is that the vast preponderance of line maintenance is performed outside of light and heavy maintenance. Finally, in this regard, the plaintiffs say that the vast majority of line maintenance work is performed by people who are employed in classifications other than those specified in the Blue and Green Books.

[120] The final submission in this regard made by the plaintiffs, is that the Blue and Green Books do not make reference to line maintenance work except as an exclusion covered by the transfer clause 10.9.

[121] The plaintiffs say that the defendant's proposed restructuring is fundamentally reliant on the Blue and Green Books covering line maintenance work. That is in the sense that it intends to create one workforce of aircraft engineering staff covered by the Blue and Green Books to perform a range of work including line maintenance work. The plaintiffs say that it is pivotal to the airline's restructuring plans that it can direct that line maintenance work be performed pursuant to the Blue and Green Books. The defendant's plan presupposes that all relevant employees will be engaged on the terms and conditions of employment set out in the Blue or Green Books, at least in Auckland and Christchurch, although the

Purple Book will continue to govern the employment of aircraft engineers in Wellington. So, the plaintiffs say, the planned restructuring cannot take place lawfully unless agreement about altering coverages is reached with the relevant employees through their unions.

[122] The plaintiffs say that the defendant's position that the Blue and Green Books cover line maintenance work is illogical when one considers the statutory position for the initiation of bargaining. This is governed by s 41 of the Act. The plaintiffs say that line maintenance engineering work was part of the bargaining for the Purple Book, which bargaining was concluded in November 2011. The plaintiffs say that the evidence establishes that bargaining for the Blue and Green Books began in February 2012, making it impossible in law for either the AMEA or Air New Zealand to initiate bargaining for those two collective agreements in relation to line maintenance work. That is said to be because of the opening words of s 41(3) which (with the following italicised emphasis) state:

> If there is *an applicable collective agreement* in force,—
> (a) a union must not initiate bargaining earlier than 60 days before the date on which the collective agreement expires:
> (b) an employer must not initiate bargaining earlier than 40 days before the date on which the collective agreement expires.

[123] The plaintiffs say that this is reinforced by s 41(5) which provides:

> For the purposes of this section, an applicable collective agreement is in force between a union and an employer if the agreement binds employees whose work is intended to come within the coverage clause in the collective agreement being bargained for.

[124] The plaintiffs say that it was not permitted legally for the AMEA and the defendant to enter into bargaining for coverage of work for which the parties had already bargained and agreed on (the Purple Book), thus reinforcing the fundamental submission that the Blue and Green Books cannot and do not cover line maintenance work.

[125] Next, the plaintiffs rely on s 43 of the Act which states:

> **Employees' attention to be drawn to initiation of bargaining**
> An employer that initiates bargaining or that receives a notice initiating bargaining for a collective agreement must, as soon as possible but not later

> than 10 days after initiating the bargaining or receiving the notice, draw the existence and coverage of the bargaining, and the intended parties to it, to the attention of all employees (whether or not members of a union concerned) *whose work would be covered by the intended coverage clause if the collective agreement were entered into*.

[126] The plaintiffs say that for the defendant's proposed restructuring to be lawful and, in particular, to comply with the coverage requirements of the Act, the defendant must establish that the Blue and Green Books cover line maintenance work.

[127] However, the plaintiffs point out that aircraft engineers currently engaged in line maintenance work would, therefore, be employees "whose work would be covered by the intended coverage clause" of the Blue and Green Books. Accordingly, the plaintiffs say, when bargaining for the Blue and Green Books was initiated in 2011 (and in previous bargaining rounds for those same agreements), if the defendant had truly considered that it would be bargaining over line maintenance work as well as light and heavy engineering work, it would have been required to bring this bargaining to the attention of all line maintenance engineer employees, and would have done so. The plaintiffs say that this was not done by Air New Zealand. Their witnesses Messrs Wade and Kennedy gave uncontradicted evidence that they had not ever received a notice from their employer drawing their attention to the bargaining for the Blue and Green Books or otherwise advising them that their line maintenance work would be covered by that bargaining. This, too, is said to illustrate the real nature of coverage and the recent necessary, but strained, adoption of a position by the company that does not accurately reflect what had to happen and did happen leading up to, and at the times when, coverage was settled.

[128] Further, the plaintiffs say, that coverage is a matter for agreement between parties to a collective agreement and that the defendant was obliged to have put the AMEA and the EPMU clearly on notice that it considered that the Blue and Green Book coverage included all of the line maintenance engineering work. They say it did not and has not ever done so, at least until it disclosed its restructuring strategy. The plaintiffs say that coverage of the sort the defendant claims was not ever bargained for in respect of the Blue and Green Books so that line maintenance work does not and cannot form part of the work covered by them.

The transfer clauses

[129] These are the only references in the Blue and Green Books to "line maintenance" work. They are contained at cl 10 as follows:

> **10.9 Temporary Transfer to Line Maintenance**
>
> 10.9.1 An Employee may from time to time, for periods up to 1 calendar week, agree to temporarily carry out the duties and responsibilities of an Employee in Line Maintenance to cover short term absences, provided that Employee is suitably qualified and competent. In these instances, they will remain on their current terms and conditions.
>
> 10.9.2 For periods of more than one calendar week or, if the Employee is required to change shifts, the Employee shall be paid for the entire period at either the terms and conditions of the Line Maintenance CEA, or their current terms and conditions, whichever is the greater.
>
> 10.9.3 Secondments for longer periods to Line Maintenance will be by agreement with the Employee concerned and in accordance with clause 10.5. of this CEA.

[130] The plaintiffs say that these clauses allow employees to be transferred or seconded temporarily from performing light or heavy maintenance work, to perform the duties and responsibilities of line maintenance work. In this regard, they emphasise particularly the words in 10.9.1: "… to temporarily carry out the duties and responsibilities of an Employee in Line Maintenance …".

[131] The plaintiffs point also to the comparable provision in the Purple Book, cl 39, which permits employees to be transferred or seconded temporarily from line maintenance to carry out the duties and responsibilities of light or heavy maintenance. Clause 39 of the Purple Book provides:

> **39 <u>TEMPORARY TRANSFER TO LIGHT OR HEAVY MAINTENANCE</u>**
>
> 39.1 An Employee may from time to time, for periods up to 1 calendar week, agree to temporarily carry out the duties and responsibilities of an Employee in Light or Heavy Maintenance to cover short term absences, provided that Employee is suitably qualified and competent. In these instances, they will remain on their currents terms and conditions.
>
> 39.[2] Periods of more than one week will be by agreement. Should there be a need for the Employees shift pattern to change, the Employee

> shall be paid for the entire period at either the terms and conditions of the Aircraft Workers CEA, or their current terms and conditions, whichever is the greater.
>
> 39.3 Secondments for longer periods to Light or Heavy Maintenance will be by agreement with the Employee concerned and in accordance with normal company secondment processes.

[132] The plaintiffs say that these transfer clauses provide the only contractual basis whereby an aircraft engineer under the coverage of the Blue or Green Books may be directed to carry out line maintenance work or, in the case of those covered by the Purple Book, the converse. This is also said to confirm the plaintiffs' stance that, with those very limited exceptions, the Blue and Green Books cover only light and heavy maintenance work and do not otherwise cover line maintenance work.

[133] The plaintiffs say that if it is correct, as the defendant asserts, that employees covered by the Blue and Green Books can and do cover line maintenance work, it would render such transfer clauses redundant or meaningless because Air New Zealand would be able to shift employees from one work area to another regardless of the cls 10.9 and 39 constraints.

[134] Addressing evidence about variations to the transfer provisions, the plaintiffs say it was clear that the Unions and Air New Zealand understood the differences between the Purple Book on the one hand and the Blue and Green Books on the other. The variation that was negotiated and agreed to in 2007, evidenced in document 9, was subsequently incorporated into the 2008 Blue and Green Books.

New employees

[135] The plaintiffs' next point is that ss 62 and 63 of the Act set out an employer's obligations when a new employee, whose work is covered by an existing collective agreement, is employed on an individual employment agreement. Section 62(2)(a)(i) requires an employer to inform the employee "that the collective agreement exists and covers work to be done by the employee".

[136] The plaintiffs say that the evidence establishes that the defendant has only ever advised new employees, engaged to carry line maintenance work, of the

existence of the Purple Book. If the defendant's contention now that the Blue and Green Books also cover line maintenance work is to be credible, the plaintiffs say that the Court should expect that new employees commencing work in line maintenance should also have been given the options of either joining the EPMU for coverage under the Green Book, or of being employed under the Blue Book terms.

[137] Even quite recently when these issues came into focus, the plaintiffs say that the defendant has acted inconsistently with the logical consequences of its stance in the case by only advising new line maintenance employees of the existence of the Purple Book.

[138] Although the plaintiffs accept that the Purple Book "binds more of the employer's employees in relation to the work" (s 62(3)), they say the defendant was nevertheless required to inform new employees about the existence of the Blue and Green Books if their work was to be "covered by more than one collective". The plaintiffs say that the fact that Air New Zealand did not do so emphasises the artificiality, unreality, and inconsistency of its current stance. In this regard, as in the case of s 43 notices as well, the plaintiffs say that the defendant's actions in practice, even including dealing recently with new employees, are inconsistent with its argument that line maintenance work is covered by the Blue and Green Books.

[139] In this regard, also, the logic of the plaintiffs' argument is difficult to disagree with. Unsurprisingly, in my assessment, Air New Zealand has drawn to the attention of new employees engaged for line maintenance positions, the Purple Book settled with the AMEA but not either of the Blue or Green Books settled with the same Union and with the EPMU. That logical and legislatively compliant stance illustrates the artificiality of the defendant's position in this litigation and, thereby, strengthens the plaintiffs' coverage argument.

[140] Coverage of work (and therefore of the employees who perform that work) under collective agreements is a matter of negotiation and settlement of their terms by unions and employers. Coverage is not determined by job descriptions issued to individual employees covered by those agreements so that, in effect, coverage may be determined, or affected significantly, unilaterally by the employer. A job

description of work affected by the coverage clause of a collective agreement must conform to, and if necessary yield to, the collective agreement's coverage clause.

[141] Where an employer has multiple collective agreements affecting the employment of employees (including in the same part of the business), the provisions of a collective agreement governing any particular situation will be determined, first, by which collective agreement (if any) covers the issue. This will be done by considering the coverage of the affected employees by reference to the work performed by them.

Defendant's case

[142] In contrast to the plaintiffs', this is said by the defendant to be simple. Although simplicity is frequently to be preferred to complexity and certainly to opaqueness, the simplicity of the plaintiff's case may be both seductive but ultimately unsatisfactory if it fails to engage with multiple issues raised by the plaintiffs that spoil its simplicity.

[143] The defendant denies the charge that its restructuring is a scheme to undermine a collective agreement (the Purple Book) by eliminating any coverage under it and moving most of its line maintenance staff to other positions under other collective employment agreements. It says that it intends to create some 187 new positions falling within the coverage of the existing Green or Blue Books (depending upon of which union the people holding those new positions may choose to be a member). It says that the materially identical coverage clauses of the Blue and Green Books encompass engineers performing all types of engineering work including line maintenance and repairs. It invites the Court to so conclude as a matter of interpretation of the coverage clauses of the Blue and Green Books and, that being so, the plaintiffs' case must fail.

[144] Air New Zealand says that the plaintiffs' causes of action are based on assumptions about the defendant's current and intended conduct which are erroneous.

[145] As to the interpretation of the collective agreements, the defendant says that the judgment of the Supreme Court in *Vector Gas*[13] have necessarily resulted in complication and expansion of the relevant evidence that this Court may and, in appropriate cases including this, must examine to interpret them.

[146] I will not repeat what I have already written about interpreting collective agreements. I note, however, that *Vector Gas* concerned not a collective agreement in the employment field but a commercial contract, so that its reasoning is distinguishable from those cases in which this Court and the Court of Appeal (on appeals from this Court) have set out the parameters of inquiry to interpret collective agreements.

[147] With current and impending changes to the way in which aircraft engineering maintenance and repair is performed, Air New Zealand says it has decided to restructure the work of its aircraft engineers and others engaged in associated operations. There is, and will continue to be in the future, less engineering work required for routine transits of aircraft. Some of the work which line maintenance engineers undertake at present can be done by staff without specialist engineering qualifications and experience. Examples of this include the placing and removing of plastic cones around aircraft, 'chocking' aircraft, and towing or otherwise repositioning aircraft on ramps or aprons, or between them and hangars. The company's view is also that such line maintenance work as will continue to be done, can be performed by general aviation engineers and also that current line maintenance engineers can perform a broader range of engineering functions.

