IN THE FAIR WORK COMMISSION

Matter No.: AM2018/14

Re Application by: Australian Federation of Air Pilots

OUTLINE OF SUBMISSIONS OF THE AUSTRALIAN FEDERATION OF AIR PILOTS

Background

1. On 18 December 2018 Vice President Catanzariti issued Directions for the filing of material concerning amendments to the *Air Pilots Award 2010* ("**Air Pilots Award**") as part of the 4 yearly review of modern awards.

2. The Directions required a party who had filed a Form F46 in this matter, or in matter AM2016/2, to file an Outline of Submissions and any evidentiary material in support of the amendments sought by 4.00pm on 13 February 2019.

3. The Australian Federation of Air Pilots ("**AFAP**") has filed 2 applications to vary the Air Pilots Award, the first in matter AM2016/2 (on 15 February 2016) and the second in this matter (on 16 January 2019).

4. In relation to the application filed in matter AM2016/2, the AFAP withdraws paragraphs 3.2 and 3.5. The variation sought in paragraph 3.4 ("**Schedule C Variation**") is maintained (and, as noted in paragraph 7 below, expanded). The application filed in this matter ("**Training Variation**") is also maintained.

5. The AFAP's submissions in support of the Schedule C Variation and the Training Variation are outlined below.

Schedule C Variation

6. The AFAP seeks to add the following words to Schedule C of the Air Pilots Award:

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Pilots employed by regional airlines operating an aircraft type not listed in C.1.1 will be paid the minimum salary and additions to minimum salary provided for in Schedule B – Classifications, Minimum Salaries and Additions to Salaries – Airlines/General Aviation.

7. In addition to the above variation, the AFAP seeks to also add the following words into Schedule C of the Air Pilots Award:

   If the aircraft type is a jet with a MTOW 20,000kg or more, then pilots will be paid the minimum salary and additions to minimum salary in accordance with Schedule B – Classifications, Minimum Salaries and Additions to Salaries – Airlines/General Aviation as follows:

   MTOW 20,000 UTBNI 35,000kg – Fokker 28/CRJ-50

   MTOW 35,000 UTBNI 50,000 – BAe-146/Fokker 100B/Boeing 717.

   MTOW 50,000 and above – Narrow body aircraft

8. This variation is sought to resolve an uncertainty that has arisen from the drafting of the Air Pilots Award (in particular the definitions of "regional airline" and "airline operation"), and exacerbated by the decision of *Jetgo Australia Holdings Pty Ltd v Goodsall* [2015] FCCA 1378 (***"Jetgo Decision"***).

9. In the *Jetgo Decision*, Vasta J adopted a literal reading of the definition of "regional airline" at clause 3.1 of the Air Pilots Award. The consequence of this interpretation is that some operators which the AFAP considered to fall within the definition of "airline operation" at clause 3.1 of the Air Pilots Award might now fall within the definition of regional airlines. This means that Schedule C of the Air Pilots Award applies to these operators rather than Schedule B.

10. Schedules B – E of the Air Pilots Award provide for the minimum salaries (and other entitlements) applicable according to the relevant type of operator (being airlines, general aviation, regional airline, aerial application operations and helicopter operations).

11. Unlike the other schedules, Schedule C lists specific aircraft, rather than categories of weight. If a pilot is employed by a regional airline and flies an aircraft type that is not listed in Schedule C, then it appears that there may be no minimum salary per annum set by the Air Pilots Award.

12. This results in an anomaly whereby some regional air pilots would be entitled to salaries set by the Award, and others would appear to fall back on the minimum wage. By varying Schedule C as proposed by the AFAP, this anomaly is removed.

13. As noted by Vasta J in the *Jetgo Decision*, Schedule C of the Air Pilots Award does not provide for jet aircraft types. Jet aircraft types, from Schedule B of the Air Pilots Award, are entitled to minimum salaries higher than those applicable for piston or turbo prop aircraft types. This is made clear in Schedule B where a distinction is made between clause B.1.1 of Schedule B (which is applicable to piston and turbo prop aircraft) and clause B.1.2 (which is applicable for jet aircraft). By varying Schedule C as proposed in paragraph 6 and 7 above, this anomaly is removed.

