IN THE FAIR WORK COMMISSION

AT SYDNEY

MATTER: AM2018/14

4 YEARLY REVIEW – AIR PILOT'S AWARD 2010

REGIONAL AVIATION ASSOCIATION OF AUSTRALIA SUBMISSIONS

INTRODUCTION

1. A coalition of employers[1] covered by the *Air Pilots Award 2010* (collectively**, the Regional Aviation Association of Australia Operators, 'RAAA Operators'**) have made an application to vary cl.16 of the Award (currently cl.13 of the Exposure Draft of the 2016 Award) through the 'Regional Aviation Association of Australia' (RAAA). The RAAA is representing the RAAA Operators without leave per s.596(4)(b)(ii), and here acts in that sense largely for administrative convenience (and is in turn represented by lawyers, with permission). The RAAA Operators should be considered the foundational applicant(s) for the purposes of s.158.

2. The variation:

    a. confirms, in accordance with case authority, that clause 13.2 only applies in circumstances where employment has already commenced;

    b. clarifies clauses 13.2 and 13.5 to limit the employer's liability to pay for pilot training to circumstances where the employer requires the training, and not where a pilot (before or during employment) seeks to voluntarily obtain qualifications required to be obtained by a regulatory body such as a pilot's licence or aircraft type endorsement; and

[1] Air North, Aviair, Casair, Chartair, Cobham Aviation, General Aviation Maintenance Group, Hardy Aviation, Hinterland Aviation, Maroomba Airlines, Pacific Flight Services, Regional Express Group, the Royal Flying Doctor Service, Sharp Airlines and Skippers.

c. confirms that nothing in cl.13 prevents the entry into a '*training bond*' for the recovery of training costs assumed by the employer where that employer would not otherwise be obliged to pay them, as per usual industry practice.

3. The variation is in the same terms as that sought by Alliance Airlines. The RAAA Operators support and rely on the submissions filed by Alliance Airlines.

GENERAL PRINCIPLES

4. This application is made as part of the 2014 four-yearly review being conducted by the commission per s.156 of the *Fair Work Act 2009* (Cth) (commenced before its repeal). The general principles governing the approach to this review are well established, and were recently summarized in *Re 4 Yearly Review – Pharmacy Industry Award 2010* [2018] FWCFB 7621 at [126] (citations omitted):

> • *section 156(2) provides that the Commission must review all modern awards and may, among other things, make determinations varying modern awards;*
> • *"review" has its ordinary and natural meaning of "survey, inspect, re-examine or look back upon";*
> • *the discretion in s 156(2)(b)(i) to make determinations varying modern awards in a review, is expressed in general, unqualified, terms, but the breadth of the discretion is constrained by other provisions of the FW Act relevant to the conduct of the review;*
> • *in particular the modern awards objective in s 134 applies to the review;*
> • *the modern awards objective is very broadly expressed,21 and is a composite expression which requires that modern awards, together with the NES, provide "a fair and relevant minimum safety net of terms and conditions", taking into account the matters in ss 134(1)(a)–(h);*
> • *fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question;*

- *the obligation to take into account the s 134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process;*
- *no particular primacy is attached to any of the s 134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award;*
- *it is not necessary to make a finding that the award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a modern award;*
- *the s 134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives;*
- *in giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s 134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance;*
- *what is necessary is for the Commission to review a particular modern award and, by reference to the s 134 considerations and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net;*
- *the matters which may be taken into account are not confined to the s 134 considerations;*
- *section 138, in requiring that modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective, emphasises the fact it is the minimum safety net and minimum wages objective to which the modern awards are directed;*
- *what is necessary to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence;*

- *where an interested party applies for a variation to a modern award as part of the 4 yearly review, the task is not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation meet the objective.*

THE EVIDENCE

5. The RAAA Operators rely on the following witness statements:

   a. Andrew Hardy, Chief Executive Officer of Hardy Aviation;

   b. Carl Jepsen, Chief Executive Officer of General Aviation Maintenance Group;

   c. Ian Coxall, Chief Pilot of Skippers Aviation;

   d. Malcolm Sharp, Managing Director of Sharp Airlines;

   e. Mark Wardrop, Director of Chartair;

   f. Matthew Tsai, Solicitor of Norton White;

   g. Michael Bridge, former Director of Air North and Board Member of the Civil Aviation Safety Authority.

   h. Michael McConachy, Managing Director of Aviair; and

   i. Peter Scott, Chief Executive Officer of Maroomba Airlines.