[148] There is really no dispute about these changes and the underlying reasons for them. Rather, the contentious issue between the parties is whether the company can impose unilaterally the restructuring changes it wishes to put in place, or whether it is required in law to negotiate with the affected unions and obtain their agreement about the consequences of those changes on the employment of union members.

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[13] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

[149] Given that the case has not generally concerned the detail of the proposed restructuring, it is unnecessary to do more than summarise the practical consequences for the aircraft engineers of the proposed restructuring.

[150] Air New Zealand proposes to have what it calls hit and ramp teams to undertake aircraft turnaround work that requires engineering involvement. Existing and new aircraft engineering staff will rotate through those teams as part of their overall aircraft engineering duties which will also include light and heavy hangar maintenance. There will also be hit and light engineering teams to perform other AOG work, defect rectification work, daily checks, overnight work, and other general aircraft engineering work, together with heavy teams to do "C" checks and other substantial aircraft engineering maintenance work. The company proposes that its aircraft engineers will rotate through both on-line and off-line maintenance tasks by being deployed and cycled through a coordinated management system. This is known to the parties by the shorthand of the "propeller model".

[151] As the company submitted, there has been consultation with the Unions and employees about these proposals and, apart from these proceedings, there has not yet been any legal challenge to them. Cost savings are anticipated to be about $3.1 million per year (about $258,000 per month) over the next five years.

[152] Air New Zealand anticipates that it will be able to provide ongoing employment to about 165 of the approximately 200 employees engaged in line maintenance and covered by the Purple Book. Its case is that about 74 per cent of those employees will receive a pay rise although this will be subject to shift patterns finally adopted. The company anticipates that there will be between 20 and 30 redundancies although it believes that there are more than sufficient volunteers for this, pursuant to the redundancy provisions in the Purple Book. The company is committed to accepting volunteers for redundancy if that is at all possible operationally.

[153] In addition to disestablishing the line maintenance positions (in Auckland and Christchurch but not now Wellington) covered by the Purple Book, the company says that it will establish 165 general aircraft engineering roles that it says will be

covered by the existing Blue and Green Books. Its case is that because of s 56(1)(b) of the Act, neither the company nor the employees who are union members, will have a choice about their coverage under the Blue or Green Books.

[154] The company's case relies on its use in practice of aircraft engineering staff covered by the Blue and Green Books having already undertaken "line activity" for some time. It disagrees with the Unions that the practice has been occasional and unlawful.

[155] Air New Zealand's case is that its aircraft engineers employed under the Blue and Green Books have, in practice, undertaken a wide range of work, including line maintenance work at Auckland and Christchurch on the ramp and in hangars, and line maintenance work in various regional, provincial and overseas airports. It says that work done by these Blue and Green Book engineers has, for many years, included aircraft arrival and departure work, defect rectification and other AOG work, and overnight work.

[156] It says that it offers aircraft engineers work as Lead Hands, 2 ICs, QCA/RTSs, QCs, and AE3-1s under the Blue or Green Books on the basis of their acceptance of that role and as it is set out in the role description attached to individual employees' letters of offer. Its case is that these role descriptions form part of each employee's employment agreement and, in particular, describe the employee's job. It says that such employees may be asked to perform any duties that fall within that role subject to those employees have the necessary skills and qualifications for the particular task concerned. The defendant's case is that the role descriptions for the roles of lead hand, 2 IC, QCA/RTS, QC, and AE3-1, are broadly drafted, and deliberately so. That is said to enable the company to deploy its general aircraft engineers to whatever general aircraft engineering tasks may be required, and that this has been discussed with the Unions in bargaining and at various forums. The company says that, on these bases and relying on the broadly worded descriptions of the roles, it can and does direct its Blue and Green Book staff to undertake heavy, light and line maintenance work and other engineering work that does not fall within these descriptions.

[157] The company's essential argument is that there is nothing in the position descriptions, the individuals' employment agreements or the Blue and Green Books, that prevents Air New Zealand from directing staff covered by those collective agreements to undertake the full range of aircraft engineering work including heavy, light and line maintenance work.

[158] The defendant's case is that at all relevant times, Air New Zealand has operated its airline business through a number of divisions. Until very recently, these have included ANZTO. One or more of these divisions has always had, as its primary focus, the provision of aircraft engineering repair and maintenance services to Air New Zealand and its third party customers. What is now called ANZTO was previously called ANZES.

[159] ANZTO is currently responsible for about 2,600 Air New Zealand employees. Of these, about 900 are employed pursuant to the Blue and Green Books. Of those 900, about 800 are employed in roles called lead hand, 2 IC, QCA/RTS, QC, and AE3-1. The remaining 100 or so ANZTO Blue and Green Book employees are employed in other classifications listed in the first schedule to those collective agreements including tool store lead hand, tool store person 3-1, non-trade lead hand, trades assistant, non-trade senior logistics controller, logistics controller, and various roles in the materials group. Those 100 employees, although within ANZTO, do not undertake work which could be described as heavy, light or line maintenance work. Rather, their work is described as components work, materials work, calibration work, GSE work, side shops work, and inward goods work. So the defendant says the Blue and Green Books cover, and have always covered, more than just light and heavy maintenance work irrespective of whether they can be said to cover line maintenance work.

[160] There is a further group of about 100 employees of the group of about 800 employees referred to above (who have the roles of lead hand, 2 IC, QCA/RTS, QC, and AE3-1) who also work in other areas of ANZTO and carry out work that is not described as heavy, light or line maintenance work.

[161] The 700 or so staff employed as Lead Hands, 2 ICs, QCA/RTSs, QCs, and AE3-1s are allocated to various teams from time to time including heavy teams, light teams, hit teams, AOG teams, overnight teams, interiors teams, and the like. The company currently changes the makeup and names of those teams from time to time, swaps employees from one team to another as required, and allocates different teams to different work as required. The company says that its entitlement to do these things not having been the subject of any previous challenge or dispute, the parties must be taken to have accepted these as normal and acceptable operating practices.

[162] The company's restructuring proposals intend to continue with, and expand upon, what Air New Zealand says is its entitlement to deploy Blue and Green Book staff including to establish more hit, overnight, and ramp teams, and to rotate all relevant engineering staff through these various teams as required. The company says that it is entitled in law to do so because the work is within the scope of the employment agreements of the affected employees including their position descriptions. It says the parties have accepted by conduct that relevant employees are able to be deployed in this way. Finally, its case is that there is nothing in the employees' individual employment agreements, position descriptions or collective agreements which prevents the current deployment practices and those proposed for the future.

[163] Air New Zealand emphasised its employee appointment process and, thereby, the terms and conditions of employment of aircraft engineers who are members of the Unions and therefore covered by the Blue and Green Books. Each was offered, and accepted, a particular position particularly described. The example used is of Mr Hetey who was offered, and accepted, "the position of Aircraft Engineer 2 in our Technical Operations Division at Auckland". Accompanying Mr Hetey's letter of offer was an individual employment agreement which identified his position Aircraft Engineer 2, and a copy of the Green Book collective agreement to which his employment was subject. Mr Hetey also received a position description which set out the purpose of his role as being "to carry out routine aircraft maintenance, identify and rectify aircraft defects, undertake modification and servicing tasks …".

[164] The "Key Outcomes" listed in this employee's position description included:

> The major functions of those carried out in respect of aircraft, compounds, accessories, furnishings, and auxiliary airborne equipment as follows: Carry out all planning, production, and inspection work necessary to maintain the aircraft as airworthy as per the existing approved standard and to meet the flying programme …

[165] Among his "KRAs" is to "demonstrate versatility and adaptability … perform work in other sections/teams as required".

[166] Even if this alone is not determinative of its entitlement to allocate employees to work within those parameters, the defendant says there is more in its favour. The company's case is that position descriptions for other relevant roles are drafted in a broadly similar fashion, again deliberately, because the company wishes to have the flexibility to use its Lead Hands, 2 ICs, QCA/RTSs, Certifying Engineers – QC, and AE3s to undertake any engineering work required.

[167] The company's case is that the breadth of these position descriptions was raised by the Unions during the 2008 collective bargaining, at which time the company asserted that their breadth entitled it to use employees in other roles very flexibly. The company says that although there was an agreement to review the position descriptions, no changes were made to them and no subsequent claims were made by the Unions affecting those position descriptions in the 2009 or 2012 collective negotiations.

[168] So Air New Zealand's case is that there is nothing in the individual employment agreements and their accompanying position descriptions which would justify a conclusion by the Court that line maintenance work (however defined) cannot be undertaken by employees in the roles of Lead Hands, 2 ICs, QCA/RTSs, Certifying Engineers – QC, and AE3s, that is those employees covered by the Blue and Green Books.

[169] Turning from what Air New Zealand says is the position under the collective agreements and/or the individual position descriptions, it submitted that this is reinforced when consideration is given to the performance of work in practice. That differs between airports (Auckland and Christchurch) and within Auckland Airport

as between international and domestic operations. The current range of engineering teams includes heavy teams, light teams, hit teams (at Auckland), AOG teams (in Christchurch), and overnight teams. There are, in addition, special arrangements made when engineering employees travel overseas on special flights (end of lease/delivery/charters etc) or travel to other main or provincial airports to perform engineering work on aircraft at these places. The company says that within these teams or other arrangements, Blue and Green Book staff may be directed to, and do, carry out a mix of work that might be described as heavy, light or line work as well as work that does not fall within any of these categories.

Collective agreement coverage – the defendant's position

[170] Air New Zealand's general response to the Unions' argument that Blue and Green staff cannot be required to undertake line maintenance work because it falls outside the coverage clause for those collective agreements, is that the Unions are interpreting the coverage clauses as if they said something entirely different. There are four underpinnings to this argument.

[171] First, Air New Zealand says that the coverage clauses of the Blue and Green Books are not limited to light and heavy maintenance. Second, the company says that the parties have always known and intended those collective agreements to cover employees who work in areas other than light and heavy maintenance. Third, the defendant says that the EPMU's lead advocate in negotiations for those collective agreements accepted that they have always covered more than just light and heavy maintenance. Finally, Air New Zealand says that the parties have always operated on the basis that Blue and Green Book employees can perform a wider range of work than just light and heavy maintenance.

[172] For these reasons the company's case is that there can be no compliance order limiting the work done by aircraft engineers covered by the Blue and Green Books to just light and heavy maintenance or, put another way, to prevent line maintenance work from being undertaken by those employees.

[173] The company's case is that in any event a coverage clause simply determines to whom the collective agreement applies. It says that it is not a scope of work clause and does not purport to define or limit the work activities which the employees may be required to undertake. The company's case is that the scope of the work that employees may be called upon by the employer to undertake is defined in the position descriptions which are agreed between them and the employer at the time of their appointment to the role.

[174] In making these submissions Air New Zealand accepts that these are matters which can become the subject of bargaining about position descriptions. It points, for example, to the situation in the 2006 collective negotiations in which the classifications of Lead Hands, 2 ICs, QCA/RTSs, Certifying Engineers – QC, and AE3s were the subject of bargaining. Following this, there was a specific agreement that a joint working party would be established to develop the position descriptions, although it is at least unclear whether this actually occurred. The defendant also points to the 2008 collective negotiations in which various changes to classifications were agreed (including to the classifications of AE3-1) and also the introduction of a range of other classifications. At that time, also, the defendant says that the parties agreed during collective negotiations to the establishment of a new position description for the role of Trades Assistant. In 2008, also, the parties agreed that existing position descriptions would again be reviewed although the outcome of that agreement in principle is similarly unclear.

[175] The airline also points out that despite the ability to negotiate a "scope of work" clause or similar and the existence of such clauses in collective agreements, the Unions have not sought to do so in the cases of the collective agreements at issue in this case.

[176] Contrary to the Unions' position that it is unlawful to define coverage of a collective agreement by "type of employee" and that coverage can only be defined by work or type of work, the defendant says that the Blue and Green Books have endeavoured to deal (and have succeeded in dealing) with coverage by reference to type of employee. In particular, those are employees employed in the classifications of Lead Hand, 2 IC, QCA/RTS, and AE3-1, QC and AE3-1 and the other

classifications listed in their schedules numbered 1. The defendant says that this approach to classification is common at Air New Zealand and has been the subject of express discussion and agreement between the company and the EPMU (at least), and was the approach to coverage which the Unions sought in their initiated bargaining for the current collective agreements. So, defining coverage is said to have been a feature of the 2002, 2004, 2006 and 2009 collective agreements as well as the current document and is consistent with the approach that the parties adopted under the Employment Contracts Act 1991 although those clauses were employee party clauses rather than coverage clauses.

