IN THE COURT OF APPEAL OF NEW ZEALAND

CA570/2014
[2016] NZCA 131

BETWEEN	AIR NEW ZEALAND LIMITED Appellant
AND	NEW ZEALAND AIR LINE PILOTS' ASSOCIATION INCORPORATED Respondent

Hearing: 16 February 2016

Court: Wild, Cooper and Winkelmann JJ

Counsel: J G Miles QC and P A Caisley for Appellant
R E Harrison QC and R R McCabe for Respondent

Judgment: 15 April 2016 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The judgment of the Employment Court is set aside.

C The costs orders made by the Employment Court are reversed.

D The decision of the Employment Relations Authority is reinstated.

E The respondent is to pay the appellant's costs for a standard appeal on a band A basis with usual disbursements. We allow for second counsel.

REASONS OF THE COURT

(Given by Wild J)

Table of Contents

	Para No
Introduction	[1]
Background	[6]
Issue (a): Does this Court have jurisdiction under s 214(1) to hear this appeal?	[20]
Issue (b): Was the Employment Court's approach to the interpretation of cl 24.2 of the ALPA CEA erroneous in law?	
A preliminary observation	[26]
Contractual interpretation principles	[31]
The Employment Court's interpretation	[36]
The natural and ordinary meaning of the words "any agreement"	[40]
The words in their context in the ALPA CEA	[51]
The words in the context in the background circumstances known to the parties	[58]
Business (or employment relations) common sense	[65]
Unworkable	[73]
Conclusions	[76]
Result	[80]

Introduction

[1] This appeal is from a judgment of Chief Judge Colgan delivered in the Employment Court at Auckland on 11 September 2014.[1]

[2] Such appeals can come to this Court only with leave granted under s 214(1) of the Employment Relations Act 2000. This provides:

> **214 Appeals on question of law**
>
> (1) A party to a proceeding under this Act who is dissatisfied with a decision of the Court (other than a decision on the construction of an individual employment agreement or a collective employment agreement) as being wrong in law may, with the leave of the Court of Appeal, appeal to the Court of Appeal against the decision; and section 66 of the Judicature Act 1908 applies to any such appeal.

[3] On 27 November 2014 this Court granted leave on the following question:[2]

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[1] *New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd* [2014] NZEmpC 168 [EC judgment].

> Did the Employment Court err in law in finding that cl 24.2 of the collective agreement between the New Zealand Air Line Pilots' Association Incorporated (NZALPA) [and Air New Zealand Limited] meant that Air New Zealand Limited was required upon request by NZALPA to pass on to members of NZALPA part only of a collective agreement reached on 15 March 2013 between Air New Zealand [Limited] and the Federation of Air New Zealand Pilots Incorporated, namely the remuneration provisions applicable to B737-type first officers and all second officers?

[4] That question appears to put in issue the Employment Court's construction of the collective employment agreement (CEA) between the New Zealand Air Line Pilots' Association Inc (ALPA) and Air New Zealand Limited (Air NZ) (the ALPA CEA), and thus to be outside the jurisdiction s 214 confers on this Court. And ALPA indeed argues that it is. Air NZ accepts that jurisdiction remains an issue, notwithstanding this Court's grant of leave for this appeal.

[5] Accordingly, we need to determine two issues:

(a) *Jurisdiction*: Does this Court have jurisdiction under s 214(1) to hear this appeal?

Only if yes to (a):

(b) *Erroneous interpretative approach*: Was the Employment Court's approach to the interpretation of cl 24.2 of the ALPA CEA erroneous in law?

Background

[6] Air NZ pilots may belong to one of two employee associations. ALPA is longer established and larger. It was formed in 1945 and around 75 per cent of Air NZ's pilots belong to it.

[7] The Federation of Air New Zealand Pilots Inc (FANZP) came into existence in 1990.

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2 *Air New Zealand Ltd v New Zealand Air Line Pilots' Association Inc* [2014] NZCA 570.