14. The objective of modern awards is to "*provide a fair and relevant safety net of terms and conditions*" taking into account the matters specified in section 134(1) of the *Fair Work Act 2009* (Cth) ("**FW Act**"). The anomaly that has now become apparent results in some pilots not having a fair and relevant safety net set by the Air Pilots Award.

Training Variation

15. The AFAP has become aware that some employers are of the view that, if minimum qualifications are required by the Civil Aviation Safety Authority, then they are not required by the employer for the purposes of clause 16.2 of the Air Pilots Award. Accordingly, it is argued that the employer is not responsible for those qualifications.

16. The variation of clause 16.2 sought by the AFAP is required to ensure it operates as it was historically intended to do so.

17. The Air Pilots Award is, essentially, an amalgamation of 4 pre-modernisation awards:

    a) *Pilots' (General Aviation) Award 1998* [Print R0200] (prior to its simplification, *Pilots (General Aviation) Award 1984* [Print F6276]);

    b) *Regional Airlines Pilots' Award 2003* [PR940134] (prior to its simplification, *Pilots' Supplementary Airlines Award 1988* [Print H4087]);

c) *Helicopter Pilots (General Aviation) Award 1999* [Print R2738] (prior to its simplification, *Helicopter Pilots' (General Aviation) Award 1987* [Print G9691]); and

d) *Aerial Agricultural Aviation Pilots Award 1999* [Print R8613] (prior to its simplification, *Aerial Agricultural Aviation Pilots' Award 1983* [Print F4477]).

18. Prior to the award simplification, each of these awards contained clauses in relation to training. Relevant to lineage of clause 16.2 of the Air Pilots Award, clause 24 of the *Pilots (General Aviation) Award 1984* made specific reference to qualifications required by CASA (or its predecessors), and required that the employer would be responsible for the costs of obtaining those qualifications.

19. During award simplification, clause 24 of the *Pilots (General Aviation) Award 1984* was subject to redrafting. However, it was intended that the liability of the employer remained. Commissioner Wilks in the award simplification decision [Print Q8606] makes this clear. Accordingly, notwithstanding that the training clause was significantly amended, clause 19 of the *Pilots' (General Aviation) Award 1998* retained the intention that the employer would be responsible for the cost of qualifications required by CASA.

20. During the award modernisation process, the Air Pilots Award was largely a product by way of consent between various stakeholders. The first draft of the Air Pilots Award was filed by Qantas on 18 March 2009 (the relevant pages are attached at "**Attachment A**"). The training clause contained in that draft was expressly stated to be based on clause 19 of the *Pilots' (General Aviation) Award 1998*, and was in identical terms.

21. Qantas then filed a revised draft on 24 April 2009 (the relevant pages are attached at "**Attachment B**"). This draft was the product of extensive consultation and was filed by agreement with the various stakeholders. These stakeholders were the Aerial Agricultural Association of Australia, the AFAP, the Australian & International Pilots Association, Cobham Aviation Services Australia and the Regional Airlines Association of Australia. The revised draft retained the earlier clause, and added 2 further clauses (one of which is derived from the *Regional Airlines Pilots' Award 2003*, the other excluding the training clause applying to aerial application operations).

22. It is clear, then, from the history of clause 16.2 of the Air Pilots Award that the type of qualifications referred to in the clause include those qualifications which are required by CASA.

23. The intended operation the pre-modernisation process clauses on which clause 16.2 was based is also affirmed by a draft policy (a copy of which is attached at "**Attachment C**") of the Office of the Employment Advocate for the purposes of applying the no-disadvantage test to Australian Workplace Agreements in response to concerns held by the AFAP. That draft policy clearly contemplates minimum qualifications required by CASA.

24. The decision of *McLennan v Surveillance Australia Pty Ltd* [2005] FCAFC 46 ("***McLennan's Case***") also supports the AFAP's position. In that decision, the phrase "where the employer requires a pilot to reach and maintain minimum qualifications for a particular aircraft type" was considered by the Full Court. The circumstances of *McLennan's Case* were that the Appellant was employed by the Respondent as a pilot on the Islander aircraft and was subject to an AWA. The AWA did not contain a bond for training costs. The Appellant applied for a new position with the Respondent as a Dash-8 pilot. The Respondent offered the Dash-8 position to the Appellant who accepted it. A Dash 8 endorsement bond was signed by the Appellant, who subsequently successfully completed the Dash-8 endorsement training. The Full Court found that the Dash-8 endorsement bond operated as a common law agreement, which was contrary to the statutory agreement in place (the AWA) and was therefore unenforceable.