[177] Air New Zealand acknowledges, however, that this history of practice and acquiescence is immaterial if the current Act prevents parties from defining coverage in this way. The company's position is, however, that the Act does not do so and, on the contrary, it provides for it expressly.

[178] To determine this important preliminary question, the defendant says that the starting point is s 54(2) of the Act which provides that "[a] collective agreement may contain such provisions as the parties to the agreement mutually agree on." It follows, in the defendant's case, that unless there is some express statutory prohibition or restriction, the parties are free to negotiate whatever coverage they wish to have in their collective agreements.

[179] The next point made by the defendant is that, pursuant to s 54(3)(a)(i), a collective agreement must contain a coverage clause. That is defined under s 5 as:

> (i) … a provision in the agreement that specifies the work that the agreement covers, whether by reference to the work or type of work or employees or types of employees; and
> (ii) includes a provision in the agreement that refers to named employees …

[180] The defendant's case is that this s 5 definition provides the parties with a menu of four options (alternatives) for defining the work that the agreement covers. They are:

- by reference to the work; or
- by reference to the type of work; or
- by reference to employees; or
- by reference to the types of employees.

[181] The defendant says that in applying the ordinary meaning of the statutory words, Parliament has permitted parties to define coverage by reference to types of employees, in this case employees employed in particular classifications.

[182] Turning to the case law on s 54(3)(a)(i) and the s 5 definition, the defendant relies first on the judgment of the Court of Appeal in *Australasian Correctional Management Ltd v Corrections Association of New Zealand Inc.*[14] Mr Caisley submitted that the Court of Appeal accepted in that case that defining the work covered by reference to types of employees was permissible. At [40] of the judgment of McGrath, Anderson and Glazebrook JJ, the Court of Appeal wrote:

> We have not heard argument on and therefore leave open the question of whether, in the light of the definition in s 5 of the ERA, a coverage clause can be limited to certain employees and exclude others who perform the same type of work. We note that the definition of coverage clause requires specification of the work that the agreement covers, although this can be by reference to employees or types of employees.

[183] Next, the defendant relies on the subsequent judgment of the Court of Appeal in *APN New Zealand Ltd v NZ Amalgamated Engineering Printing & Manufacturing Union Inc.*[15] Unlike the *Australasian Correctional Management* case in 2002, by 2004 the Court addressed in *APN* a collective agreement under the current Act which no longer provided that coverage applied to named employees and purported to give them a right to opt out of coverage so that they could remain as members of the union but choose not to be covered by the collective contract. The primary focus of that earlier case had been whether this opt-out right was inconsistent with the Act as the Court of Appeal found it to have been.

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[14] [2002] 1 ERNZ 175 (CA), [2002] 3 NZLR 250.
[15] [2004] 2 ERNZ 281.

[184] At first instance in the Employment Court in *APN*, counsel for the Union (the EPMU) conceded that there was reference to the work covered, by reference to the positions specified in a clause of the collective agreement. This was recorded at [40] of the Employment Court's judgment.

[185] Counsel accepted that Parliament subsequently changed the law and confirmed explicitly that coverage clauses referring to named employees were acceptable.[16]

[186] Mr Caisley also referred to further judicial recognition of the validity of coverage clauses based on types of employees or classifications. In *New Zealand Merchant Service Guild IUOW v Interisland Line A Division of Tranz Rail Ltd*[17] the Employment Court noted:[18]

> The plain meaning of the coverage clause, combined with the history of industrial documents between the two parties, shows clearly that the coverage of the agreement is limited to the specified positions on the two vessels, … and to no others.

[187] Mr Caisley submitted that for coverage to be determined by reference to types of employees is consistent with the purpose of the coverage clause which is essentially a mechanical provision that determines how certain other provisions in the statute operate. These include:

- who should be notified when bargaining has been initiated (s 43);
- who should attend ratification meetings (s 51);
- on whom the agreement is binding (s 56); and
- which new employees should be notified about the collective agreement and/or employed on its terms.

[16] Section 5 (coverage clause) (a)(ii).
[17] [2003] 1 ERNZ 510, 517.
[18] At [38].

[188] The defendant's case is that the approach adopted by the parties in the Blue and Green Books provides for an orderly and stable environment that has worked well for many years. Counsel submitted that this was behind the agreement of the EPMU and the company, after they had discussed these issues in bargaining, to continue to adopt the approach of defining coverage by reference to types of employee.

[189] The defendant rejects the argument for the plaintiffs that this would create a situation in which an employer can determine or amend coverage unilaterally. That is because, the defendant says, the classifications are recorded in the collective agreement which, having been negotiated and agreed, cannot be changed unilaterally by the company. It goes further and concedes that even although they were not settled in the collective agreement, it cannot in any event vary its employees' position descriptions unilaterally because they are matters of contract between each individual employee and the company.

[190] For the foregoing reasons the defendant contended that it is not unlawful to define coverage by reference to types of employees as the parties have done in the Blue and Green Books.

[191] Mr Caisley submitted that at the time of the negotiations for them, Blue and Green Book staff were, literally every day and every night, undertaking line maintenance work. It was, counsel submitted, in this context that the parties agreed to the current coverage clause in December 2011/January 2012. And, after concluding the latest agreements, counsel submit that the parties continued to operate exactly as previously with Blue and Green Book staff undertaking line maintenance work every day and every night in Auckland and Christchurch. Mr Caisley emphasises that from as long ago as in *Dwyer v Air New Zealand Ltd No 2*,[19] this Court has acknowledged:

> The performance of the contract by the parties can be indicative of what the parties intended the particular clause to mean. Their actions are an objective demonstration of that intention manifested in the conduct of contractual performance.

[19] [1996] 2 ERNZ 435.

Clause 1.4.1 – the defendant's case

[192] Mr Caisley submitted that, in this interpretive exercise, the Court should begin by looking at the words used in cl 1.4.1 in the context of the rest of the collective agreement to determine what they mean on their face. Having done so, the Court should then consider the overall context of the agreement in the circumstances in which the parties operate.

[193] The defendant says that there is no ambiguity whatsoever in this case and the interpretation of cl 1.4.1 for which the plaintiffs contend is simply unsustainable on its plain words.

[194] Alternatively, the defendant says that even if there might be some ambiguity, recourse to the context in which the parties operate will render the Unions' proposed interpretation unsustainable. Finally, and even if that is not the case, an estoppel should be found to operate to prevent the Unions from advancing the interpretation for which they contend.

[195] Addressing, first, the plain words of cl 1.4.1, these are materially:

> This Agreement applies to all Employees of the Company who are employed in ANZES and:
>
> a. Any classifications specified in Schedule 1 …

[196] Mr Caisley submitted that the words themselves are clear and unambiguous, except the reference to ANZES. That is, the agreement covers employees employed in the roles of Lead Hand, 2 IC, QCA/RTS, QC, AE3-1 and certain other classifications which are not relevant to this case. The defendant submitted that there can be no suggestion that the words used were intended to convey any special meaning other than their plain and ordinary meaning. The submission is that the work undertaken by the employees in those classifications includes work which the parties describe colloquially as heavy, line and light maintenance work. Mr Caisley emphasised that the parties did not agree on a coverage clause that read, for example, "This Agreement shall cover light and heavy maintenance … in an area commonly

known as the hangar". The defendant's case is that the plaintiffs' argument invites the Court to rewrite the collective agreement to achieve that sort of interpretation.

[197] Addressing the problematic reference to ANZES, Mr Caisley contends that this was an anomaly, certainly at the time these collective agreements were entered into because, he says, there was no longer an Air New Zealand business unit of that name. It is, however, defined in cl 3.1 of the agreements to mean "Air New Zealand Engineering Services, including light and heavy maintenance, a division of the Company" and counsel acknowledged that the Court cannot ignore conveniently one part of the coverage clause, and especially where it has been agreed to repeatedly in successive collective agreements.

[198] Nevertheless, the company says that there is no such division and has not been since 30 June 2006 when the division then called ANZES changed its name to ANZTO. Accordingly, counsel for the defendant submitted, the reference in the document to ANZES should be read and treated correctly as a reference to ANZTO.

[199] This ANZES "anomaly" is said, by the defendant, to have come about as a legacy of prior documents from a time of over 15 years when the division of the company responsible was called ANZES and various predecessor documents had more or less accurately referred to ANZES to describes its division primarily responsible for providing engineering services. Mr Caisley had to concede, however, that even at various times in the past there had been associated inaccuracies, for example in at least one of the documents the references to "Air New Zealand Engineering Services Ltd" when no company of that name ever existed. The chances of the reference to ANZES being an anomalous error reduce significantly when there is exposed a continuum of its use and correction when used erroneously.

[200] Mr Caisley submitted that by 2008 the company and the Unions had overlooked the need to update the reference to the name of the division when they were preparing their claims. Air New Zealand's case is that this was simply an oversight. Mr Caisley invites the Court to find that it was an entirely understandable oversight because all the parties knew exactly to which division of the company they

were referring by using the acronym ANZES. That was the division of the company which was primarily responsible for the provision of engineering services so therefore, in the defendant's submission, it was simply an oversight by the parties not to update the document and one of no particular consequence. ANZES was in reality ANZTO.

[201] More particularly, Mr Caisley submitted that following negotiations and in the course of preparing a new draft collective agreement in 2008, the airline's lawyer, Mr Doak, picked up on this oversight and suggested that there should be a change. This was taken up with one of the Unions' bargaining representatives and, Mr Caisley submitted, agreement was reached that the document would be updated "to reflect the organisational change" which had occurred by that time. For this purpose, there was a new sentence added to the negotiators' Memorandum of Settlement which read: "Coverage is amended to reflect the current organisational structure".

[202] There is evidence, as Mr Caisley emphasised, that in a collective agreement drafting session on 30 May 2008 Mr Doak proposed that "ANZES" should be changed to "ANZTO" and that at least one of the bargaining representatives for the Unions appeared not to have a problem with that change. It seems that the mediator assisting the parties then queried whether such an amendment should be made so late in the process and this persuaded the Unions' bargaining representatives to oppose that change because it had not been the subject of agreement in bargaining. So the Unions insisted that the document was to continue to refer to ANZES to reflect the company's insistence throughout negotiations that there should be no change from the previous coverage clause.

[203] In these circumstances, Mr Caisley submitted, the Air New Zealand negotiators decided not to continue to press the issue in the interests of making progress and finalising the collective agreements and the reference to ANZES, and its extended definition, remained. For completeness, Mr Caisley acknowledges that there have been two subsequent renegotiations and resettlements of these collective agreements without further change or proposal for it.

[204] Addressing the Unions' case that the words in the definition of ANZES ("including light and heavy maintenance") were intended to exclude line maintenance, Air New Zealand rejects this in preference to the intention, it says, evidenced by the conduct of the negotiating parties.

[205] Addressing the Unions' proposals in 2008 for change to the coverage provision, Mr Caisley submitted that the first of these related to the proposed inclusion of what is known to the parties as "gas turbines" while the second concerned a proposed clarification of inter-relationship of the coverage clauses between the Blue and Green Books on the one hand, and the Purple Book on the other. It is common ground that Air New Zealand adamantly and consistently opposed any change to coverage to include gas turbines and that is not otherwise in issue in this case.

[206] The exact nature of the Unions' second claim in bargaining in 2008 was never really clarified to the company during bargaining, although there has now been produced in evidence an internal working document used by the Union negotiators indicating what they had in mind. This appears, in the company's submission, to have been a coverage clause that referred to ANZTO and expressly included "employees and positions covered by [the Purple Book]". Mr Caisley submitted that, ironically, had the Unions actually tabled this draft clause, it is likely that the company would have accepted it as reflecting what Mr Caisley submitted was the reality of the situation at the time and has continued to exist until now. No draft clause was ever tabled by the Unions which then withdrew their claims for amendment to the coverage clause.

[207] Although, on 9 May 2008, the negotiating representatives entered into a settlement agreement that contained no coverage changes at all, this Memorandum of Settlement was not accepted by the employees and there were further negotiations for higher wages before a second Memorandum of Settlement was signed by the negotiators a couple of weeks later. The focus of those second period of negotiations was on the wage issues. At the same time, however, it appears that the company's wish to update the divisional reference from ANZES to ANZTO was raised as a technical change and, it says, not a matter of great moment.

[208] Mr Caisley addressed the reference to a wish to include the words "light maintenance" in the definition of ANZES. That is said by the defendant to have come about as a separate issue having had nothing to do with excluding line maintenance from coverage. It was not part of the Unions' claims during negotiations. This was said to have been a matter which arose during the drafting process because "light maintenance" was a new term which had recently been introduced to the company by the then manager of Engineering Services. The initial draft of the proposed amended coverage clause simply added the words "and light maintenance" after "ANZES".