[8] Competition between the two associations for members is the genesis of this litigation.

[9] The ALPA CEA includes the following term:

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

[10] Clause 24.2 was first included in the 2002 ALPA CEA at ALPA's instance. There was no negotiation or discussion at the time. Each subsequent ALPA CEA has contained cl 24.2, including the 2012 CEA.[3] The term of that CEA commenced on 5 November 2012 and ended on 4 November 2015.

[11] FANZP concluded negotiations with Air NZ for a new CEA in March 2013. Most of the terms were to remain unchanged from the previous CEA. The changes were detailed in Terms of Settlement dated 15 March 2013 and signed by the authorised representative of each party.

[12] The changes included a 2 per cent increase in FANZP captains' remuneration and a 12.6 per cent increase in the remuneration of B737 first officers and all second officers. While the 2 per cent increase for captains was lower than the corresponding 2.5 per cent in the 2012 ALPA CEA, the 12.6 per cent increase for first and second officers was significantly higher. The corresponding figure in the ALPA CEA was 2.5 per cent.

[13] The Terms of Settlement also contained numerous variations that Mr Miles QC described as "concessions" by FANZP to Air NZ. An example of one of these concessions was what the Employment Court described as "removal of what are known as 35/7 flying hour restrictions".[4]

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3 The same wording was used in cl 24.3 in the 2002 CEA. The clause was renumbered cl 24.2 with no textual changes in 2004 and has remained the same since then.

4 EC judgment, above n 1, at [47].

[14] Before the Employment Court, Air NZ gave evidence that it was the lower increase in captains' remuneration together with these concessions that enabled it to agree to the significant increase in remuneration for B737 first officers and for second officers. In short, it was the overall package or bargain that enabled Air NZ to stay within its budgetary constraints in concluding the Terms of Settlement, and subsequently the new CEA with FANZP.

[15] Consistent with this, cl 13.1 of the Terms of Settlement provided:

> **13.1 General Provisions**
>
> The rates of remuneration and changes thereto are in consideration for and conditional on the totality of the changes agreed to in this Collective Employment Agreement.

[16] That and the other clauses agreed in the Terms of Settlement were incorporated into the new FANZP CEA dated and signed on 14 April 2013, which came into force on that day. Its term expired on 13 April 2016.

[17] On 24 April 2013 ALPA wrote to Air NZ. The letter set out cl 24.2. It then noted that the rates of remuneration for B737-300 first officers and all second officers provided for in the new FANZP CEA represented "a significant increase from the previous rates", and were "more favourable than provided for in" the ALPA CEA. The letter continued:

> NZALPA now requests, in accordance with 24.2 of the ALPA CEA, that Air New Zealand Ltd pass on to pilots who are members of NZALPA covered by the ALPA CEA and employed as B737-300 First Officers and as Second Officers the rates of remuneration applicable to each of them as established under the FANZP CEA effective 22 April 2012 and the subsequent increases to those rates effective 7 April 2014 and 6 April 2015.

[18] Air NZ responded on 3 May 2013:

> You have referred in your letter to clause 24.2 of the CEA. The Company is aware of the provisions in clause 24.2 — and your letter correctly sets out the wording of that sub-clause.
>
> However, and in all the circumstances, the Company does not agree that the recent agreement entered into with the Federation of Air New Zealand Pilots (FANZP) gives rise to any ability on the part of NZALPA to make a request pursuant to clause 24.2, and/or in the manner that NZALPA has done. The Company does not accept that the isolated and selective approach to terms

> and conditions falls within clause 24.2, and/or that the FANZP CA is "more favourable" and/or that your request is consistent with the legislative restrictions now in place around "passing on".