6. The RAAA Operators operate a range of different aircraft. The *Civil Aviation Safety Regulations* prescribe that pilots, in addition to holding a pilots' licence, must hold an aircraft type rating for each aircraft type they will operate, as well as holding other ratings and endorsements and complying with licensing recency requirements. The cost of the training to obtain an aircraft type rating is between $10,000 to $50,000, depending on the aircraft type. The cost of obtaining a commercial pilot licence is approximately $75,000 and the cost of a multi engine command instrument rating is approximately $30,000.

7. There is also employer-specific training, including in emergency procedures and in respect of certain routes.

8. What that evidence shows is that the normal industry practice is that:

   a. where a pilot (or aspirational pilot) wishes to obtain a pilot's licence and/or a particular endorsement or rating, they would ordinarily bear the cost of the necessary training;

   b. from time to time, a prospective or current employee will voluntarily apply for a position piloting an aircraft for which they do not hold relevant qualifications as required by CASA; and

   c. where this occurs, the pilot and the employer usually enter into an agreement whereby the employer pays for the training costs, with the employee/prospective employee to refund a pro-rata amount if they resign their employment within a certain period of time (known as a '*training bond*'.

9. As Mr Tsai's affidavit shows, it is common for enterprise agreements in the airline industry to have specific clauses dealing with training bonds, reflecting this general practice.

10. What the evidence also reveals – as, indeed, does the material filed by the Australian Federation of Air Pilots – is that there is some confusion about the correct interpretation of cl.16 of the *Air Pilots Award 2010*, and in particular whether it permits arrangements of this kind. The AFAP from time to time contends that it does not. The question in respect of training bonds has not been directly considered by a court.

11. An alternative to a training bond is a staged reimbursement model, whereby the pilot bears the upfront cost of the training and is reimbursed in stages over the course of a prescribed period of employment. Due to the upfront cost, this is a significantly less beneficial arrangement for employees. Staged repayment options have, and have been found to be lawful: see *Jetgo Australia Holdings v Goodsall* [2015] FCCA 1378.

12. All of the RAAA Operators' witnesses are clear that these bonds are integral to their business model; without them, smaller regional operators in particular would be unable to sustainably train pilots in new qualifications. This would detrimentally affect their business operations, and in turn would significantly limit the employment and career opportunities for current and prospective pilots.

13. Nevertheless, the disputation caused by the current lack of clarity is causing some operators to only agree to staged repayment of training costs, or to cease hiring or promoting unqualified pilots altogether: see Mr Wardrop's statement at [17] and Mr Sharp's statement at [18]. As such, it is desirable that this perceived ambiguity be resolved.

THE CURRENT CLAUSE

14. Clause 13.2 currently reads:

> *Where the employer requires a pilot to reach and maintain minimum qualifications for a particular aircraft type in accordance with the award, all facilities and other costs associated with attaining and maintaining those qualifications will be the responsibility of the employer.*

15. Two things are apparent from this clause.

16. **First**, it can only apply to current employees, rather than prospective employees. *'Pilot'* is a defined term limited to persons '*employed under the provisions of the award*': cl.3.1. A prospective employee (including a person who has been offered employment *conditional* on the completion of a training course) cannot fall within this definition. Similarly, the award itself only applies to '*employees'*: cl.4.1. As such, the clause in its terms does not require an employer to bear the costs of pre-employment training and cannot preclude an arrangement whereby a prospective employer does agree to bear these costs on a conditional basis.