[209] So the defendant submitted that the parties did not agree to add the words "light and heavy maintenance" for the purpose of excluding line maintenance but, rather, added "light maintenance" as a new term that had not previously been used.

[210] Mr Caisley submitted that the parties used the word "including" in the non-exhaustive sense of a classification, meaning that ANZES was to include light and heavy maintenance among other things, but not to the exclusion of other things. This is said to have reflected the historical reality of the Blue and Green Books having included more than heavy maintenance and, subsequently, light maintenance. Again, counsel pointed to the fact that about 200 employees covered by the Blue and Green Books do not work in either heavy or light maintenance and also that, of the 700 or so who do, these latter employees undertake various line maintenance activities from time to time.

[211] Next, Mr Caisley submitted that the company's interpretation of the reference to ANZES is supported when the rest of the collective agreements are considered. The term is used elsewhere than in cl 1.4.1. Other references to it appear at cls 2.1.1, 2.1.2, 6.2.9, 10.2.3, 10.2.7, 10.3.1, 10.3.2, 10.7.1, 12.8.1, and in Schedules 1 and 9. Mr Caisley's submission is that in these cases, also, it is intended to refer generically to the division of the company currently responsible for engineering. Referring to the example at cl 10.7.1 (outsourcing), Mr Caisley submitted that if ANZES were to be interpreted to mean only light and heavy maintenance, the company would be free to outsource other areas of its engineering operation without following the 58 day consultation process provided for. Counsel submitted that there is no reason to

suppose that the parties intended this, and indeed it is more probable that they expected that any decision to outsource any part of ANZTO would require the 58 day process to be followed.

[212] To take another example (cl 12.8, the ANZES Review Forum), Mr Caisley points to the evidence that representatives from all parts of the ANZTO business (and not just from light and heavy maintenance) are invited to the "ANZES review forum". The reference to the forum including the "ANZES General Manager" clearly anticipates that this will be the General Manager of the division rather than of another subsidiary manager.

[213] Penultimately in this regard, Mr Caisley submitted that the evidence makes it clear that the parties have used the terms ANZES and ANZTO somewhat interchangeably. For example, the Settlement Agreement which was signed refers expressly to the "ANZTO Collective Agreement". The competency criteria set out in Schedule 5 of the collective agreements all refer to Air New Zealand Technical Operations even though they deal clearly with the roles of AE1-AE3.

[214] Finally, Mr Caisley submitted that the Unions' intended coverage clause referred to ANZTO and their negotiator, Mr Bryce, acknowledged that he would have been happy to update the reference and replace ANZES with ANZTO when he was drafting the document in the 2008 negotiations.

The Purple Book – the defendant's case

[215] Although Air New Zealand takes the primary position that this collective agreement does not need to be dealt with in order to resolve these proceedings, it accepts that the relevance of the Purple Book and its provisions were raised on a number of occasions during the hearing. In spite of the AMEA's apparent position that this collective agreement is void in any event, the defendant submits that it does have a lawful coverage clause and that this does not confine line maintenance work exclusively to Purple Book employees.

[216] Although it featured extensively throughout the hearing, the defendant says that because it was not raised in the pleadings, there is now no evidence that it has been able to put before the Court about the negotiations for both the current Purple Book and its predecessors. It is submitted, in these circumstances, that the Court should not be drawn into making any binding decision interpreting that document. However, the defendant accepts that if the Court finds it necessary to consider the question of coverage under the Purple Book, it does have a lawful coverage clause (cl 3, "Classification/Certification") which sets out the covered classifications of AME, LAME and team leader.

[217] Turning to the meaning of the coverage clause, Mr Caisley submitted that the parties adopted the same approach to coverage in the Purple Book as they did with the Blue and Green Books, namely that coverage is determined by reference to "types of employee". Those types under the Purple Book are AMEs, LAMEs and team leaders. In the past, the company has told new employees to be engaged in these categories, that the relevant collective agreement covering them is the Purple Book or its predecessors and has so treated those who have elected to be members of the AMEA. It says that employees in those classifications have attended collective negotiations and the relevant ratification meetings for the current Purple Book and its predecessors. The defendant says that AMEA has not, at any time in the past, challenged or disputed this and there appears to be acceptance by AMEA that the Purple Book covers the types of employees specified in its cl 3.

[218] That is also said to be consistent with the evidence of the Unions' intention in 2008 to table a proposal to clarify coverage under the Blue and Green Books which would have confirmed the coverage of the Purple Book.

[219] So, the defendant says, AMEA must be taken to have considered that the line maintenance collective agreement (the Purple Book) contained a coverage clause and that this coverage clause provided for coverage by position description.

[220] The defendant says that it agrees with the plaintiffs that the classification of the person undertaking the work, so classified, determines the collective agreement under which it is performed. So, in the defendant's submission, just as the work

covered by the Blue and Green Books is the work undertaken by employees in classifications listed in that document, so the work covered by the Purple Book is the work undertaken by employees in the classifications listed in that document (cl 3). And, to complete the picture, the company says that work undertaken by loaders and servicemen respectively is the work covered by the Orange and Red Books which are not otherwise in issue in the case, but cover the work of other employees dealing with aircraft movements. Air New Zealand says that this approach works very well in practice and avoids the complexities that might otherwise arise because the actual work itself is not clearly delineated.

The minor/occasional line maintenance work argument – the defendant's position

[221] A major plank of the defendant's case is that the interpretation of the collective agreements at issue in this case and, in particular, their coverage clauses, should be affected to a significant degree by current and historical workplace practice which it says favours a conclusion that line maintenance work is covered by the Blue and Green Books.

[222] The defendant says that its case is not that the Blue and Green Books cover line maintenance work. Rather, it says that these collective agreements cover the work undertaken by employees employed in ANZTO "in any of the classifications specified in Schedule 1". Those employees are, however, listed as Lead Hands, 2 ICs, QCA/RTSs, QCs, and AE3-1s. They do not include the employees classified under the Purple Book who are members of the AMEA described as team leaders, AMEs and LAMEs.

[223] Mr Caisley submitted that, at least so far as overnight and defect rectification/AOG work goes, the Unions' position is untenable. He said that for at least some Blue and Green Book employees, the whole of their work consists of overnight work (the overnight teams in Auckland and Christchurch), defect rectification, and AOG work (the hit teams in Auckland and the AOG teams in Christchurch).

[224] Air New Zealand concedes that most arrival and departure line maintenance work is undertaken by Purple Book employees and the company uses Blue and Green Book staff to do this work only supplementarily and occasionally. The company's case is, however, that the frequency and extent of this work is immaterial to the decision of this case, the fact that it is done at all being important. It says that the work either falls within the scope of the employees' position descriptions (in which case they can be directed to do the work) or it does not. Its case is that the work does fall within the position descriptions of Blue and Green Book engineers so that there is no basis for issuing a compliance order preventing them doing so on the basis that it is only a small part of the work that they have previously undertaken.

Clause 10.9 – the employer's position

[225] The defendant refutes the Unions' argument that cl 10.9 in the Blue and Green Books means that aircraft engineers covered by them cannot undertake, as a matter of course, combinations of arrival and departure, defect rectification, AOG, or overnight work said by the Unions to be line maintenance.

[226] Mr Caisley submitted that cl 10.9 was agreed to, first, in 2007 although the evidence shows that both immediately before and immediately after that agreement, Blue and Green Book staff were undertaking such line maintenance work. Counsel submitted that it would be to defy credibility to assert that cl 10.9 was somehow intended to change that situation and prevent Blue and Green Book staff carrying out that line maintenance work as part of their roles. The defendant says that this would only have been so if the practice had stopped immediately after the negotiation of the clause. Indeed, counsel submitted, far from ceasing, the practice of using hit and AOG teams to undertake line maintenance work continued to grow and expand.

[227] Next in this regard, Mr Caisley submitted that there is nothing in the wording of cl 10.9 which would suggest that it was intended to limit the scope of work which Blue and Green Book staff may be required to undertake. Rather, the clause is said to state expressly that it covers situations where Blue and Green Book employees agree to temporarily "carry out the duties and responsibilities of an Employee in Line Maintenance to cover short term absences …". The parties agree that the term

in cl 10.9 "Employees in Line Maintenance" is a reference to employees covered by the Purple Book, that is, team leaders, AMEs and LAMEs. The company's case is that cl 10.9 was agreed to for the purpose of determining rates of pay applicable to Blue and Green Book employees who were temporarily seconded to a role of team leader, AME or LAME where the Purple Book provided different and more complex pay arrangements for those roles. The clause is said by Air New Zealand to have been negotiated to have allowed such temporarily transferring employees to be paid according to the Purple Book formula if that was the higher rate, even although such employees continue to be engaged under the Blue or Green books.

[228] The company's case is that cl 10.9 does not purport to constrain Blue and Green Book employees from performing other than heavy and light maintenance work except where they may be seconded temporarily to line maintenance work under cl 10.9.

What is "line maintenance"?

[229] "Line maintenance" requires definition in this case because, although I am satisfied that it has not been an issue in the past between the parties, its definition has now come into sharp and contentious focus.

[230] In the interim judgment I concluded that "line maintenance" work is defined by a combination of the type of work performed and a description of the classifications of those employees who perform it. It is the work previously undertaken by AMEs, LAMEs and Team Leaders in the former division of the company known as the Terminal Services Business Unit. The work performed is that of checking, servicing, maintaining and certifying aircraft that are between scheduled services in the course of each flying day or other flying period, in preparation for such scheduled services at the start of a day's or period's flying, and at the conclusion thereof. Line maintenance work includes such work on both Air New Zealand's own aircraft, and contracted customer aircraft.

[231] "Line maintenance" work so defined may be distinguished from other Air New Zealand aircraft engineering work (performed by aircraft engineers engaged

under the Blue and Green Book collective agreements) which includes work in and around the company's hangers at Auckland and Christchurch airports and the performance of light and heavy maintenance (A and C checks) on both the company's own aircraft and contracted customer aircraft.

[232] I now set out my reasons for so concluding.

[233] There is the significance of the Purple Book's title: "Line Maintenance Engineers Collective Employment Agreement" and, at cl 9.1(a), the following overview of its purpose: "The parties acknowledge the processes and purpose of the Agreement is intended to contribute to maintaining Line Maintenance quality, competitiveness and profitability …". Further, there is no reference at all to hangar or light or heavy maintenance work in the Purple Book, except in the transfer provisions of cl 39 examined above.

[234] Turning to the Purple Book's provisions about "customer payments", at cl 4(c) and Appendix C, this refers to payments for work on aircraft owned or operated by other airlines than Air New Zealand which is performed by line maintenance engineers who are required to have additional authorisations beyond those possessed for Air New Zealand aircraft types. Such payments are made "in recognition of the additional requirements to hold customer authorisations" and work performed on non-Air New Zealand aircraft is a significant part of a line maintenance aircraft engineer's work.

[235] I agree with the plaintiffs that only aircraft engineers performing line maintenance work have, or need, these types of customer authorisations because they are the engineers responsible for turning around such aircraft on line or while in service. Although light and heavy maintenance engineers do work on customer aircraft and may have some authorisations necessary for them to do so, they are not conducting the turnaround checks on those aircraft because the aircraft are not in schedule when subject to light or heavy maintenance in or around the defendants' hangars.

[236] So it follows, as the plaintiffs say, that the Blue and Green Books do not refer to or include customer payments, emphasising the different nature of line maintenance work.

[237] Next, Appendix E of the Purple Book provides for what is called a line maintenance business forum established by the AMEA and the defendant. The forum's terms of reference include "To disseminate relevant business information, opportunities or problems that are facing the Line Maintenance business" and "To consider and recommend solutions to any matters that affect the terms of employment of Line Maintenance employees as provided for in the Line Maintenance Engineers CEA". The line maintenance business review forum is also referred to in cls 9.1(b) and 9.3(b) of the Purple Book.

[238] These references to the business review forum emphasise the separateness of line maintenance from light and heavy engineering. Even although the company's line maintenance business is now treated as being within the ANZTO business unit, it continues to have line maintenance business forum meetings which are separate from other forums established within ANZTO.

[239] Line maintenance engineers do what is known as "turnaround" work while aircraft are on line or in service including for the defendant's domestic services aircraft, its international services aircraft, and a wide and significant range of other international customers' aircraft. Indeed, the plaintiffs' uncontradicted case is that the majority of line maintenance work on international aircraft is for other international customer airlines. The key feature of line maintenance work is that it is done during an aircraft's turnaround between flight sectors with the focus being on keeping the aircraft on line and on schedule. In the case of international aircraft, line maintenance engineers will undertake their arrival checks, follow up any minor defects logged during flight or rectify defects discovered during the arrival check, and then complete departure checks and certification. Such checks are sometimes called, collectively, "transit checks".

