IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 60
EMPC 313/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TREVOR HOLMAN Plaintiff
AND	CTC AVIATION TRAINING (NZ) LIMITED Defendant

Hearing:	15 and 16 November 2016 (Heard at Hamilton)
Appearances:	R McCabe, counsel for plaintiff E Burke, counsel for defendant
Judgment:	18 May 2017

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] These proceedings arise from an allegation by the plaintiff, Trevor Holman, that his former employer, the defendant CTC Aviation Training (NZ) Ltd (CTC), had breached s 12A of the Wages Protection Act 1983 (WPA) by seeking and receiving a premium from him in respect of his employment.

[2] CTC provides pilot training to aspiring and qualified pilots as part of a multi-national group providing pilot training. In particular, CTC is contracted to provide Joint Aviation Authority (JAA)/European Aviation Safety Agency (EASA) approved pilot qualifications to students who train in New Zealand. CTC must have JAA/EASA qualified flight instructors to provide that training.

[3] Mr Holman came to be employed by CTC as a flight instructor commencing on 13 November 2012. Prior to commencing such employment, Mr Holman entered into an agreement with CTC to complete an instructor training course called a C-Cat EASA course. In proceedings commenced in the Employment Relations Authority (the Authority), and now on a challenge to this Court, Mr Holman claims that the fees he was required to pay to receive the qualification amounted to a premium in breach of s 12A of the WPA. He seeks recovery of that portion of the fee which he has paid to date and to be relieved of the responsibility for paying the balance.

[4] The proceedings between Mr Holman and CTC have a history across jurisdictions. Proceedings have been commenced in the Disputes Tribunal as well as in the Authority, which is vested with the jurisdiction to determine issues arising under s 12A of the WPA. If Mr Holman's claim that the fees paid for the training course were in fact a premium is successful, that will finally resolve the issues between the parties. However, if that is not held to be the case, an issue as to Mr Holman's liability for the balance of the fees owing remains to be decided by the Disputes Tribunal, and the proceedings which have already been commenced there will be continued.

The contract under which Mr Holman undertook the training

[5] The C-Category Instructor Rating qualification (C-Cat), whether it was obtained from CTC or some other person or entity authorised to provide the training courses, would open for Mr Holman the prospect of being employed as a C-Cat instructor. The obtaining of the C-Cat instructor qualification and experience as an instructor would also advance Mr Holman's ability to obtain employment as a commercial airline pilot, which was one of his objectives. The following passages from an article by Christine Ody in a 2012 edition of Pacific Wings Magazine show the importance of this for someone with Mr Holman's aspirations:[1]

[1] The exact date and edition number is unable to be ascertained, but the authenticity of the article is not in dispute.

> **First Job Profiles**
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> Getting to an airline job requires experience at the lower levels of the aviation industry. So what does the path to the airline actually entail? Talk to ten airline pilots and you'll hear ten different stories of how they got there. However, their experience will probably include at least one of the following: flight instructing, parachute dropping, Part 135 flying and/or other Part 125 or 121 flying.
>
> **Flight Instructing**
>
> One of the most popular ways to gain experience is to complete a C-category instructor's rating, which enables the holder to teach other people to fly.
>
> To hold a C-cat, a pilot must have at least 200 hours' total time, of which 150 must be pilot-in-command (solo). The National Diploma in Aviation may be completed in an instructing "stream", in which graduates finish with this rating (although they will not have completed the Airline Transport Pilot Licence (ATPL) theory subjects or Airline Integration Course (AIC)).
>
> Many flight training organisations prefer to hire graduates of their own programmes as instructors, so when you are choosing a place to train, it is worthwhile asking them about your eventual job prospects.

[6] The selection for the course was not automatic. An applicant had to have a total of 200 hours flight experience in aeroplanes, current and valid medical clearances and other basic flying certifications.

[7] The selection process was a full day event held at CTC's training centre in Hamilton. Flight assessment was made by one of the chief flight instructors. Fees of $150 had to be paid in advance to secure a place in the selection process.

[8] If selected for the course, the fees payable to CTC were either in the sum of $15,000 paid in advance or paid by way of an initial deposit and then by instalments. If the instalment option was selected, the total fees amounted to $17,000. There is some dispute in this case as to the basis upon which the additional $2,000 was to be charged.