25. The relevant reasoning that the AFAP relies on is that the Full Court, to arrive at this conclusion, found that the Dash-8 training was training of the type contemplated by clause 19.1 of the *Pilots' (General Aviation) Award 1998* (which as noted above, is the clause upon which clause 16.2 of the Air Pilots Award is based. The AWA was assessed against the *Pilots' (General Aviation) Award 1998* for the purposes of ensuring it passed the no-disadvantage test. To make a finding that the Dash-8 common law agreement was detrimental to the Appellant when compared to the AWA, it was necessary for the Full Court to have determined that the Dash-8 training bond dealt with training caught by clause 19.1 of the *Pilots' (General Aviation) Award 1998.* Accordingly, the Full Court expressly found that the minimum qualifications required to fly the Dash-8, being qualifications required by CASA, were covered by clause 19.1.

26. There is nothing that would indicate that during the award modernisation process that the drafting of clause 16.2 of the Air Pilots Award was intended to depart from the established meaning of clause 19.1 of the *Pilots' (General Aviation) Award 1998*, as interpreted by the Full Federal Court in *McLennan's Case*.

27. Finally, if clause 16.2 did not apply to minimum qualifications required by CASA, it is unclear what other minimum qualifications it could be referring to. Clause 16.2 would have little or no work to do.

28. The variation sought clarifies the intention of clause 16.2 as set out above. The entitlement conferred on a pilot by clause 16.2 and its predecessors has been part of a fair and relevant safety net of terms and conditions for pilots both historically and as set by the award modernisation process. It should be clarified given that it is disputed by some employers.

Australian Federation of Air Pilots

13 February 2019

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
AWARD MODERNISATION
(AM2008/25) STAGE 3 AIRLINE OPERATIONS

Blake Dawson

18 March 2009

Our reference
HM RJB 02 2002 3249

SUBMISSIONS BY THE QANTAS GROUP

- DRAFT PILOTS OCCUPATIONAL AWARD

We refer to our submissions dated 6 March 2009 filed on behalf of the employers within the Qantas Group specified in those submissions.

As previously submitted, pilots are a distinct occupational group with unique and complex working arrangements mandating a separate occupational award. All relevant stakeholders have proposed a separate occupational award for pilots.

A draft *Pilots Occupational Award* (**Draft Pilots Award**) prepared by the Qantas Group is attached as **Attachment A** to these submissions.

The Qantas Group proposes to have further discussions with relevant stakeholders in relation to the draft.

1. Scope of the award

We propose that the Pilots Occupational Award cover pilots, as defined in clause 3.1(z), and employers of pilots throughout Australia.

At this stage, the Draft Pilots Award does not cover employers who employ helicopter and aerial agriculture pilots. The Qantas Group does not employ any such pilots and has no knowledge or understanding of the employment of those pilots and how appropriate it would be to incorporate them into an award applying to airline pilots.

The Qantas Group would be happy to discuss this further with relevant stakeholders.

2. Awards used

In preparing the Draft Pilots Award we have had regard to the *Pilots' (General Aviation) Award 1998* (**Pilots GA Award**) and the *Regional Airlines Pilots' Award 2003* (**Regional Pilots Award**) which are the two industry awards.

The Draft Pilots Award includes drafting notes throughout the document intended to highlight for the Commission and other stakeholders some of the key drafting issues which arise and the source of provisions included in the draft.

Further submissions are set out in section 10 below regarding the relevance of particular pilot awards to determining rates of pay.

For the reasons set out in section 1 above, at this stage we have not had regard to the terms of the *Aerial Agricultural Aviation Pilots Award 1999* or the *Helicopter Pilots (General Aviation) Award 1999*.

The *Qantas/Australian Airlines Pilots Integration Award 1994* is an

enterprise award and we have not had regard to it for the purposes of preparing the Draft Pilots Award.