[240] If there is a defect resulting in the grounding of an aircraft which line maintenance engineers cannot rectify in time or at all, then the airline concerned is

contacted and the aircraft is grounded (declared AOG). If an AOG aircraft is one of the defendant's, then the plaintiffs accept that light or heavy maintenance engineers may well rectify the defect or defects. Depending on a number of factors, such work may occur either on the ramp or an AOG may be towed to a hangar. If a customer's aircraft is AOG, then once notified of the defect by line maintenance, customer airlines may fly their own engineering teams to perform the necessary work. Air New Zealand is not contracted to perform this AOG work as it undertakes in relation to its own aircraft using light or heavy maintenance engineers.

[241] The plaintiffs say that the defendant's case has sought to avoid or at least minimised what happens to customer aircraft despite these being a very substantial proportion of its international ramp work. They say that the defendant has minimised this issue because the distinction between line and other maintenance work is particularly clear in those cases and, indeed, the defendant enters into separate contracts for line maintenance on the one hand, and hangar/base/ANZES engineering work on customer aircraft, on the other, including for the same customers.

[242] Unlike with its own fleet, the defendant does not generally have the flexibility to decide to carry out deferred maintenance or opportunity maintenance on customers' aircraft because it is not generally contracted to perform that work. Where the defendant is so contracted (for example, in relation to Hawaiian Airlines aircraft), line maintenance engineers do not carry out arrival and departure checks because such aircraft are not in transit but are off line, flown (ferried) to and from New Zealand for specific contracted maintenance.

[243] Light and heavy maintenance engineers generally perform work on aircraft which are off line or out of service for the defendant's own domestic and international fleet aircraft and for a different and more limited set of international customers.

[244] I accept the plaintiffs' case that the most appropriate and practical way of identifying and distinguishing line maintenance work, is to consider whether it is the same as that work which was previously carried out by line maintenance engineers

with the Terminal Services Business Unit of Air New Zealand. This work was clearly negotiated to fall within the coverage of the Purple Book and, just as clearly, was never negotiated to come within the Blue and Green Book counterparts' coverages. It says that these distinctions have remained in several iterations of these collective agreements and continue in the current documents.

[245] There is really no dispute that there is a work activity within Air New Zealand known as "line maintenance", even although it may also now be called "ramp maintenance". One needs to look no further than the name of the Purple Book or beyond cls 10.9 of the Blue and Green Books to establish its existence. Defining it is the real issue.

[246] I have drawn on the history of aircraft engineering work practices within Air New Zealand in attempting to determine what is "line maintenance". There are no bright defining lines, on one side of which falls work that can clearly be described as line maintenance and on the other side of which is aircraft engineering work that is not. There are differences in engineering work arrangements between the company's operations at Auckland, Wellington and Christchurch and, in Auckland in particular, between its domestic and international operations. There are also differences between aircraft engineering work performed on Air New Zealand's own aircraft and that performed under contract with what it calls customer airlines.

[247] "Line maintenance" consists of two words each of which has a meaning and is also a phrase that has a meaning drawn from those two words. Although the focus at the hearing has been more on the word "line", even its companion "maintenance" is not entirely accurate. If "maintenance" denotes inspection, replacement of parts or consumables, and repair of minor defects, this does not adequately define the extent of "maintenance". It includes in practice inspections and airworthiness certifications.

[248] Nor can it be said that "line maintenance" is simply the work that is performed by Purple Book employees.

[249] When attempting to ascertain the meaning of the word "line" in the phrase "line maintenance", there are difficulties also, for example, in determining the extent to which it applies to aircraft that fly, usually or exclusively, between the hours of about 0500 and 2300 hours and are then figuratively "tied down", either on ramps or in hangars outside those hours. Particularly in the case of aircraft operating services internationally, there is generally no such predictable period of inactivity which might assist in determining that an aircraft is off line. Such aircraft tend to operate more or less continuously between major maintenance checks and overhauls, with their times on the ground being determined by the airline's flight schedules rather than the combination of the clock and flying schedules alone as is more often the case with domestic operations aircraft.

[250] Taking account of all of these factors arising out of the very complex and, at times, conflicting evidence of witnesses, and conceding that the following may not be a complete definition for all purposes or, at the margins, necessarily accurate, I nevertheless define "line maintenance" as follows.

[251] "Line maintenance" work is defined by a combination of the type of work performed and a description of the classifications of those employees who perform it. It is the work previously undertaken by AMEs, LAMEs and Team Leaders in the former division of the company known as the Terminal Services Business Unit. The work performed is that of checking, servicing, maintaining and certifying aircraft that are between scheduled services in the course of each flying day or other flying period, in preparation for such scheduled services at the start of a day's or period's flying, and at the conclusion thereof. Line maintenance work includes such work on both Air New Zealand's own aircraft, and contracted customer aircraft.

[252] "Line maintenance" work so defined may be distinguished from other Air New Zealand aircraft engineering work which includes work in and around the company's hangars at Auckland and Christchurch Airports and the performance of light and heavy maintenance (A and C checks) on both the company's own aircraft and contracted customer aircraft.

[253] Incursions into, and exceptions to, what would otherwise be considered to be line maintenance work as defined above by Blue and Green Book employees are, even if regular, relatively minor and are often out of necessity. Such incursions include the arrival on one day a week at Christchurch of a Qantas freighter aircraft and the processing of the arrivals and departure of customer aircraft (ferry flights) intended for hangar based maintenance including, in Christchurch, Virgin Australia (VA) and Virgin Australia New Zealand (VANZ) aircraft and, in Auckland, Hawaiian Airlines aircraft arriving before and departing after heavy hangar maintenance. Such work does not constitute "line maintenance".

[254] Falling the other (line maintenance) side of the dividing line in my assessment are the deployments of engineers to other airfields in New Zealand and, also temporarily, to overseas destinations including with charter flights, of engineers to perform line maintenance tasks in those locations. Such work is line maintenance work and is covered by the Purple Book for AMEA members.

[255] What is known as "AOG" work is not line maintenance when it cannot be performed by line maintenance engineers covered by the Purple Book. So, in practice, line maintenance of an aircraft will lose that status when the aircraft is declared to be "AOG" and the maintenance on it will not be covered by the Purple Book.

Coverage - decision

Lawful coverage clauses?

[256] To what forensic end is still enigmatic, but counsel for the plaintiffs maintain that the Purple Book in particular, but also the Blue and Green Books, do not contain coverage clauses that comply with the statutory minimum requirements for these essential ingredients of collective agreements.

[257] I disagree for the following reasons.

[258] As a matter of general approach to the validity of collective agreements in which the parties have settled on their definition of coverage and where this has continued essentially unaltered for a long time, the Court should not be astute to upset such arrangements with the potentially very widespread and disruptive consequences of a finding that there were no lawful collective agreements in existence. Rather, the Court should attempt to ascertain what the parties intended to be the coverage of work under their collective arrangements and to determine whether this meets the statutory minimum requirements for coverage. The Court should strive to find the existence of a coverage clause and to define its contents, rather than to give up too easily and declare an absence of coverage.

[259] The parties disagree, first, about the interpretation and application of the definition of the phrase "coverage clause" in s 5 of the Act. Essentially, the plaintiffs say that, however expressed, a coverage clause must identify the work covered by the agreement and, thereby, the covered employees who perform that work. Again essentially, the defendant says that in s 5's extended definition of the phrase "coverage clause", Parliament has allowed the work covered by the collective agreement to be identified not only by reference to that work or type of work but, independently, by reference to the employees or, particularly for the purposes of this case, "type of employees". The defendant's case is that the collective agreements' references to employee positions or roles comply with the statutory definition.

[260] The Act's definition of "coverage clause" is a broad one. For example, a collective agreement is not required to have a separate clause entitled "Coverage" or the like or even which refers necessarily to "coverage". Coverage may be addressed in another "provision in the agreement" but may, for the purposes of this case, specify the work that the agreement covers by reference to the "type of employees". There is, therefore in my conclusion, no necessity as Mr Roberts argued for, that the provision in the agreement must refer expressly to the work or type of work covered by it.

[261] The Blue and Green Books (which are materially identical in this regard) identify a number of "classifications" by titles of roles or positions. These include Lead Hand, 2 IC, Certifying Engineer – QCA/RTS, Certifying Engineer – QC,

Aviation Engineer 3, Aviation Engineer 2, and Aviation Engineer 1. Schedule 1 of those collective agreements also list work areas for some (but not all) of the classified positions including Lead Hands and 2 ICs. Those work areas include the paint shop and the trim shop. The work areas identified are all in the aircraft hangar and associated areas at the defendant's airport sites at Auckland and Christchurch. These areas are what continue to be known generally as the ANZES areas. Those work areas do not include the work areas known generally as the ramp. The work areas for the employees classified by their roles under the Blue and Green Books are synonymous with the work areas identified in the list of facilities set out in Air New Zealand's NZCA 145 document.

[262] Turning to coverage under the Purple Book, it is common ground that this is less easily identified than in the cases of the Blue and Green Books but coverage may, nevertheless in my conclusion, be discerned sufficiently by a combination of the relevant contents of this collective agreement when viewed in context with the coverage provisions of the Blue and Green Books. That is not to say that the coverage provisions of the Blue and Green Books determine coverage under the Purple Book: that is not permitted by the Act which requires that coverage be determined by reference to the contents of the collective agreement in issue. Rather, the relevance of the Blue and Green Books is in assisting the Court to discern what the parties intended to be the meanings of the words and phrases used by them in their Purple Book coverage provisions.

Do the Blue and Green Books contain valid coverage provisions?

[263] As already noted, the Blue and Green Books contain a clause (1.4) entitled "Coverage". For the purposes of this case (and excluding flight simulator engineers, apprentices and trainees), there are two qualifications for coverage. These are referrable to employees rather than being descriptive directly of the work performed.

[264] The first qualifying factor is that the collective agreement "applies to all Employees of the Company who are employed in ANZES". "ANZES" is defined in cl 3.1 of the collective agreement as being "for the purpose of this CEA means Air

New Zealand Engineering Services, including Light and Heavy Maintenance, a division of the Company".

[265] The second and cumulative qualifying factor for coverage is that such employees who are employed in ANZES (as defined) must fall within any of the classifications specified in Schedule 1 to the agreement. These include "Lead Hand", "2 IC", "Certifying Engineer – QCA/RTS", "Certifying Engineer – QC", "Aviation Engineer 3 (AE3)", "Aviation Engineer 2 (AE2)", "Aviation Engineer 1 (AE1)", "Tool Store Lead Hand", "Took Store Person 3", "Tool Store person 2", "Tool Store Person 1", "Non-Trade Lead Hand", "Trade Assistant", Non-trade", "Senior Logistics Controller", and "Logistics Controller".

[266] I conclude that cl 1.4 meets the minimum statutory requirements for a coverage provision because it refers to "types of employees" to whom the collective agreement applies.

Does the Purple Book contain a valid coverage provision?

[267] Turning to whether there is coverage under the Purple Book and, if so, what it is, the plaintiffs also rely on a number of clauses in this collective agreement in support of their arguments about the limited coverage of its Blue and Green Book counterparts. If the Purple Book is an effective collective agreement,[20] the plaintiffs say that it indicates the parties' common understanding of the distinction between work types, line maintenance on the one hand and light and heavy maintenance on the other. They say also that it shows that the parties bargained for terms and conditions of line maintenance work in negotiations for the Purple Book, but not in negotiations for its Blue and Green Book counterparts.

[268] The Purple Book is the Air New Zealand Technical Operations Aviation and Marine Engineers Association Line Maintenance Engineers Collective Employment Agreement 3 October 2011 to 6 October 2013. It consists of a number of clauses, each of which is described in a heading. There is no clause headed "Coverage" or

[20] An issue raised by the AMEA itself but which, because I have determined that all collective agreements have lawful coverage clauses, will not need to be decided in this case.

the like but that is not necessary for compliance with s 64(3)(a) of the Act so long as there is, first, a provision in the agreement and, second, that this addresses its coverage as defined in s 5.

[269] Mr Roberts for the Unions submitted that the requirement for a coverage clause is met, not solely by cl 3 ("Classification/certification") but also by references elsewhere in the Purple Book to line maintenance work.

[270] I conclude that, in combination, cl 3 and references in the Purple Book to line maintenance work (including in the very title to the document) meets sufficiently the statutory definition of a coverage clause. The work covered by the Purple Book is the work of line maintenance by those employees referred to in cl 3.