[9] The terms under which Mr Holman was accepted by CTC to undertake the course are set out in a letter from CTC dated 9 May 2012. That letter has considerable significance in this dispute and is set out in full as follows:

09 May 2012

Trevor Holman
[Email address]

RE: C CAT EASA COURSE

Congratulations. You have been accepted to our C CAT EASA course. Your course information is as follows:

Course Duration	12 weeks
Total Flight Hours	30 hours
Total Groundschool Hours	125 hours
Instructional Technique Course	Included within the course
Course Start date	25 June 2012
Course Cost	$17,000
Payment Term	Refer to payment terms below
Exclusion	• Any additional / remedial hours. Any additional flight hours will be charged to the trainee at $400 / hour • Flight test / exams after the first attempt

Prior to the commencement of the course, you will need to meet the following criteria:

- Current New Zealand CPL and Class 1 Medical
- Minimum 140 hours PIC
- Hold an instrument rating

Terms and Conditions

I have enclosed our terms and conditions for the course.

Upon successful completion of the course, you will be offered a position in CTC Aviation Training (NZ) Limited, subject to the following:

- Position Availability. A position will likely be available within 3 months of course completion, however it may not initially be an instructing role;
- Employment agreement signed and agreed between both yourself and CTC;
- Course first time pass;
- Positive feedback received from your instructor.

Terms of payment

You are required to make an initial $5,000 payment in one sum prior to the commencement of the course.

The remaining $12,000 balance will be paid by fortnightly salary deduction over a four year term once you have entered into an Employment Agreement with CTC. If you decide not to complete the course or commence employment with CTC, then the balance of the fee will be payable in full on such withdrawal, removal from the course or at the completion of the course.

Please signify your acceptance of the terms above by signing below and return one copy of the letter to me.

Yours faithfully
CTC Aviation Training (NZ) Ltd

Jenny Liddle
Head of Line Operations

Acceptance
I confirm that I accept this letter and the terms and conditions attached.

Signed: [Signed] Date: [Dated]

Mr Holman's employment with CTC

[10] When Mr Holman completed the course and obtained the qualification, a position of employment was available within three months of its completion. Mr Holman had obtained a first time pass, and positive feedback had been received from his instructor. He was accordingly offered and accepted employment by CTC as a flight instructor. The employment was to commence on 13 November 2012, and in accordance with the requirements, a written employment agreement dated 13 November 2012 was signed. Mr Holman had elected to pay the course fees by way of the initial deposit and the balance by instalments. The employment agreement recorded an agreement that the instalments would be paid by way of deductions from his salary. This, along with other correspondence, meant that the deductions were with his consent, pursuant to s 5 of the WPA.

[11] Mr Holman continued in employment with CTC as a flight instructor until a deterioration in the employment relationship between them arose in 2014. Following a disagreement arising in 2014 between Mr Holman and CTC relating to initial charging and the repayment of the training course fees, Mr Holman reached an agreement with CTC to take leave without pay. During the course of such leave, Mr Holman resigned from employment. Notice of his resignation was contained in an email dated 16 September 2014. The three months' notice he gave expired on 16 December 2014. The entire circumstances of the disagreement do not need to be the subject of discussion in this judgment.

[12] However, one matter which did feature in the evidence was Mr Holman's dissatisfaction with what he perceived in 2014 as inconsistency and unfairness in the way that CTC treated instructors insofar as charging fees and flight time requirements for their training was concerned. He formed the view that instructors already employed as trainers by CTC were receiving training without being charged. However, I am of the view that this was satisfactorily explained by witnesses for CTC. Those trainers who were receiving further training without charge were already holders of the C-Cat qualification. Indeed, they could not have been employed by CTC as trainers without that qualification. The training which they were receiving free of charge was an EASA upgrade. In any event, even if there were instances of Mr Holman's colleagues having been in receipt of C-Cat training without charge, and I do not accept that that occurred, it has no relevance to the issue which is now to be determined as to whether CTC provided employment to Mr Holman on the basis of a premium paid by him. Apart from that claim related to an alleged premium for employment, no other grievances have been raised.

The history of the litigation

[13] Following Mr Holman's resignation from employment, CTC made a claim against him for the balance of the money it alleged was owed for the course fees. This amounted to $6,457.50. Mr Holman had already paid a substantial portion of the total fee charged of $17,000. He had also received a credit of $1,000 for a part of the training which was subsequently agreed to be unnecessary. He resisted further payment. Believing the dispute arose from an employment relationship problem, CTC commenced proceedings in the Authority, claiming the balance of the training fee of $6,457.50.[2] The proceedings in the Authority were commenced in September 2015. Mr Holman disputed liability for the debt in the Authority and also counterclaimed that the training fee was a premium for employment.[3] He therefore sought recovery of all money paid to CTC to that date related to his selection and training for the C-Cat rating undertaken by him in 2012. Mr Holman also sought the imposition of a penalty for breaches of the WPA in the sum of $20,000, but that

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2 CTC Aviation Training (NZ) Ltd v Holman [2015] NZERA Auckland 297.
3 At [2].

claim was subsequently withdrawn at the investigation meeting conducted by the Authority.