3. Termination of employment

Clause 13 of the Draft Pilots Award includes occupational-specific detail in relation to termination of employment which are necessary to take into account the unique nature of pilot working conditions and payment arrangements.

4. Allowances

We have included only allowances that are not obsolete or irrelevant.

The Pilots GA Award and the Regional Pilots Award both contain a "transport allowance"[1], which provides for an additional payment for a pilot who signs on for duty or signs off from duty between the hours of 7pm and 7am, unless:

(a) The pilot is provided with transport;

(b) The pilot is reimbursed for the cost of transport; or

(c) The pilot is paid a per kilometre allowance.

Consistent with the approach taken in our submissions dated 6 March 2009, we have not included a transport allowance in the Draft Pilots Award because such an allowance is outmoded and is not appropriate for inclusion in a modern award. We repeat the comments made at section 5.7 of our submissions dated 6 March 2009.

If the Commission proposes to include such an allowance in a modern award for pilots, it ought to be subject to a transitional provision and its application should be restricted to those who had an entitlement in accordance with a pre-reform award that applied to the employee immediately prior to 1 January 2010.

5. Pilots indemnity

Clause 29.6 of the Pilots GA Award and Clause 13 of the Regional Pilots Award contain a pilot indemnity provision (as part of the Accident Pay clause) in the following terms:

> A pilot will not be required to pay for damage or loss of aircraft or equipment used in the service nor will any lien or other claim be made by the employer upon the pilot's estate. Any claim made by any member of the public, passenger or other person upon the pilot's estate as a result of any accident or happening caused by the pilot when duly performing their nominated duty, whether efficiently or, as may be subsequently determined, negligently, will be accepted as a claim made against the employer. The employer will be solely responsible for all claims as a result of operations by or travel in their aircraft. The foregoing will not apply to a pilot who knowingly performs their nominated duty in a manner contrary to law or the employer's policy.

The Commission will need to determine whether such a clause:

(a) is an allowable award matter;

(b) is appropriate for inclusion in a modern award; and

(c) should be covered by the scope of the transitional provision preserving accident pay for employees who had a pre-existing entitlement.

[1] See clause 30.2 *Pilots' (General Aviation) Award 1998* and clause 23.8.1 *Regional Airlines Pilots' Award 2003.*

6. Hours of work, days off and rest periods

The hours of work, days off and rest periods of pilots are prescriptively regulated by the regulations approved by the Civil Aviation Safety Authority (**CASA**) from time to time.

There are also general or employer-specific exemptions to, or concessions under, those regulations allowed by CASA from time to time.

Clause 20 of the Draft Pilots Award recognises the role of CASA Regulations in place from time to time for regulating hours of work, days off and rest periods of pilots. It is not otherwise appropriate to have detailed provisions dealing with these matters.

In addition, we are instructed there is currently a significant review being undertaken of the regulation of hours of work for pilots, which may involve a move away from the current regulation under CAO 48 to a fatigue management system. Clause 20.1 is intended to be broad enough to encompass any future changes to the regulatory environment by referring to a Fatigue Risk Management system approved by CASA.

7. Annual leave and personal leave

Clauses 23 and 24 of the Draft Pilots Award incorporate occupational-specific detail regarding annual leave and personal leave.

8. Public holidays

Neither the Pilots GA Award nor the Regional Pilots Award contain provisions which provide for days off on public holidays or additional payment for working public holidays.

The annual leave entitlement of 42 days annual leave per annum (inclusive of Saturdays, Sundays and public holidays) in Clause 23 of the Draft Pilots Award takes into account the requirement to work public holidays. Clause 25 of the Draft Pilots Award dealing with public holidays is intended to clarify and reflect the current position regarding public holidays.

9. Superannuation clause

We have not included a superannuation clause in the Draft Pilots Award as the underlying industry awards do not deal with superannuation.

In accordance with the approach taken by the Full Bench in relation to other similar circumstances, for example the *Mining Industry Award 2010*, no superannuation provision should be included.

10. Classification structure and rates of pay

We are not yet in a position to provide the Commission with a finalised classification structure and rates of pay for inclusion in the Draft Pilots Award. However, we make the following preliminary submissions.