Transfer clauses

[271] I accept the plaintiffs' analysis of the significance of the transfer clauses and reject the defendant's. Although cls 10.9 and 39 do refer to pay for employees transferred temporarily between duties, the transfer clauses also limit the periods of such transfers. This acts as a constraint upon the defendant's ability to call on light and heavy maintenance engineers to undertake light maintenance engineering and vice versa. Any longer periods must be by agreement with the employees concerned.

[272] Clauses 10.9 is not consistent with the defendant's fundamental position in the litigation that line maintenance work is covered by the Blue and Green Books so that it is entitled to direct those employees to perform line maintenance work as and when it wishes. As Mr Roberts submitted, if that were so, cl 10.9 would have little or no significance except to the extent that it may entitle light and heavy maintenance engineers to be paid more for their performance of line maintenance work.

[273] The defendant's interpretation of cl 10.9 does not take account satisfactorily of the reference in cl 10.9.1 to such transfers being "to cover short term absences". The employer has bound itself not to call on Blue and Green Book employees to

carry out the duties and responsibilities of employees in line maintenance other than "to cover short term absences".

[274] Nor can it be argued that the necessity for the existence of a short term absence applies only to temporary transfers of up to one calendar week. The requirement of a short term absence to permit a temporary transfer extends to such transfers of more than a week but which must be agreed specifically with the employees concerned.

[275] The existence of cl 10.9, read together with cl 39 of the Purple, and its interpretation of it, were significant factors in my conclusion that the Blue and Green Books do not cover line maintenance work as the defendant contends.

[276] The Purple Book covers aircraft engineers performing line maintenance work (as defined). The Blue and Green Books cover aircraft engineers (and others) performing aircraft engineering work (and other associated tasks) other than line maintenance work (as defined).

[277] Except in accordance with the temporary transfer provisions of each of the collective agreements, line maintenance work is covered under the Purple Book.

[278] Complementing that Purple Book coverage of line maintenance work, the coverage provisions of the Blue and Green Books exclude aircraft engineers engaged for and on line maintenance work.

Civil Aviation Act considerations

[279] The Civil Aviation Act 1990 establishes the New Zealand Civil Aviation Rules. Rule 145 itself prescribes rules governing the certification and operation of aircraft maintenance organisations. Air New Zealand's Technical Operations CAA NZ Part 145 document describes how the defendant complies with r 145.

[280] The plaintiffs say that in this document the employer has clearly distinguished and separated work done by light (and heavy) maintenance engineers from work done by line maintenance engineers. The plaintiffs say that the

defendant's own publication goes further and separates expressly Air New Zealand Engineers Services (ANZES) and Line Maintenance operations in Auckland. They say that while this civil aviation document does not determine coverage, it does nevertheless identify the work area referred to as that of ANZES, as quite different from the work areas where Line Maintenance is undertaken. It is Air New Zealand's document and illustrates the defendant's longstanding and still current separation of these maintenance types.

[281] As to the defendant's position in reliance on the definitions of "Line Maintenance Auckland" and "Light Maintenance Auckland". as showing that the work of light maintenance also includes line maintenance, the plaintiffs say that this ignores very clear differences. The provisions relating to line maintenance include:

> The major functions are to provide Air New Zealand, external/contracted and ad hoc Line Maintenance capabilities throughout the network.
>
> - Carry out routine and non-routine maintenance of on-line aircraft …

[282] As to the document's reference to light maintenance, it provides as follows:

> The major function is to provide Air New Zealand and customers' Light Maintenance capabilities in the Akl hangars:
>
> - Carry out routine/non-routine and modifications of hangar aircraft to approved maintenance standards.
>
> - Support Line Maintenance on online-aircraft if required …

[283] The plaintiffs say that these differences are significant in that the defendant has defined the major function of line maintenance as "Line Maintenance capabilities" in relation to "on-line aircraft" whereas the major function of light maintenance is "Light Maintenance capabilities in the Akl hangars" on "hangar aircraft". Where those functions intersect, to a limited extent, the involvement by light maintenance in line maintenance, is said to be in a supporting role. That is said to be consistent with the evidence of involvement of light maintenance engineers in an AOG situation that cannot be resolved by line maintenance engineers. It is, however, said to be entirely inconsistent with light maintenance carrying out indiscriminately line maintenance as well as major (light and heavy) maintenance functions, as is the defendant's case in effect.

[284] In this respect, also, the plaintiffs' position impresses me as being more logical and persuasive than the defendant's. Again judging the defendant's words by its actions, they are inconsistent, casting further significant doubt on the correctness of its argument that the Blue and Green Books cover all line maintenance work so that it is entitled to direct employees covered by those collective agreements to perform all line maintenance work.

What work is covered/not covered by the collective agreements?

[285] Having concluded that all three collective agreements at issue contain coverage provisions that comply with the statute, I now move to decide whether the Blue and Green Books cover line maintenance work (as defined) and line maintenance engineers.

[286] They do not do so for the reasons advanced by the plaintiffs and summarised earlier in this judgment.

[287] Coverage of collective agreements is, by statute, a matter for negotiation and agreement between the parties to the collective bargaining. Coverage is not to be determined unilaterally by the employer whether, as in this case, by drawing deliberately general job descriptions for classes of aircraft engineer or individual engineers, or otherwise. The parties and the Court must look to the product of collective bargaining (collective agreements) on the issue of coverage, to determine what work is covered. Where, as in this case, there are multiple agreements operating in the same general field, an analysis of all such agreements will be necessary to define the coverage of each. Here, that comparative analysis is of the Blue and Green Books, on the one hand, and the Purple Book, on the other.

[288] To use an uncontroversial example, but one that illustrates the point, each of the Blue and Green Books purports to cover the same job classifications. The distinguishing feature which determines the coverage of each is union membership. So, it is clear that the Blue Book covers the work of employees within the listed classifications who are members of the AMEA. Coverage by the Green Book includes employees who are engaged under the same work classifications but who

are members of the EPMU. That is a distinction that the parties have agreed upon in bargaining by providing for separate collective agreements rather than, as they might have, for a single multi-union/single employer collective agreement.

[289] So, when it comes to determining in practice the coverage of the Blue and Green Books, regard must be had not only to their own coverage provisions but also to the coverage of the Purple Book and, potentially although not in issue in this case, the coverage clauses of any other collective agreements affect the work of aircraft engineers. Even more broadly, regard might be had to the collective agreement coverage of persons who handle aspects of the arrival and departure of aircraft such as directing their parking, the placement of chocks and cones, and the movement of such aircraft into positions other than under their own power.

[290] This part of the decision turns essentially on what the parties to the 2008 collective bargaining intended to mean by the changes they made to coverage under the Blue and Green Books, which changes have remained materially unaltered since then.

[291] I do not accept the defendant's case about the meaning of those changes (also summarised earlier in this judgment). While it is correct that coverage under the Blue and Green Books was and is not limited to light and heavy aircraft maintenance, that is not to conclude thereby that it extends also to line maintenance of aircraft. That is because of the existence of the Purple Book and its coverage of line maintenance work as defined in this judgment.

[292] In these circumstances, I have concluded that, despite some attempts by both parties in 2008 to clarify the coverage issue, in the resultant collective agreement they went only so far as to confirm the previous coverage of the Blue and Green Books by including expressly "light maintenance" but also, by strong implication, excluding line maintenance from coverage under those two collective agreements.

[293] This interpretation is consistent with the relevant statutory provisions including those addressing the initiation of bargaining, the employer's communications to new employees about relevant collective agreements, and

generally under the statute. This interpretation is also consistent with the practice of the parties, at least until the issue came into focus as a result of the defendant's proposed restructuring. To the extent that other aircraft engineers may have been performing line maintenance work at the company's direction, that is, for the reasons set out previously, both insufficient and arises out of circumstances described that it does not tip the otherwise very considerable balance in favour of the plaintiffs' position.

[294] I agree that the parties agreed to two significant things with regard to coverage. First, the plaintiffs say that they agreed to amend the coverage clauses to reflect the company's current organisational structure and, second, they agreed that employees covered by the previous collective agreement would continue to be covered by its successor, that is, the plaintiffs say, coverage crystallised at that time. The 30 May 2008 terms of settlement (document X) were ratified by union members so that they were to form the basis of the collective agreement to be drawn up for signing by the parties' representatives. That collective agreement amended the previous definition of "ANZES", a significant element of the coverage clauses. The definition of it was changed from "means Air New Zealand Engineering Services" to a new definition, "For the purposes of this CEA, means Air New Zealand Engineering Services, including Light and Heavy Maintenance, a division of the Company."

[295] I accept the plaintiffs' case emphasising what they are say are the significances of the 2008 amendments to the Blue and Green collective agreements. The addition of the words "For the purposes of this CEA" confines the definition to the collective agreements and gives ANZES a discrete meaning within those documents. Regardless of whether ANZES was then used by the defendant to describe a business unit or indeed even if no company employees may have been working for ANZES, that acronym nevertheless had a specific meaning created or reiterated for the purpose of those collective agreements.

[296] The defendant's case is, however, that pre-existing coverage did not change after the 2006 collective agreements. I disagree and conclude that in those earlier Blue and Green Books, "ANZES" could not have included line maintenance work

because it was still undertaken by the Terminal Services Business Unit. So, the plaintiffs say, if the defendant is right that coverage did not change in 2006, this strengthens their cases.

[297] The addition of the words in 2008 "including Light and Heavy Maintenance" reflected the then organisational structure as agreed to in the 30 May terms of settlement. Those additional words were not used by the parties before 2008, but the parties having chosen to include them specifically, the Court assumes that this was done for a purpose, namely to explain limits of coverage.

[298] Even if the defendant is correct that line maintenance work which had previously been conducted by the Terminal Services Business Unit was and continues to be a not insignificant proportion of the work done by other aircraft engineers, it was not ever included within the bargaining for the Blue and Green Books. It was, and remains, included separately from light and heavy maintenance even in the defendant's currently planned restructure and is described as "ramp maintenance".

[299] Turning to subsequent renegotiations of those collective agreements in 2009 and 2011, even if they were the products of "bargaining", the resulting collective agreements did not change the issue of coverage. Indeed, these negotiations and resettlements of the collective agreements provided the defendant with two further opportunities to have confirmed expressly to the Unions its claimed current view that the Blue and Green Books cover all line maintenance work, but Air New Zealand did not do so.

[300] The defendant's position is now not only that line maintenance work can be done by engineers currently engaged in light or heavy maintenance but, more importantly for the purposes of this case, the Blue and Green Books cover line maintenance work in a way that enables it to effect its restructuring lawfully without the plaintiffs' agreement. I accept, however, that this is a very significant change from the approach that Air New Zealand took, even from 1993 to 2007 during which period line maintenance engineering was undertaken in a different business unit of the company.

[301] Collective bargaining for the Blue and Green Books (including their 2006 versions in which important provisions were first stated) included, among other associated work, hangar (light and heavy) maintenance but bargaining for the Purple Book only included bargaining about line maintenance. Indeed, the 2006 Blue and Green Books could not have included the line maintenance work as most of it was still then in a separate business unit, Terminal Services, whereas the Blue and Green Books were negotiated with the Engineering Business Unit.

[302] Particularly important to the decision of this case are three aspects of the words of the Blue and Green Books' coverage clauses. The first relates to the importance of ANZES (and its definition) affecting coverage. The second is that the "classifications specified in Schedule 1" (referred to in cl 1.4.1) are the "work areas" only of, or associated with, light and heavy maintenance and there is no reference at all to line maintenance areas in those collective agreements. Third and finally, the plaintiffs' case refers to cl 1.4.3 relating to new "classifications".

[303] Turning in more detail first to the importance of "ANZES", the Blue and Green Books encompass "… all employees of the Company who are employed in ANZES …". ANZES is defined in cl 3.1 of those collective agreements as follows: "ANZES for the purpose of this CEA means Air New Zealand Engineering Services, including Light and Heavy Maintenance, a division of the Company."

[304] It is not determinative of the coverage issue that ANZES may no longer exist formally as a division of Air New Zealand. Since the time when the defendant itself claims to have ceased to have a division so-named, the parties bargained for and settled collective agreements defining coverage by reference to ANZES. This included references to light and heavy maintenance but omitted what the plaintiffs say is the third type of aircraft engineering work, line maintenance. So, the Blue and Green Books define their coverage as excluding line maintenance work.

[305] I do not accept the defendant's case that ANZES has been "renamed" ANZTO and should be so defined for the purposes of these collective agreements. ANZES is still the name commonly applied to the engineering base areas at Auckland and Christchurch airports but excludes line maintenance, much if not most

of which takes place on the ramps (which are not ANZES areas) at those two sites. This is reinforced by Air New Zealand's own documentation drawn up to comply with New Zealand civil aviation requirements and, in particular, the document known as NZCAA 145.