[14] In the Authority proceedings, Mr Holman also alternatively claimed that he was induced to enter into the training agreement by a misrepresentation on the part of CTC.[4] He sought cancellation of the contract and made a claim for damages.

[15] The outcome of the proceedings before the Authority was that the claim by CTC for the balance of the training fees was declined for lack of jurisdiction.[5] The Authority held that the training fee was not a premium for employment and Mr Holman's application for recovery of funds paid by him was declined.[6] The Authority held that it did not have jurisdiction to deal with Mr Holman's claim for damages based on a misrepresentation.[7] In any event, the Authority held that even if it was wrong as to jurisdiction, Mr Holman had failed to establish misrepresentation on the part of CTC that induced him into entering into the training agreement or his subsequent employment with CTC.[8]

[16] Insofar as costs were concerned, the Authority indicated that it was of a mind to let costs lie where they fell, but if the parties could not resolve the issue of costs between them, then the matter could be referred back to the Authority for a further determination.[9]

[17] As a result of the findings on jurisdiction, CTC commenced a claim in the Disputes Tribunal for the balance of the training fees. Mr Holman in turn challenged the determination of the Authority, both as to the findings in respect of the premium issue and the declinature of the claim based on misrepresentation. By the time that the challenge came to be heard, only the issue of the premium was being pursued. Mr Holman abandoned his cause based on misrepresentation. CTC has not challenged the declinature of jurisdiction on its claim for the balance of the training fees. It has obtained an adjournment of the Disputes Tribunal proceedings pending

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4 At [3].
5 At [33]-[34].
6 At [37]-[50].
7 At [51].
8 At [52]-[60].
9 At [61].

the outcome of the challenge. CTC has, therefore, reserved its position so that if the Court holds that the training fees were not a premium for employment, it can refer the matter back to the Disputes Tribunal and continue its claim against Mr Holman for the balance of the fees owing. Obviously, the timing of that would be subject to any appeal rights which the parties may have in respect of this Court's judgment.

Legal principles applying

[18] Both counsel have referred in their submissions to the fact that there is not a great deal of legal authority in respect of what constitutes a premium for employment or analysis of the requirements of the s 12A of the WPA. Both counsel referred to the previous decisions of the Court in *Sears v Attorney-General* and *Mehta v Elliot (Labour Inspector).*[10] At the time of the hearing of this matter, the Court had not issued its full Court judgment in *Labour Inspector of the Ministry of Business, Innovation and Employment v Tech 5 Recruitment Ltd.*[11] That decision became available on 16 December 2016. I had indicated to counsel during the course of the hearing in this case that I would not issue a judgment until after the issue of the judgment in *Tech 5 Recruitment Ltd* and the likelihood of any appeal against it was known. No leave has been sought to appeal *Tech 5 Recruitment Ltd*. In making their submissions in the present case, counsel were aware that a full Court judgment in *Tech5 Recruitment Ltd* was pending.

[19] The full Court in *Tech 5 Recruitment Ltd* carried out an analysis of *Sears*, *Mehta* and other authorities referred to the Court in that case.[12] The Court also had regard to the legislative history of s 12A of the WPA and other sources which might potentially assist in deciding whether a payment is a premium for employment.[13] There is no need in this judgment to repeat the entire analysis which the Court made. The pertinent paragraphs of the full Court's judgment are as follows:

> [54] Used in the context of s 12A we consider "premium" naturally captures paying to acquire a job (that is, consideration over and above the

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[10] *Sears v Attorney-General* [1994] 2 ERNZ 39; *Mehta v Elliot (Labour Inspector)* [2003] 1 ERNZ 451.

[11] *Labour Inspector of the Ministry of Business, Innovation and Employment v Tech 5 Recruitment Ltd* [2016] NZEmpC 167.

[12] At [32]-[41].

[13] At [42]-[48].