The Pilots GA Award contains an appropriate classification structure and rates of pay up to and including single-aisle (narrow-bodied) jets (B737 aircraft). This should form the basis of the classification structure and rates of pay in the Draft Pilots Award.

The Qantas Group proposes using the structure in the Pilots GA Award and building on it to include classifications and rates of pay for dual-aisle (wide-bodied) aircraft (which includes single-decker and double-decker wide-bodied aircraft).

The *Qantas Short Haul Pilots' Award 2000* (**QF Short Haul Award**), which is an enterprise award, also contains a B737 rate of pay. This rate of pay is much higher than the Pilots

GA Award B737 rate and is higher than the rate in the *Qantas Technical Aircrew (Long Haul) Award 2000* (**QF Long Haul Award**) (also an enterprise award) for the B767 aircraft which is a wide-bodied (dual aisle) aircraft.

It is inappropriate for the Commission to have regard to the rates of pay in the QF Short Haul Award because:

(a) The Commission should use the established industry rate over an enterprise award rate;

(b) The rates of pay in the QF Short Haul Award have their origin in the award made in 1989 by agreement between the parties following the 1989 Pilots Dispute. Those rates of pay reflect the unique circumstances arising from the 1989 Pilots Dispute and have resulted in much higher rates of pay than other properly fixed minimum rates. We are instructed that those rates were set by:

  (i) using the existing paid rates at the time based on average actual earnings;

  (ii) rolling up a range of allowances that were previously paid on top of that rate of pay, such as duty credit hours, passive flying hours, night flying hours, SIM time and overtime on the day;

  (iii) including a wage increase on the loaded rate; and

  (iv) providing for 700 flying hours in a year, a number which is significantly lower than the flying hours provided for in the Pilots GA Award (900 hours) or CAO 48 (up to 1000 hours).

If necessary, we undertake to review the Commission's files relating to the creation of the QF Short Haul Award in 1989 to provide the Commission with more information in this regard.

For these reasons, it is appropriate to use the established rate of pay for a single-aisle jet from the Pilots GA Award.

The only Pilot award rates of pay available in relation to wide-bodied (dual aisle) aircraft are contained in the QF Long Haul enterprise award.

There are acknowledged properly set minimum rates in the QF Long Haul Award for B767 (wide-bodied) and B747 (super-wide/double-decker) aircraft. In the absence of any other rates, the Qantas Group proposes these rates be used as a guide to establish minimum rates of pay in the Draft Pilots Award.

11. Conclusion

The Qantas Group will continue to prepare its proposed classification structure and rates of pay and would be happy to consult with relevant stakeholders in relation to the Draft Pilots Award.

[redacted]

BLAKE DAWSON
Solicitors for the Qantas Group
18 March 2009

Qantas Group Parties' Draft
18 March 2009

Pilots Occupational Award 2010 (MA0000XX)

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HM RJB KZS 02 2002 3249

and benefit appropriate to the pilots period of service with the employer for a minimum of one week. Except as stated in clause 26.1(c), the remuneration rate and benefits will return to the pilots normal rate at the expiry of the relief/transfer or one week, whichever is the latter.

(c) Should a period or periods of flying in a category or classification attracting a higher level of remuneration and/or benefits exceed 90 days in the aggregate in any twelve month period standing alone, excluding a period spent relieving another pilot on long service leave, the pilot will be paid at the higher rate of remuneration and benefit for twelve months.

(d) If, during a relief or temporary transfer a pilot is required to carry out flying duties in a category or classification attracting a lower level of remuneration the pilot will continue on the existing salary scale.

26.2 **Permanent**

(a) On a change of category or classification of work, years of service with the employer will determine the incremental level in the new category or classification of work.

(b) On promotion to a different category or classification of work, attracting a higher remuneration, the pilot will maintain their existing salary until proficient in the new category or classification.

(c) **Transfer to lower paid duties**

Where a pilot is transferred to lower paid duties by reason of reduction of establishment or phase out or withdrawal of aircraft type. The pilot will be given the following minimum notice or paid at the existing salary rate for the notice specified below:

Under 1 year	3 weeks
Over 1 year but under 3 years	6 weeks
Over 3 years	8 weeks

Drafting note:

- Based on clause 18 *Pilots' (General Aviation) Award 1998*.
- Clause 21 *Regional Airlines Pilots' Award 2003* is largely similar.