[306] The 2006 Blue and Green Books upon which the defendant relies significantly also referred to ANZES in their coverage clauses although the agreements could not have included line maintenance in 2006 as it was then still in the Terminal Services Business Unit which had separate collective agreements. I do not accept the argument for the defendant that its decision to bring line maintenance under ANZTO in 2007 means that coverage of the Blue and Green Books thereby expanded, but without any bargaining for, or agreement about, the inclusion within them of line maintenance work.

[307] Irrespective of the defendant's position that ANZES is no longer a business unit within its corporate structure and that the use of the name is simply for marketing purposes,[21] in practice it is still a term used widely within Air New Zealand to mean light and heavy maintenance operations. I am sceptical that large signs on hangar buildings at airports constitute "marketing" if that word means the promotion of the business of its contracted engineering services to other airlines. It is difficult to accept that potential customers of aircraft engineering would be attracted to put their business Air New Zealand's way by the signs on its hangars. They appear to more probably identify, to persons in and about the airports, the activities carried out in the buildings so identified.

[308] As already noted, Air New Zealand uses the term ANZES in its regulatory documentation for the Civil Aviation Authority where it is still used to refer to the area of the relevant airports where hangar maintenance operations are based. This documentation appears to have been at least reviewed, if not updated, as recently as September 2011.

[21] Air New Zealand says that this "marketing" use accounts for the prominent and multiple use of "Air New Zealand Engineering Services" signs on hangars at Auckland International Airport, some at least of which appear to have been placed there and maintained more recently than 2006.

[309] Most importantly, however, the term ANZES is still intact in the current Blue and Green Books despite several rounds of bargaining and renewals of those agreements since the defendant says that ANZES ceased to be a business unit. This use includes on the covers of the Blue and Green Books. It is significant that the term "ANZES" does not appear likewise in the Purple Book because, as counsel Mr Roberts submitted, line maintenance has not ever been a part of ANZES.

[310] Schedule 1 of the Blue and Green Books identify a number of classifications by titles of roles or positions such as Lead Hand, 2 IC, Certifying Engineer – QCA/RTS, Certifying Engineer – QC, Aviation Engineer 3 (AE3), Aviation Engineer 2 (AE2), and Aviation Engineer 1 (AE1). These classifications do not specify the work to be performed by their holders. Schedule 1 (at p57) of those collective agreements also list work areas for some classified positions such as Lead Hand and 2 IC. Those work areas include the paint shop and the trim shop. Lead hands and 2 ICs supervise work performed in the hangar areas by other engineers. All of the listed work areas are located in or around the engineering hangars and within what is generally still known as the ANZES areas. None of those work areas is located on what is known as "the ramp", the tarmacs for temporary aircraft parking at or adjacent to passenger and freight terminal buildings. They are, however, synonymous with the work areas identified in the list of facilities set out in Air New Zealand's NZCAA 145 document.

[311] The Blue and Green Books cover light and heavy maintenance work carried out in the listed work areas only but do not extend to work that is performed in line maintenance which is work that is generally carried out elsewhere. The Blue and Green Books have defined the work covered by the type or nature of that work (light and heavy maintenance) and the areas where it is carried out (in ANZES).

Consequences of coverage decision

[312] Having established not only that line maintenance work (as defined) is not work covered by the Blue and Green Books, but is work covered expressly the Purple Book, what is the consequence of this for the directions that Air New Zealand can lawfully give to affected employees about what work they are to perform?

[313] None of the collective agreements goes so far as to say that the employer shall only allocate the work covered under any particular agreement only those employees who are subject to it. In one sense, that would probably be unlawful because Air New Zealand is entitled to (and probably does) employ aircraft engineers as AMEs, LAMEs or Team Leaders who are not members of the AMEA or any other union. So the question becomes, in the context of this case, whether Air New Zealand is entitled to direct employees who are not AMEs, LAMEs or Team Leaders to perform line maintenance work that is covered by a current collective agreement (the Purple Book) where such employees are members of either of the plaintiff unions.

[314] The Act does not assist expressly in determining this question. Section 56(1)(b) provides materially that a collective agreement that is in force binds, and is enforceable by, employees who are employed by an employer party to the agreement, who are members of a union that is a party to the agreement, and whose work comes within the coverage clause in the agreement.

[315] When, however, those provisions are applied to the instant circumstances of mutually exclusive coverage clauses between the Purple Book on the one hand and the Blue and Green Books on the other, the answer to the question becomes clearer.

[316] Section 61 of the Act provides for employers and employees subject to a collective agreement to agree upon additional (individual) terms and conditions which are "not inconsistent with the terms and conditions in the collective agreement": s 61(1)(b). It would be such an inconsistency, and therefore a breach of s 61, for Air New Zealand to direct an employee who is a member of either the AMEA or the EPMU, and whose work is covered by the Blue or Green Book collective agreements' coverage clauses, to perform work covered by another collective agreement, ie line maintenance work under the Purple Book.

[317] There is another way of determining this issue. As noted earlier in this judgment, it is a very longstanding principle of the common law of employment that an employee may only be subject to a work performance direction by his or her employer that is lawful and reasonable.

[318] Under the defendant's restructuring proposal now, the Purple Book will continue in existence. Even at best from the employer's point of view, there is no question that it would not cover the employment of line maintenance employees at Wellington Airport. The Purple Book's application is not, however, limited by location only to employees based at Wellington. It applies to line maintenance work of aircraft engineers at any location at which that takes place including Auckland and Christchurch Airports and, at the former, on both international and domestic aircraft engineering.

[319] The purposes of coverage clauses and collective agreements are not limited to the engagement of new employees who may wish to join a union. They extend to identifying the terms and conditions of employment applicable to existing employees, also, at least for the duration or currency of an applicable collective agreement.

[320] What is the consequence of the Purple Book having coverage of line maintenance work and the Blue and Green Books not having such coverage? If only because the proposed restructuring of aircraft engineering operations will include the continuation of line maintenance (or, as the defendant now prefers to call it, ramp maintenance) in Wellington as well as in Christchurch and domestically and internationally in Auckland, employees performing line maintenance work as defined, and who are members of AMEA, are entitled to continue to be covered by the Purple Book.

[321] It is in these circumstances that the defendant must approach its aircraft engineering restructuring exercise and in which it must engage with the Unions.

Estoppel

[322] Each side claims that the other is stopped from asserting the positions that they have now taken in this litigation because of their past relevant conduct. I have decided to deal with these estoppels arguments separately and subsequently to the substantive decision of the remainder of the case which largely favours the plaintiffs' position. This course also enables the Court to determine separately and, as the

defendant says, whether even if the Unions may be correct, they should not be entitled to the relief they seek on the grounds of estoppel.

Estoppel – plaintiffs' case

[323] The plaintiffs say it would be unconscionable to allow the defendant to succeed in all the circumstances of this case. The plaintiffs rely on estoppel as a sword, that is as a cause of action, and not merely as a defence to one: *Clark v NCR (NZ) Corporation.*[22] They say that estoppel provides a remedy to prevent unconscionable conduct by another party including, in some cases, the enforcement of that other party's representations made to the claimant: *Commonwealth of Australia v Verwayen*.[23] The plaintiffs say that the essential constituents to be proved for an estoppel are four. First, a belief or expectation must have been created or encouraged through some action, representation, or omission to act by the party against whom the estoppel is alleged. Second, the plaintiffs say that the belief or expectation has been reasonably relied on by the party alleging the estoppel. Penultimately, detriment will be suffered if the belief or expectation is departed from. Finally, it would be unconscionable for the party against whom the estoppel is alleged to depart from that belief or expectation.

[324] Dealing with each of these elements in turn, the plaintiffs say that the defendant must have played such a role in the adoption of their belief that it would now be unconscionable for the defendant to resile from it.[24] The plaintiffs say that their belief or expectation was that the Blue and/or Green Books did not cover line maintenance work and that in the context of a collective agreement, the defendant so held out to the officials of the Unions as representatives in bargaining of its employees. The plaintiffs say that the defendant's following omissions created or encouraged their beliefs about coverage:

- by not bringing the line maintenance employees' attentions to the bargaining for the Blue and/or Green Books as required by s 43;

[22] [2006] ERNZ 401.
[23] (1990) 95 ALR 321.
[24] *Verwayen* at 356.

- by not informing new employees beginning in line maintenance that their work was covered by the Blue and/or Green books as required by s 62(2) and (3) of the Act; and

- by omitting to assert coverage of line maintenance work in bargaining for the Blue and/or Green Books.

[325] The plaintiffs say that individually and collectively, these omissions amounted to a representation by the defendant that the Blue and Green Books did not cover line maintenance work. They say that as regards the first and second omissions set out above, the plaintiffs' belief was created or encouraged by the defendant not meeting its statutory requirements (if indeed the Blue and/or Green Books do cover line maintenance work). With respect to the third omission set out above, the plaintiffs say that in the circumstances prevailing, silence may, and in this case did, give rise to an estoppel either by amounting to a genuine misrepresentation or because the silent party was under a duty to speak.[25]

[326] In particular the plaintiffs say that because estoppel may arise by, or be inferred from, conduct,[26] the defendant's omission to assert coverage in bargaining was itself a representation that the line maintenance work was not covered. Alternatively, the plaintiffs submit that the defendant's omission to assert coverage took place in circumstances where it was under a legal duty to speak pursuant to statutory obligations to act in good faith towards the plaintiffs and, in particular, not to mislead or deceive or do anything (such as remaining silent) likely to mislead or deceive them.[27]

[327] The plaintiffs say that silence, in light of surrounding circumstances, is sufficient to create the requisite belief or expectation. In this submission they rely on the judgment of the Court of Appeal in *Purewal* which adopted the summary of estoppel in Every-Palmer's Equity and Trusts in New Zealand:[28]

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[25] *Connell Street v Purewal BS and JK* (2010) 12 NZCPR 587 (HC) and *Purewal BS and JK v Connell Street* (2012) 13 NZCPR 108 (CA).
[26] *Verwayen* at 356.
[27] Section 4 Employment Relations Act 2000.
[28] James Every-Palmer "Equitable Estoppel" and Andrew Butler Equity and Trust in New Zealand (2nd ed) Thomson Reuters Wellington 2009 at [60]-[61].

> The equitable doctrine of estoppel by acquiescence (which was a strand of proprietary estoppel), traditionally protected the party who relied on a belief or expectation fostered by the silence of another party in circumstances rendering it unconscionable for the silent party to resile from the belief or expectation. This principle now identifies one of the kinds of conduct which may give rise to a cause of action based on the doctrine of modern equitable estoppel.

[328] Although, at [61] of *Purewal*, the Court of Appeal acknowledged the author's point that "In general the law is reluctant to impose liability on a party who simply remains silent and allows another party to act to his or her detriment", the Court of Appeal accepted that one of the circumstances where silence may give rise to an estoppel occurs where the silent party was under a duty to speak.

[329] Counsel for the plaintiffs submit that English jurisprudence is more developed than New Zealand's on the questions of duty to speak. Again the Court of Appeal in *Purewal* regarded with apparent favour the English "reasonable expectations" approach that a duty will arise where "a reasonable man will expect the person against whom the estoppel is raised, acting honestly and reasonably, to bring the true facts to the attention of the other party known by him to be under a mistake as to the respective rights and obligations."[29]

[330] The plaintiffs say that, given the statutory good faith obligations on the defendant,[30] that test is both appropriate to, and satisfied in, the present case. Put shortly, the plaintiffs say that if the defendant genuinely believed that the coverage of the Blue and Green Books included all of the line maintenance work, then it was duty bound to say so in bargaining but remained silent.