[19] ALPA commenced a proceeding before the Employment Relations Authority (the Authority) seeking an order enforcing its request under cl 24.2. The Authority gave its decision on 15 January 2014.[5] The Employment Court summarised the way the Authority dealt with the matter in these two paragraphs of its judgment:[6]

> [8] The Authority decided the dispute in favour of Air New Zealand. The Air New Zealand case was that cl 24.2 meant that its entry into the FANZP collective agreement provided NZALPA the opportunity to "pick up the totality of the [FANZP collective agreement]" but not selected parts of it.
>
> [9] Analysing what the parties meant by the use of the words "any agreement" in cl 24.2, the Authority concluded that this was intended to be a reference only to a collective agreement, and then not to parts but, rather, to the whole of a collective agreement. The Authority concluded that the clause was plainly worded and that NZALPA's interpretation did "violence to the plain words of the relevant clause".
>
> (footnotes omitted)

Issue (a): Does this Court have jurisdiction under s 214(1) to hear this appeal?

[20] In submitting that this Court has no jurisdiction to hear this appeal, Mr Harrison QC relied on the last two sentences of this passage in the Court's judgment in *Service and Food Workers Union Nga Ringa Tota v Cerebos Gregg's Ltd*:[7]

> [46] We accept that on appeal this Court's supervisory jurisdiction is limited to reviewing the Employment Court's methodological approach to contractual interpretation. As a statement of policy, given that employment relations since 1991 have been governed primarily by contract and the same broad principles apply to the interpretation of employment contracts as to contractual interpretation generally, this Court must ensure that those principles are correctly and consistently applied.[8] We have jurisdiction to interfere where the appeal raises questions of principle going beyond the terms of the contract. However, that power is used sparingly, as the results in cases since *Yates* demonstrate.

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

6 EC judgment, above n 1.

7 *Service and Food Workers Union Nga Ringa Tota v Cerebos Gregg's Ltd* [2012] NZCA 25, [2012] ERNZ 38.

8 See *Secretary for Education v Yates* [2004] 2 ERNZ 313 (CA).

[21] That is one of the passages to which Mr Miles referred us, so counsel are on common ground as to the jurisdictional limits.

[22] The following excerpts from judgments both of the Supreme Court and this Court amplify the limits:

> The limitation [in s 214(1)] prevents an appellate court from construing a term or terms of a contract but does not prevent it from considering questions of interpretative principle. [9]

> … if the Employment Court reads the terms of an employment agreement in a manner that was not open to it this Court may intervene on the basis that a wrong principle has been applied, which may include that what the Employment Court has done does not in law amount to an orthodox interpretation of the contract.[10]

> … parties to Employment Court litigation are entitled to the application of orthodox legal principles. … If satisfied that … the Employment Court "errs in principle in how it goes about interpreting a contract", this Court has jurisdiction to interfere … I am of the view that the Court is also entitled to interfere where the substance of the complaint is that the Employment Court did not construe the contract in question.[11]

[23] We see the position thus: if the Employment Court correctly states and applies orthodox principles of contractual interpretation, this Court cannot intervene. But if the Employment Court misstates the principles, or misapplies them, this Court will intervene to ensure the law is correctly applied.

[24] Mr Miles submitted there were "methodological errors" in the Chief Judge's approach in interpreting cl 24.2. While he took no issue with the Judge's statement of principles of contractual interpretation, he submitted the Judge had not applied those principles.

[25] If that argument succeeds, then want of jurisdiction is not a barrier to this appeal. If it fails, then it should be dismissed for want of jurisdiction.

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9 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [20] n 21.

10 *Secretary for Education v Yates*, above n 8 at [20] per McGrath J.

11 *Secretary for Education v Yates*, above n 8 at [97] per William Young J. Glazebrook J, unable to discern an error of principle in the approach of the Chief Judge of the Employment Court, would have dismissed the appeal for want of jurisdiction (at [50]).

Issue (b): Was the Employment Court's approach to the interpretation of cl 24.2 erroneous in law?