27. TRAINING - CLASSIFICATIONS

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

27.2 Where a pilot fails to reach or maintain a standard required the pilot will receive further re-training and a subsequent check. The pilot may elect to have a different check captain on the second occasion.

27.3 Where a pilot fails the second check in clause 27.2, the pilot may, where practicable, be reclassified to the previous or a mutually agreed equivalent position.

Drafting note:

- Based on clause 19 *Pilots' (General Aviation) Award 1998.*

28. TRANSFERS

28.1 Permanent

(a) A pilot who is permanently transferred to another base at the direction of the employer will be reimbursed for all reasonable expenses incurred by the pilot for the consequential removal of the pilot, immediate family (including dependent children under 21 years of age), and their furniture, possessions and personal effects as approved by the employer prior to the transfer.

(b) A pilot transferred to a new home base will be reimbursed the costs of appropriate accommodation until the pilot has obtained suitable permanent accommodation and the provision of the reimbursement will be limited to a period of up to two weeks.

(c) A pilot will be given no less than 56 days written notice by his or her employer of an intended permanent transfer, provided that within this period the pilot will be given at least 28 days written notice of the actual date of transfer.

(d) Except that the pilot and the employer may mutually agree in a specific case that a shorter period of time represents adequate notice.

(e) Where a pilot is permanently transferred he or she will be granted upon arrival at his or her new base such period of time, as he or she requires up to a maximum of five days free of all duty to attend to personal matters arising from his or her being so transferred.

(f) Duty-free days prescribed by this award will not be used to meet the requirements of this subclause.

28.2 Temporary

(a) A pilot who is to be sent on a temporary transfer at the direction of the employer will be notified as soon as possible in advance, but unless the pilot consents to less notice, this will in no case be later than 48 hours prior to the pilot's scheduled departure from the pilot's home base to commence such transfer.

(b) A pilot whose child is due to be born will wherever possible, not be required by his employer to transfer away from the pilot's home base during

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
AWARD MODERNISATION
(AM2008/25) STAGE 3 AIRLINE OPERATIONS

Blake Dawson

SUBMISSIONS BY THE QANTAS GROUP
- AIR PILOTS OCCUPATIONAL AWARD 2010

24 April 2009

Our reference
HM RJB KZS 02 2002 3249

We refer to our submissions dated 6 and 18 March 2009 and the draft Pilots Occupational Award 2010 filed by the Qantas Group on 18 March 2009. We also refer to the submissions made at the consultation hearings on 19 and 20 March 2009.

We make the following additional submissions on behalf of the Qantas Group in relation to the proposed occupational award for pilots.

1. REVISED DRAFT AIR PILOTS OCCUPATIONAL AWARD 2010

The Qantas Group has consulted extensively with both employer and union stakeholders since the consultation hearings on 19 and 20 March 2009, including:

(a) the Aerial Agricultural Association of Australia (**AAAA**);

(b) the Australian Federation of Air Pilots (**AFAP**);

(c) the Australian & International Pilots Association (**AIPA**);

(d) Cobham Aviation Services Australia (**Cobham**); and

(e) the Regional Airlines Association of Australia (**RAAA**).

The product of these consultations is what is, in very large part, an agreed parties' draft *Air Pilots Occupational Award 2010.*

The Qantas Group is appreciative of the additional time provided by the Commission to stakeholders which has enabled them to prepare a joint draft for consideration by the Commission prior to the publication of the exposure draft awards for Stage 3 industries.

We attach the following documents to this submission:

- **Attachment A** - A revised draft *Air Pilots Occupational Award 2010* (**Draft Air Pilots Award**);
- **Attachment B** - Schedules to the Draft Air Pilots Award which set out sector specific conditions as follows:
  - (i) Schedule A – Airline and General Aviation Operations;
  - (ii) Schedule B – Regional Airlines;
  - (iii) Schedule C – Aerial Application Operations; and
  - (iv) Schedule D – Helicopter Operations.