> wage paid for the work performed in the wage/work bargain) as described in *Sears* and illustrated in *Tan*; specifically where a price is paid either by an employee, or potential employee, or is paid on that person's behalf to secure employment. However, we consider "premium" extends beyond those situations to apply to an employer recouping, or attempting to recoup, recruitment-related costs or other expenses that would ordinarily be borne by an employer. Given the ingenuity with which agreements can be drafted each case will be fact-specific. However, the feature that stands out in this case is the lack of any benefit to the employee in meeting the trade testing costs, other than getting the job. An inference arising strongly from cls 7 and 8 of the addendum is that obtaining the job was conditional on agreeing to pay these costs.
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> [55] The sole purpose of the trade testing undertaken by Tech 5 was to enable it to be satisfied that the carpenters presenting themselves as candidates for employment possessed the skills and experience required by Tech 5. It considered that step was necessary because it did not wish to place reliance on any certificates or other evidence of trade skills and experience tendered by the job candidates. In a real sense the benefit of this trade testing flowed one way: to Tech 5. The candidates did not obtain any benefit from paying those testing costs, other than by being given job offers. The carpenters had no choice but to accept that cost and to pay it. Instructively, Tech 5 did not take the same approach to recruitment within New Zealand. It follows that Tech 5 would ordinarily have borne these recruitment costs, sometimes referred to as "search costs", had the candidates not been in the Philippines.

Conclusions in this case

[20] Arising from these statements, there are two requirements for a payment to be a premium for employment:

(a) The payment is a condition for the obtaining of employment. The employment will not be obtained without making the prior payment.

(b) The payment does not benefit the employee in any way other than obtaining employment.

[21] Mr Holman's payment of training fees does not satisfy the first requirement. It was not the payment of the training fees that was a condition which needed to be met prior to employment; it was the obtaining of the qualification itself. Without Mr Holman having the qualification, he could not be employed by CTC as a trainer, as that would not comply with the JAA/EASA requirements. CTC also had its own

requirement that trainers who obtained the C-Cat qualification elsewhere had to have in addition 200 hours of instructional experience. For those, such as Mr Holman who did the C-Cat course with CTC, that additional requirement was waived. The same analysis also applies to the $150 selection fee. That again was a prerequisite to being admitted to the training and obtaining the qualification rather than being a necessary condition of employment.

[22] In *Tech 5 Recruitment Ltd*, the Court stated that each case will be fact specific.[14] In this case, a clear distinction needs to be made as to the purpose of the payment. CTC had to comply with the strict requirements of the bodies governing pilot training in order to offer Mr Holman employment. The qualification had to come first. On proper analysis, the payment was made before the qualification, even though financing by CTC of Mr Holman to enable him to make the further instalment payments was secured by the arrangement to take deductions from his income. It just so happens in this case that both the trainer of Mr Holman in the first instance, and the employer of him in the second instance, were the same entity (CTC). That will not always be the case, and indeed, evidence was given in the present case that CTC employed trainers who had received qualifications elsewhere.

[23] Insofar as the second requirement is concerned, it is clear that in this case the payment substantially benefited Mr Holman. At the point of completion of the course, the benefit only flowed one way, and that was to Mr Holman. Once he had the qualification, it was something that he retained permanently and as indicated earlier, would have been of substantial use to him in pursuing his desired career as an airline pilot. As part of the commercial training contract, CTC received payment as consideration for providing the training to enable Mr Holman to gain the qualification he desired. Provision of such training to pilots was its core business. It was entitled to recover its costs and make a profit from training Mr Holman for his qualification.

[24] In the context of the facts of this case, some insight can be gained by also considering the mutuality, or otherwise, of obligations. CTC had, with some conditions, clearly guaranteed Mr Holman employment as a flight instructor once he

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14 At [54].

had gained the qualifications. Mr Holman, however, was not bound to accept the employment. There was no bonding arrangement attached to it, and the arrangement of deducting the balance of the training fees from his wages, which was with his agreement, was merely to provide a convenience to him, rather than having to look to financial sources elsewhere. If he had chosen not to take the employment, then the deduction from wages would never have arisen. He would still have been required (by virtue of the contract dated 9 May 2012) to repay the fees. If the payment was indeed a premium for employment, then upon payment, he would have been entitled to insist on being employed despite the reservations. The contract shows that he did not have that entitlement. Also if it was a premium and if he had not taken up the employment, he would have been entitled to refuse to make the payment. That was clearly not the position in this case. By the time Mr Holman came to be employed, the agreement to provide training had been concluded and was an executed contract. CTC had completed training Mr Holman for the C-Cat qualification, and consideration for that had passed by Mr Holman paying the deposit and entering into financing arrangements with CTC to secure the balance.