A preliminary observation

[26] At the outset, we note that the argument put to us had a different focus from that put to the Employment Court. Air New Zealand's primary submission to the Employment Court was that the words "any agreement" in cl 24.2 referred to FANZP's CEA with Air NZ – to the whole of that CEA. Certainly, in the alternative, Air NZ had argued "any agreement" referred to the Terms of Settlement. But that fallback position was not pressed by Air NZ. And the Employment Court did not deal with that alternative argument.

[27] It is clear from the way this Court framed the question when granting leave to appeal that the focus, even at that stage, remained on the FANZP CEA:

> … was required upon request … to pass on … part only of a collective agreement reached on 15 March 2013 between [Air NZ and FANZP] …

[28] Before us, Mr Miles based his argument firmly on the Terms of Settlement. He submitted they evidenced the relevant agreement that ALPA could, under cl 24.2, request be passed on to its pilot members. Mr Miles accepted cl 24.2 could apply to other agreements Air NZ entered into with another pilot employee group, for examples an agreement varying a CEA or ancillary to a CEA. But, to be effective, the request had to be for the passing on of the whole of whatever agreement was the subject of the request.

[29] The Employment Court's task was to interpret cl 24.2, in particular the words "any agreement". Given that it was put to the Judge that "any agreement" referred to the whole FANZP CEA, it is perhaps understandable that the Judge did not consider whether what ALPA requested be passed on was an agreement. In other words, whether it came within the words "any agreement".

[30] Notwithstanding the way the case was put to him, we consider the Judge needed to do that and the fact that he did not has resulted in an erroneous interpretive approach.

Contractual interpretation principles

[31] As we mentioned, Mr Miles took no issue with the Employment Court's statement of contractual interpretation principles. Under the heading 'Approach to interpretation', the Employment Court identified this Court's judgment in *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc*.[12] as "[t]he most recent, authoritative and binding statement of the [Employment] Court's role in interpreting collective agreements".[13] The Court then set out passages from the judgments of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.[14]

[32] Next, the Employment Court noted the distinction between a "commercial" contract and a collective agreement in employment law. It stated:[15]

> Collective agreements are not contracts, at least in the traditional sense of the word. Nor are they "commercial" in the sense of regulating a relationship of seller and purchaser of goods or services in commerce.

[33] After further reference to the distinctive features of a collective agreement, the Court continued:[16]

> So, not only must the Court consider the relevant context in which the parties agreed originally to what is now known as cl 24.2, but regard must also be had to its adoption and re-adoption in successor collective agreements which have been settled in evolving circumstances.

[34] Since the Employment Court's decision, there have been two authoritative restatements of the correct approach to the interpretation of contractual provisions. First, in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* the Supreme Court emphasised:[17]

> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most

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12 *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc* [2010] NZCA 317, [2010] ERNZ 317 at [32]–[34].
13 EC judgment, above n 1, at [11].
14 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.
15 EC judgment, above n 1, at [14].
16 Ibid.
17 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.

> obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.
>
> (footnote omitted)

[35] Second, and to similar effect, is this observation by Lord Neuberger in *Arnold v Britton*, in the United Kingdom Supreme Court:[18]

> [15] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see *Prenn [v Simmonds]* [1971] 1 WLR 1381, 1384–1386; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989, 995–997, per Lord Wilberforce; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in *Rainy Sky [SA v Kookmin Bank* [2011] 1 WLR 2900, paras 21–30, per Lord Clarke of Stone-cum-Ebony JSC.

The Employment Court's interpretation

[36] The issue for the Employment Court was the meaning of the words "any agreement" in the phrase in cl 24.2 "any agreement entered into by [Air NZ] with any other pilot employee group …".