17. **Second**, it is limited to circumstances where the employer '*requires'* the training to be undertaken. The word '*require'*, given its ordinary meaning in

the context of an employment relationship, means to make or specify as compulsory: in other words, where the employer *directs* an employee to undertake training. It does not encompass a situation where an employee volunteers for a training opportunity, including by applying for a position for which they are not currently qualified. Nor does it cover circumstances wherein a person other than the employer – i.e. the regulator – requires the training. Accordingly, it again does not preclude arrangements whereby employers volunteer to bear these costs, subject to the employee remaining in employment for a certain period.

18. As such, correctly interpreted the clause does not prohibit the training bond/staged repayment arrangements canvassed above. This is unsurprising; the clause has a reasonably long history and it is to be expected that it would reflect widespread and long-standing practice of entering into these arrangements.

19. The situation is the same with current cl.13.5, which reads:

> *Where employment commences under this award the pilot's service required to be undertaken by the prospective employer prior to commencing employment during training period will be recognised and any training required to be conducted at the employee's cost will be reimbursed to the pilot.*

20. The clause is, as currently drafted, almost unintelligible. It is predominantly concerned with service recognition. However, for the reasons set out above – in particular, the word 'required' indicates that it is only intended to encompass training made mandatory *by the employer*. If this were not so, nobody would ever pay to obtain a pilot's license.

THE VARIATION

21. Nevertheless, as currently drafted, the clause is leading to uncertainty and disputation, with the undesirable results set out above. Although, as set out above, it is not necessary to demonstrate that the clause is not meeting the modern awards objective before a variation is justified, as matters stand, to the extent that the clause is susceptible of a meaning that does not accord

with long-standing industry practice, it is not providing a fair or relevant safety net.

22. As such, the RAAA Operators seek to vary the exposure draft clause to read:

> *13.2 Where employment has commenced and the employer and not a regulatory body or otherwise requires a pilot to undertake additional training to reach and maintain minimum qualifications for a particular aircraft type in accordance with this award, other than the aircraft type for which the pilot was employed, all facilities and other costs associated with attaining and maintaining those qualifications will be the responsibility of the employer.*
>
> *13.5 Where employment commences under this award, the pilot's service required to be undertaken by the prospective employer, and not a regulatory body or otherwise, prior to commencing employment, during a training period will be recognised and any training required to be conducted, by the prospective employer and not a regulatory body or otherwise, at the pilot's cost will be reimbursed to the pilot.*
>
> *13.6 Nothing in this clause 13 prevents the pilot and the employer entering into an individual return of service or training bond.*

23. The variation sought is effectively a clarification. The proposed changes to clauses 13.2 and 13.5 confirm the current effect of those clauses, that is, that employers must reimburse the cost of training that they require. Costs associated with becoming qualified to pilot an aircraft or pilot a particular aircraft type are expressly excluded in the proposed variation to make the wording of the award clearer.

24. The additional cl.13.6 is an avoidance of doubt clause; to that end, it may be more suitable to be included as a note. Notably, it is in different terms to the variation proposed in *Re China Southern West Australian Flying College* [2012] FWA 8272, which, although also concerned with training bonds, in fact involved a substantial alteration to the clause.

25. Together, the changes will:

    a. promote increased workforce participation and the efficient and productive performance of work by removing disputation around training bonds which is currently making recruitment of less qualified pilots unattractive to potential employers and inhibiting career progression opportunities for pilots;

    b. ensure, through increased clarity, that the award is simple, easy to understand, and sustainable;

    c. have a positive effect on business, by removing uncertainty as to employers' liability for training costs voluntarily adopted by employees or otherwise outside the control of employers;

    d. in particular benefit young pilots or would-be pilots in regional areas and elsewhere by providing increased opportunity;

    and accordingly the Commission should exercise its discretion to vary the award.

26. The Commission is not confined to the terms proposed by a party: s.599, *FW Act*. In the event that the Commission is of the view that the proposed terms do not sufficiently clarify the clause, the RAAA Operators would seek to be heard further on alternative drafting.

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