[25] In his evidence, Mr Holman claimed that the money he agreed to pay for the training was a premium because if there had been no guarantee of a job, he would not have signed the training loan contract. I do not accept that was necessarily Mr Holman's perception when he agreed to undertake and pay for the training course. Correspondence between Mr Holman and CTC prior to the contract being signed shows that Mr Holman was carefully considering his options, including continuing with his then current training and the potential to receive training from a provider other than CTC. I am of the view that, particularly because of his stated aspirations to become a commercial airline pilot, he saw CTC as his best prospect not only because of the potential employment but the quality of the training he would receive. However, even if Mr Holman had the perception he claims that would not convert the payment into a premium. Of significance also is the fact that the price charged for the course, whether it was $15,000 if paid up front or $17,000 if paid by financed instalments, was the price CTC charged everyone, whether or not they were guaranteed a job upon qualification.

[26] Mr Holman was not correct when he stated in his evidence that the contract to provide him with training was a training loan contract. While the deferred repayment arrangement is referred to in it, the contract was primarily procuring Mr Holman's commitment to the terms and conditions for the course, its pre-requisites and also outlining the conditional basis upon which employment would be offered once the course was completed. Mr Holman's evidence in this regard also raises another misunderstanding on his part where he referred in his evidence to the agreement to repay by instalments deducted from his wages as CTC bonding him to the company for four years. The arrangement to repay by instalments was not a bond. It was an agreement securing his payment of the balance of the training fees outstanding. Mr Holman could have left employment at any time - indeed, he did - but he would still remain liable to repay the fees for his training.

[27] In *Tech 5 Recruitment Ltd* the prospective employees gained no material benefit from the qualification check used by the employer, which meant that the amount they paid to undergo the check had to be considered a premium. In the present case, Mr Holman got the full benefit of the training and the qualifications he gained which are recognised in New Zealand. He retained the qualification permanently and had the potential to in turn receive a further material benefit aside from just being employed by CTC. He gained valuable consideration for the mutual transaction he had entered into.

Disposition

[28] Applying the tests set out in *Tech 5 Recruitment Ltd*, it is clear the payment which Mr Holman was required to pay to CTC to gain his qualification was not a premium for employment, even though he was subsequently employed because of the very fact that he had obtained the qualification itself. The liability for the fees arose under a separate preceding contract under which Mr Holman was liable to repay CTC regardless of whether he subsequently obtained employment with them or chose not to accept any employment offered. His challenge against the Authority's determination therefore fails.

[29] CTC will no doubt now continue with its claim against Mr Holman presently in abeyance in the Disputes Tribunal. Some comment may be made concerning the evidence which arose during the hearing of this matter. This relates to the sum of $2,000 added to the basic course fee of $15,000 if not paid immediately. CTC's evidence in respect of this further charge was very contradictory.

[30] Initially, it was alleged that the $2,000 represented Fringe Benefit Tax for which CTC would be liable as a result of providing an interest free loan to Mr Holman. Substantial flaws soon become apparent in that claim. First, CTC would only be liable for Fringe Benefit Tax if Mr Holman was an employee. At the time that the advance was being made to him, he was not an employee. Secondly, Fringe Benefit Tax applies at the rate of nearly 50 per cent on the value of the benefit – in this case avoidance of a liability for interest. No evidence was given as to exactly how the sum of $2,000 was calculated. However, if the liability for Fringe Benefit Tax which CTC was claiming in reimbursement from Mr Holman was $2,000, then this would mean that the total benefit which CTC was providing to Mr Holman by making an interest free advance would approach $4,000. That would seem to represent an exorbitant charge for the loan upon which the calculation of Fringe Benefit Tax would be based. Thirdly, however, Fringe Benefit Tax is a liability incurred by CTC as an employer, and there would seem to be a substantial basis for argument against this being able to be passed on to an employee.

[31] As a result of the granting of an application to amend pleadings, CTC changed its position so that the sum of $2,000 was then alleged to be interest. No evidence was provided to the Court as to how this interest was calculated, and there was no evidence that if the Credit Contracts and Consumer Finance Act 2003 applied, the requirements which would be imposed on CTC had been complied with. These are matters which will no doubt be considered by the Disputes Tribunal in deciding what liability remains on Mr Holman's part.

[32] Insofar as costs are concerned, these proceedings were commenced prior to the introduction of the Court's Guideline Scale of Costs. Costs will therefore be determined on the customary basis although the scale may be a useful guide in determining costs in this matter. Costs will be reserved. If the issue of costs cannot

be resolved between the parties and an application for costs including costs in the Authority proceedings is to be made, counsel will need to file appropriate memoranda contemporaneously within 14 days of the date of this judgment.

M E Perkins
Judge

Judgment signed at 12.30 pm on 18 May 2017