[37] Counsel agree that the Employment Court's critical conclusion is in this paragraph in the judgment:

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

[18] *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619. Lord Sumption and Lord Hughes concurred in Lord Neuberger's judgment.

groups. These included, but were not necessarily confined to, other unions, and to agreements which in any event were not collective agreements. *So, too, I conclude that the words "any agreement" were intended to encompass constituent parts of a collective agreement.*

(our emphasis)

[38] Mr Miles submitted the reasoning behind that conclusion is back at [32] of the Employment Court's judgment, where the Judge found that ALPA had proposed the insertion of what is now cl 24.2:

> … in an attempt to protect the terms and conditions of its Air New Zealand pilot members and, indirectly, its own membership strength, by seeking to have a ratchet arrangement included in its collective agreement. It intended that if, following settlement of its collective agreement, Air New Zealand entered into arrangements providing for more favourable terms and conditions of employment than enjoyed by NZALPA pilots, those enhanced terms and conditions could be passed on to affected NZALPA members on request.

[39] Mr Harrison argued that the Employment Court's conclusion is supported by the reasoning in [36]–[42], [73]–[76] and [78] of the judgment. So we will need to consider these parts of the judgment.

The natural and ordinary meaning of the words "any agreement"

[40] As the judgment of the New Zealand Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* and the United Kingdom Supreme Court in *Arnold v Britton* emphasised, central to the interpretation task is the natural and ordinary meaning of the words in question.[19] So, in *Arnold v Britton*, Lord Neuberger stated:[20]

> The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision.

[41] The words "any agreement" are common words. Synonyms of "agreement" include contract, settlement and bargain.[21]

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19 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 17; *Arnold v Britton*, above n 18.
20 At [17].
21 *Oxford Dictionary of Synonyms and Antonyms* (2nd ed, Oxford University Press, New York, 2007) at 12. Note, however, that Bryan A Garner (ed) *Black's Law Dictionary* (10th ed, Thomson Reuters, St Paul (Minnesota), 2014) at 81 makes the point that, although every

[42] It is really no different in the law. For example, *Black's Law Dictionary* defines "agreement" thus:[22]

> **1.** A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons. **2.** The parties' actual bargain as found in their language or by implication from other circumstances, including course of dealing, usage of trade, and course of performance.

[43] Chapter 3 of *Law of Contract in New Zealand* is headed "Agreement". Emerging quickly from the discussion in this chapter is "The idea of bargain, fundamental to the English concept of contract".[23]

[44] And *Treitel: The Law of Contract* states:[24]

> The first requisite of a contract is that the parties should have reached agreement. Generally speaking, an agreement is made when one party accepts an offer made by the other. …

[45] Chief Judge Colgan correctly identified the meaning of "agreement" at the end of this paragraph of his judgment:

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

[46] Mr Miles submitted that "agreement", defined in terms of the last sentence of that paragraph, "would not encompass a constituent part of the agreement". That is because an "accord" would not mean just part of the accord, nor "a consensual arrangement" just part of that arrangement.

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contract is an agreement, not every agreement is a contract.

22 At 81.

23 John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (5th ed, LexisNexis NZ Ltd, Wellington, 2016) at 81.

24 Edwin Peel (ed) *Treitel: The Law of Contract* (14th ed, Sweet & Maxwell, London, 2015) at [2-001].

[47] We agree. Fundamentally, an "agreement" is an exchange of promises. At a minimum, it must include all the promises made by the parties relevant to the particular topic. Having correctly identified the meaning of "agreement", the Employment Court did not apply that meaning. The final sentence of [65] of its judgment is inconsistent with the conclusion it reached at [72] (these two paragraphs are set out in [45] and [37] above, respectively).

[48] In the course of its judgment the Employment Court analysed the 2013 FANZP CEA. The Court recorded Air NZ's argument that the agreement was "a total package deal", Air NZ only agreeing to the remuneration increases for B737 first officers and all second officers in exchange for FANZP's agreement to the various new provisions which increased Air NZ's revenue or decreased its costs.[25] The Court listed 10 of these,[26] but noted there were "a number of other similar examples of gains and concessions (from Air NZ's viewpoint)".[27]

[49] This part of the Employment Court's judgment ends with this important paragraph in which the Court accepted that the 2013 FANZP CEA was a package deal:

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

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[25] EC judgment, above n 1, at [43].
[26] At [47].
[27] At [48].