[331] Moving to the second requirement for reasonable reliance on the representation, the plaintiffs say that their reliance must have been reasonable (judged objectively) in three senses. These are, first, that the belief or expectation must have been reasonably held; second, it must have been reasonable for the plaintiff to have relied upon the belief or representation; and, third, ongoing reliance on it must also have been reasonable.[31] This objective assessment will depend upon

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[29] *Purewal* at 632 citing *The Lutetian* [1982] 2 Lloyd's Rep 140 at 157.
[30] See ss 4(1), (1A)(b), (2)(b) and (4)(a) of the Act.
[31] Every-Palmer at 615.

the circumstances of the case as well as the nature of the belief or expectation. The plaintiffs accept that the representation must be clear and unambiguous although it is not necessary for it to be susceptible of only one interpretation.[32]

[332] The plaintiffs say that it is not necessary to show that the defendant had the influencing of the plaintiffs, in any particular manner, as an object, nor that it proposed deliberately to mislead or deceive the plaintiff. Rather, they say it is sufficient if the defendant so conducts itself that a reasonable entity in the plaintiffs' position would take the representation to be true and believe that it was meant to induce the plaintiffs to act in that manner.[33]

[333] For the following reasons, the plaintiffs submit that their belief was reasonably held and relied upon. The defendant is a large corporation with ready access to human resources and legal advice. The plaintiffs say that not bringing the line maintenance employees' attention to the bargaining for the Blue and/or Green Books, and not informing new employees commencing work on line maintenance that their work is covered by those collective agreements, was a clear and unambiguous representation that those collective agreements did not cover line maintenance work. The plaintiffs say that they relied upon this representation as agreement to the meaning of the terms of the language then used to describe coverage in the respective collective agreements.

[334] The plaintiffs point to the evidence of Kevin Bryce that the defendant's Mary Haley informed him that the words "including light and heavy maintenance" had the same effect as the words "excluding line maintenance". In evidence Ms Haley did not deny making that statement but said that she could not recall doing so. She did, however, say that she, together with the defendant's Paul Wallace, were the company's representatives involved in dialogue with Mr Bryce about the drafting of the amendments to the Blue and Green Books in 2008. Ms Haley also agreed that the words "including light and heavy maintenance" were provided by the company's in-house lawyer, Mr Doak, and that she would have provided an explanation for them to the Union bargaining representatives. I accept the plaintiffs' case that Ms

[32] *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Product Marketing Co Ltd* [1972] AC 741, 755f and 756d-f.
[33] *Freeman v Cooke* [1843-60] All ER Rep 185, 189.

Haley conveyed this advice to Mr Bryce who represented the plaintiffs in the negotiations.

[335] The plaintiffs say that when, during the 2008 collective bargaining, at a time that the very issue of coverage in relation to line maintenance work was raised by the Unions, not only did Air New Zealand fail to assert that it considered that the Blue and Green Books covered the line maintenance work that was previously in the Terminal Services Business Unit, but it provided the words "including light and heavy maintenance" for inclusion in the coverage clause. The plaintiffs say that, as line maintenance is such a considerable body of work, its omission is significant and it was therefore only reasonable for the plaintiffs to rely on the reference to light and heavy maintenance as excluding line maintenance. The plaintiffs say that it was immaterial in all the circumstances that the Unions' claims to amend coverage were withdrawn during the course of the bargaining.

[336] Next, the plaintiffs accept that they must establish some detriment or loss in reliance on the employer's representations. The authorities show that detrimental reliance may take one of two forms.[34] First, the party claiming the estoppel may have spent time, effort or money in reliance on the belief or expectation which would not have been spent if the representation had not been made and which is rendered worthless if the belief or expectation is abandoned. Second, in reliance on the belief or expectation, the party claiming the estoppel may have foregone other opportunities to gain benefit which will be lost (or avoid the detriment which will be suffered) if the belief or expectation is abandoned.

[337] Here the plaintiffs claim to have suffered detriment of the latter type in reliance on the employer's representation. They say that they have foregone the opportunity to bargain for an express exclusion within coverage or, alternatively, terms and conditions, including such matters as pay, allowances and shift patterns, for the benefit of employees performing line maintenance work, during their negotiations for the Blue and Green Books. To identify what clauses might ultimately have been agreed to in such negotiations, is speculative. The plaintiffs nevertheless invite the Court to find that line maintenance would have either been

[34] *Smyth v Wadland* (2007) 26 FRNZ 255, [134] (HC).

expressly excluded or included and, if the latter, at least some terms relating to line maintenance would have been included in the Blue and Green Books.

[338] Fourth is unconscionability. The plaintiffs say that for the forgoing reasons it would be unconscionable for the defendant to now depart from them, the plaintiffs having relied on them to their detriment.

[339] As to relief for estoppel by unconscionable conduct, the plaintiffs say that the law is flexible in determining the appropriate equitable relief to achieve the aim of remedying the previously unconscionable conduct.[35]

[340] The plaintiffs say that there are two broad classes of remedy. The first is reliance-based with the aim of putting the plaintiffs in the position in which they would have been if the defendant's representations had never been made and relied on. The second form of relief is expectation-based, aiming to put the plaintiffs in the position in which they would have been if their beliefs had been fulfilled.[36]

[341] Applying these to the facts of this case, the plaintiffs say that a reliance-based remedy would allow them to have bargained for the Blue and Green Books, knowing that the defendant considered that these included line maintenance work. The plaintiffs say that this remedy is more difficult to pinpoint with precision both because it is speculative as to what would have been agreed on in the 2008 bargaining, and because of the practical inability to now rewind the clock.

[342] In the case of expectation-based relief, the plaintiffs say that they would be in their present position, having collective agreements whose coverage is as they understand it, that is excluding line maintenance work. This, the plaintiffs submit, is the appropriate remedy to redress the defendant's unconscionable conduct. The plaintiffs seek a declaration that the Blue and Green Books do not cover line maintenance work.

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[35] *Verwayen* at 344-345 and 363.
[36] Every-Palmer at 637.

Estoppel – decision of plaintiffs' claim

[343] The plaintiffs are entitled to succeed on their estoppel cause of action and to the declaration that they seek that the Blue and Green Books do not cover line maintenance aircraft engineering work as defined and applied in this judgment.

[344] The foregoing summary of both the law and the application of relevant facts to it is cogent and really cannot be improved upon. As summarised previously, I accept that the defendant's conduct created and then encouraged in the plaintiffs a belief or expectation that the Blue and Green Books did and do not cover line maintenance work. That belief or expectation was created and subsequently encouraged by the omissions of the defendant to assert otherwise in circumstances in which it was obliged to do so. The plaintiffs' beliefs or expectations were relied on reasonably by then in all the circumstances.

[345] Next, I accept the plaintiffs' case that they will suffer detriment if those beliefs or expectations are now departed from by permitting the defendant to assert that the Blue and Green Books cover and have covered line maintenance aircraft engineering work.

[346] Finally, I accept the plaintiffs' case that it would be unconscionable to permit the defendant to now depart from those beliefs or expectations reasonably held by the plaintiffs.

Estoppel – defendant's case

[347] The defendant also invokes the equitable doctrine of estoppel, albeit as a shield to the plaintiffs' claims. It says that even if there is some ambiguity in the interpretation of the coverage provision, the plaintiffs are now estopped from asserting the interpretation of cl 1.4.1 that they suggest. The defendant relies on the *Vector Gas* judgment to confirm that where parties to a contract accept and operate on the basis of a particular meaning of it, an estoppel can arise preventing one from later disavowing that interpretation of the document.

[348] Here, Mr Caisley submitted, the Blue and Green Book staff have undertaken what the plaintiffs claim is line maintenance work, for many years. The new collective agreements were entered into on the basis of that underlying factual position and the parties continued to operate on the same basis after the settlement of the latest contract.

Estoppel – decision of defendant's claim

[349] In addition to my conclusion that the plaintiffs are entitled to succeed on their estoppels argument, I find against the defendant's estoppel defence for the following reasons.

[350] First, some of the controversial work performed by Blue and Green Book aircraft engineers is not line maintenance work as I have interpreted and applied that phrase, so that there is no question of an estoppel. That includes: AOG work when line maintenance engineers cannot get an aircraft that is on line back in the air on schedule; the arrivals and departures of aircraft for hangar maintenance; and the Qantas freighter arrival in Christchurch on Sundays.

[351] Next, such gradual encroachments by Blue and Green Book engineers (directed by the defendant) into the work of line maintenance as defined, has been acquiesced in by the plaintiffs and particularly by their line maintenance engineer members more as a gesture of goodwill to the company to keep aircraft operational rather than any surrender of what they now claim to be their rights to that work to the exclusion of Blue and Green Book staff. It would not, in these circumstances, be equitable or in good conscience and, for the purpose of supporting successful employment relationships prompting good faith behaviour, to hold that conduct against the plaintiffs and their members in these proceedings: s 189(1) of the Act.

[352] Finally, those examples of Blue and Green Book staff performing line maintenance work are, although real, nevertheless minor in the overall picture in which there is still a very substantial division of line maintenance work performed by Purple Book staff on the one hand and heavy and light aircraft engineering performed almost exclusively by Blue and Green Book staff on the other.

[353] A decision made in equity and good conscience on this issue does not support the existence of an estoppel denying the plaintiffs the right to assert their position in this litigation.

Miscellaneous issues

[354] The defendant addressed what it anticipated might have been an argument advanced for the plaintiffs that some Blue and Green Book employees do not have some of the qualifications required immediately to do some of the work that Purple Book staff currently undertake. To the extent that this was advanced as part of the case for the plaintiffs (and, if so, it was faintly), I would agree with the defendant that this is a matter of obtaining or retaining qualifications and privileges to undertake line maintenance work on the aircraft of other airlines. It is not a matter upon which the case will turn. Also, as the defendant points out, the qualifications and privileges attach to those who supervise and sign off work rather than those who actually perform it.

[355] Finally, in this regard, the company's case is that, as part of its proposed restructuring, it will upskill and further train some Blue and Green Book employees to ensure a continuation in practice of its current ability to undertake line maintenance work on customer aircraft.

Compliance order principles

[356] The defendant argued that even if the plaintiffs are successful on questions of liability in this litigation, the remedies of compliance orders and injunctions are not available to them.

[357] Because I have only made declarations of the parties' positions on questions of liability, to reserve other remedies in case the broader proceedings cannot be settled in further directed mediation, and in an attempt to limit an already very lengthy judgment, I do not propose to deal with those submissions on the availability of other remedies but, rather, reserve the issue for subsequent determination if necessary.

Comment

[358] The following is not decided by this judgment. Where the defendant's restructuring proposes either terminating the employment of all Auckland and Christchurch AMEA members who are currently covered by the Purple Book and subsequently re-engaging most on different terms or conditions, or otherwise attempting to persuade those employees to change to Blue Book coverage by variations to their existing employment agreements, there is a serious question whether those employees will be 'redundant'. It may also be seriously in issue whether those employees can be required unilaterally to change terms and conditions of their employment and/or their collective agreement coverage. It must be arguable for the plaintiffs that negotiations and variations of collective agreements will be necessary if the defendant is to achieve its intended restructurings.

[359] The risk of further litigation about the restructuring means that I urge again the parties to engage in further mediated negotiations that I earlier directed to take place forthwith.

[360] The evidence shows that the defendant has sound reasons for its wish to restructure its engineering operations and that it has been able to give some assurances that incomes of employees may not be affected adversely, at least in most cases. But the evidence also indicates that there are, for the employees, real issues of rostering and other terms and conditions of employment about which employees are entitled to negotiate because they may have significant repercussions for them and their families. If the defendant wishes to restructure during the currency of collective agreements that set terms and conditions of employment for their durations, it should do so, not only after consultation, as has occurred, but by negotiation and not unilaterally.

Summary of decision of dispute

[361] The following reiterates the declarations and orders made in the interim judgment of 4 June 2013.

[362] Line maintenance work of aircraft engineers (as defined at [1]-[4] of the interim judgment) is not covered by the Blue or Green Books.

[363] The defendant was and is not entitled in law to direct employees who are members of the plaintiffs and covered by the Blue and Green Books to carry out line maintenance work (as defined in [1]-[4] of the interim judgment) except in accordance with the temporary transfer clauses of those collective agreements.

[364] The defendant is estopped in law from asserting that the Green Book covers the performance by members of the New Zealand Amalgamated Engineering, Printing and Manufacturing Union of line maintenance work (as defined in [1]-[4] of the interim judgment).

[365] The plaintiffs' applications for compliance and injunctive orders are adjourned sine die to enable the parties to negotiate (if necessary with the assistance of a mediator) variations to the relevant collective agreements including to enable the defendant's proposed restructuring to take place lawfully.

[366] The plaintiffs' applications for penalties for breaches of ss 41(3), 43, 62(2) and (3), and for compliance orders to prevent such future breaches, are adjourned sine die on the same basis as [365] above.

[367] Pursuant to s 188(2) of the Employment Relations Act 2000 the parties are directed to engage in further mediation with a view to resolving the issues between them not yet decided by this judgment and relating to the defendant's proposed restructuring of its aircraft engineering operations.

[368] The plaintiffs are entitled to orders for costs but the determination of the amounts of such orders is adjourned until either there is a settlement of the balance

of the litigation or, if not, when the Court makes final orders and in accordance with a timetable to be determined by the Court.

GL Colgan
Chief Judge

Judgment signed at 4.30 pm on Friday 13 September 2013