[50] As we pointed out in [28] above, Mr Miles focused his argument on the Terms of Settlement. These terms conveniently evidenced the new terms FANZP had negotiated with Air NZ. The other terms of the CEA remained unchanged. To be effective, ALPA's cl 24.2 request would need to be for the passing on of all the terms of the agreement – both sides of the bargain or deal. Critically, the Terms of Settlement substituted new clauses 13.1.19 and 13.1.19.2. Those new clauses gave effect to the remuneration increases referred to in [12] above. ALPA's request was for one of the benefits FANZP pilots gained under the Terms of Settlement, without the corresponding burdens. Indeed, ALPA's request was for part only of the new clauses 13.1.19 and 13.1.19.2, without the corresponding burdens, even in those clauses. We are referring to the lower remuneration increase for captains (2.0 per cent against the 2.5 per cent in the 2012 ALPA CEA). Essentially, the Chief Judge concluded that "any agreement" could include just one part of an agreement, indeed, just one part of one part of an agreement. That is, one benefit without any of its related burdens. That is simply wrong.

The words in their context in the ALPA CEA

[51] Does the context in which the words "any agreement" appear in the ALPA CEA, and in particular in cl 24.2, and the wider context of the background circumstances known to the parties when they included cl 24.2 in the successive ALPA CEAs, support the Employment Court's interpretation? In other words, did the Court correctly apply the principles referred to in [34] to [35] above?

[52] Counsel agreed that the relevant context is cl 24.2. There is nothing in the remainder of the ALPA CEA that assists in interpreting the words "any agreement".

[53] The Employment Court conducted what it termed a "micro-analysis" of cl 24.2.[28] Mr Harrison relies on that part of the judgment as supporting the Court's conclusion as to the meaning of the words "any agreement".

[54] Dealing with the words "entered into by the Company with any other pilot employee group", the Court merely noted the consensus that FANZP is such a

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[28] EC judgment, above n 1, at [36]–[42].

group.[29] We consider the words "entered into" support construing "any agreement" as meaning the whole agreement in the sense described in [47] above – all the relevant promises made by each party to the other. It is not ordinary usage to say "the parties entered into a constituent part of an agreement".

[55] The Court also considered that the phrase in cl 24.2 "which is more favourable than provided for in this Agreement" supported its interpretation of the words "any agreement". The Court stated:[30]

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

[56] The Court appears to have confused itself. "The Agreement" is the ALPA CEA. The request ALPA made under cl 24.2 did not relate to that Agreement, but rather to the FANZP CEA. The reference to "than provided for *in* this Agreement" may permit a comparison with constituent parts of the ALPA CEA, which may be necessary to determine whether the other agreement is more favourable, but it says nothing about passing on constituent parts of another agreement.

[57] To summarise, we do not see much in cl 24.2 that assists in construing the words "any agreement". But what few aids there are support interpreting "any agreement" as meaning the whole of any agreement, again in the sense described in [47] above.

The words in the context of the background circumstances known to the parties

[58] The Employment Court summarised the parties' respective positions at the time the 2002 ALPA CEA was entered into. The Court found Air NZ, in mid-2002, was in recovery mode and "wished strongly" to eliminate the threat of strike action by its pilots.[31] It observed:[32]

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29 At [39].
30 At [57].
31 At [31].
32 Ibid.

> It is probably no exaggeration to say that Air New Zealand was then prepared to consider concessions which it might otherwise have dismissed out of hand, if that meant that pilot strike action was avoided.

And:[33]

> I consider nevertheless that this imperative meant that Air New Zealand was then prepared to take its chances with agreeing to a provision that it has recently come to realise may place it at a disadvantage in collective bargaining.

[59] The Court found ALPA requested inclusion of cl 24.2 in an attempt to protect the terms and conditions of its Air NZ pilot members, and thus its own membership strength, should Air NZ settle terms and conditions of employment more favourable to pilots than were ALPA's. It noted that ALPA and FANZP were, in 2002, in "a particularly competitive relationship … which descended into hostility from time to time".[34]

[60] This summary of the factual background led the Employment Court to this conclusion:

> [55] Both the initiative for what was to become cl 24.2, and its content, emanated from NZALPA. It is therefore so unlikely that NZALPA would have proposed a term that could have negated completely its collective agreement with Air New Zealand (the potential consequence in practice of the defendant's interpretation of cl 24.2), that Air New Zealand's position cannot be right. Not only is the defendant's position generally so improbable, but the NZALPA interpretation is supported independently.

[61] Mr Miles took issue with this. He pointed out that ALPA would (indeed, could) only make a request under cl 24.2 if the overall deal to be passed on to its Air NZ pilot members was more favourable than the deal the current ALPA CEA gave them.

[62] We agree. First, we deal with the point on the basis of Air NZ's primary argument in the Employment Court – that "any agreement" meant the entire FANZP CEA. If the other "agreement" was another CEA, while there would be substitution of the more favourable CEA, that would advantage ALPA pilots. It seems inapt for the Court to have concluded this "negated completely" the then-current ALPA CEA.

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33 At [78].

34 At [54].

That conveys that the outcome would disadvantage and prejudice ALPA's Air NZ pilot members. We are likewise not persuaded that the introductory words to cl 24.2 require the ALPA CEA to continue in force for its stated term and prevent the Agreement being superseded by a more favourable one.

[63] Secondly, if the "agreement" was an agreement other than an entire CEA, passing it on would not overtake completely the then-current ALPA CEA. Clause 23 of the ALPA CEA allows for variation of the terms of the CEA , so the parts of the ALPA CEA that were affected by the more favourable agreement could simply be replaced leaving the rest of the CEA unaltered.

[64] To summarise, while the background circumstances in 2002 explain the genesis and aim of cl 24.2, they do not assist in interpreting the words "any agreement". We do not agree with the Employment Court that the background circumstances support its interpretation of those words.

Business (or employment relations) common sense

[65] Disagreeing with the Authority, the Employment Court held that Air NZ's interpretation of the words "any agreement" did not accord with "business common sense". Even on its own interpretation of cl 24.2, Air NZ could not avoid the "contingent", "unquantifiable", liability resulting from ALPA requesting that the whole of the FANZP CEA be passed on to it, on the basis that it was more favourable.[35] Such a contingent liability would not anyway be "unquantifiable", as the Authority found. Air NZ could have calculated the cost of increasing the remuneration of ALPA B737 First Officers and all Second Officers for the balance of the term of the ALPA CEA, before it agreed to the Terms of Settlement incorporated into the new FANZP CEA.[36]

[66] Mr Miles contended this missed Air NZ's point. Air NZ had submitted to the Court that it would not know the resulting costs if ALPA's interpretation of cl 24.2 was upheld. That is, if ALPA was permitted to "cherry pick" parts of the "package deal" FANZP had concluded with Air NZ. Since Air NZ would not know what if

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[35] At [62].
[36] At [63].

anything ALPA might "cherry pick", that must be correct. We consider it unlikely that Air NZ would have agreed to cl 24.2 if it would result in unquantifiable future costs for Air NZ.

[67] There are two further points under this heading. The first involves citing again from *Arnold v Britton*:[37]

> [20] Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appeared to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

[68] Secondly, Mr Harrison submitted the phrase "employment relations commonsense" should be substituted for "business commonsense" in cases such as this one. That accords with a principle the Employment Court extracted from this Court's judgment in *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc*:[38]

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

[69] Accepting Mr Harrison's proposition, Mr Miles submitted the Employment Court's interpretation would flout employment relations commonsense. That is because it would effectively undermine FANZP.

[70] Mr Harrison responded that business commonsense (and presumably employment relations commonsense also) cannot possibly be judged by reference to

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37 *Arnold v Britton,* above n 18.

38 EC judgment, above n 1, at [21]. While the Court purported to derive the principle from *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc*, above n 12, it was not explicit in this Court's judgment and actually comes from McGrath J's summary, in *Vector Gas Ltd v Bay of Plenty Energy Ltd*, above n 14, at [61], of Lord Hoffmann's judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912-913.

the impact of an interpretation on a non-contracting third party – all the more so, one which elects *subsequently* to contract with one of the two primary contracting parties. However, that response overlooks that Air NZ has pilots belonging to both ALPA and FANZP. We think it unlikely Air NZ would agree to insertion, in its CEA with one of those pilot employee groups, of a provision that had the potential to undermine the other group.

[71] The judgment of the Employment Court refers briefly to ss 59A-59C of the Employment Relations Act 2000. These provisions, introduced with effect from 1 December 2004, prevent an employer agreeing to employment terms and conditions substantially the same as those in an existing individual (s 59B) or collective (s 59C) agreement, if it does so with the intention of undermining that agreement. The provisions represent an extension of the duty imposed by s 4(1) of the Act on the parties to an employment relationship to deal with each other in good faith. Because those provisions took effect only on 1 December 2004, the Employment Court considered they were "not a strong argument in favour of [ALPA's] interpretation of cl 24.2 and certainly not a determinative factor".[39]

[72] Although both Mr Miles and Mr Harrison sought support in these provisions for their respective arguments, we prefer to put them to one side. The provisions really do not assist in the task of interpreting the words "any agreement" in cl 24.2. If a request under cl 24.2, properly construed, resulted in a breach of ss 59B or 59C, that would be a different and subsequent issue.

Unworkable

[73] Finally, Mr Harrison submitted Air NZ's interpretation of cl 24.2 would make the clause unworkable for ALPA. It would, he argued, be an almost impossible exercise for ALPA to work out whether the burdens and benefits in the FANZP CEA (that is, its overall package) were "more favourable" than those in the ALPA CEA. He observed that the Employment Court had made this point.

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39 At [58].

[74] There was no evidence supporting Mr Harrison's submission. Further, the relevant "agreement" need not always be an entire CEA, as we have said. In such a case, the comparison may be relatively straightforward. In any event, even if cl 24.2 would be difficult of operation, that is not a reason for giving it other than its plain meaning. It simply means that ALPA requested insertion of a clause of which it cannot make much — or any — use.

[75] It is unprincipled to interpret a contract so as to avoid a bad outcome for one party. This is the point Lord Neuberger made in *Arnold v Britton* in the passage set out in [65] above. That is equally the position where the relevant term in the agreement is merely unusable.

Conclusions

[76] Although the Employment Court began by accurately stating contractual interpretation principles, it did not correctly apply those principles.

[77] In particular, insofar as the Employment Court considered the natural and ordinary meaning of the words "any agreement" in cl 24.2, it gave that meaning no force. It erred in failing to identify the "agreement" to be passed on, and upheld ALPA's request to have part only of an agreement passed on – a benefit without the corresponding burdens. In doing that, it reached a conclusion inconsistent with the natural and ordinary meaning of the words "any agreement".

[78] The Court found, elsewhere in cl 24.2 and in the background circumstances in which cl 24.2 was first agreed between the parties, reasons for departing from the ordinary and natural meaning of the words "any agreement". We consider there were no such reasons.

[79] In those circumstances, this Court has jurisdiction to intervene.

Result

[80] The appeal is allowed.

[81] The judgment of the Employment Court is set aside.

[82] The costs orders made by the Employment Court are reversed.

[83] The decision of the Employment Relations Authority is reinstated.

[84] The respondent must pay the appellant's costs for a standard appeal on a band A basis with usual disbursements. We allow for second counsel.

Solicitors:
Kiely Thompson Caisley, Auckland for Appellant
New Zealand Airline Pilots' Association Incorporated, Manukau for Respondent