2. COMMENTS ON THE DRAFTING

2.1 Awards used

In preparing the Draft Air Pilots Award, the stakeholders have had regard to the following industry awards:

(a) the *Pilots' (General Aviation) Award 1998*) (**Pilots GA Award**);

(b) the *Regional Airlines Pilots' Award 2003* (**Regional Pilots Award**).

(c) the *Aerial Agricultural Aviation Pilots Award 1999*; and

(d) the *Helicopter Pilots (General Aviation) Award 1999*.

2.2 Helicopter operations

There has not been input into the draft from any stakeholder with a significant knowledge of helicopter operations and there may need to be additional carve-outs from the clauses in the body of the Draft Air Pilots Award for employees engaged in helicopter operations (as well as a definition for helicopter operations inserted in clause 3 of the Draft Air Pilots Award).

The Qantas Group is not in any position to comment on these matters and suggests that they need to be addressed by any relevant stakeholders for helicopter operations.

2.3 Errors or omissions

The Draft Air Pilots Award and the Schedules have had drafting input from a number of different stakeholders. As a result, there may be slight differences in the use of terminology and drafting style throughout the documents which needs to be tightened up.

Each of the stakeholders also reserve their rights to draw to the Commission's attention any errors or omissions that come to light after the documents have been filed.

3. AREAS OF DIFFERENCE BETWEEN THE STAKEHOLDERS

The limited number of issues which are not agreed between the stakeholders are highlighted in the Draft Air Pilots Award and dealt with below.

3.1 Transport allowance

We refer to section 4 of our 18 March 2009 submissions. The Pilots GA Award (clause 30.2) and the Regional Pilots Award (clause 23.8.1) each provide for a "transport allowance" which provides for an additional payment for a pilot who signs on for duty or signs off from duty between the hours of 7pm and 7am, unless:

(a) The pilot is provided with transport;

(b) The pilot is reimbursed for the cost of transport; or

(c) The pilot is paid a per kilometre allowance.

We repeat our submissions at section 5.7 of our 6 March 2009 submissions regarding why such an allowance is outmoded and is not appropriate for inclusion in a modern award. Consistent with this approach, and our submissions dated 18 March 2009, the Qantas Group does not agree to the inclusion of a transport allowance in the Air Pilots Occupational Award.

If the Commission does propose to include such an allowance in a modern award for pilots, it ought to be subject to a transitional provision and its application should be restricted to those who had an entitlement in accordance with a pre-reform award that applied to the employee immediately prior to 1 January 2010 and should not become an industry standard.

3.2 Accident pay

The Pilots GA Award and the Regional Pilots Award each include an accident pay clause.

On this basis, the Qantas Group is prepared to agree to the inclusion of an accident pay clause in the Draft Air Pilots Award (relevantly clause 19), but only on the basis that the clause is in transitional form and in the form provided at paragraph [88] of the decision of the Full Bench of the Commission dated 19 December 2008.

3.3 Amount of paid personal leave

The Qantas Group supports the inclusion of occupational specific detail regarding annual leave and personal leave in the Draft Air Pilots Award having regard to the unique working arrangements of pilots.

The Qantas Group does not however support the inclusion of clause 24.3 "Amount of paid personal leave" proposed by the union stakeholders in the Draft Air Pilots Award. This level of entitlement is not an appropriate minimum safety net standard. In our submission, the quantum provided for in the National Employment Standards is appropriate and proposed clause 24.3 is unnecessary and should not be included.

In respect of personal/carer's leave, there was some discussion between stakeholders about whether it was necessary to include provision for unpaid carer's leave for casuals. We have not included such a clause on the basis that, in our view, the National Employment Standards will provide for unpaid carer's leave for casuals.

4. CONCLUSION

As outlined above, we have focussed in these submissions only on the limited areas of difference between the stakeholders.

We would be happy to provide additional information to the Commission about other clauses in the Draft Air Pilots Award if this would be of assistance to the Commission.

BLAKE DAWSON
Solicitors for the Qantas Group
24 April 2009

Air Pilots Occupational Award 2010 (MA0000XX)

Joint Submission from:

Aerial Agricultural Association of Australia (**AAAA**)

Australian Federation of Air Pilots (AFAP)

Australian & International Pilots Association (AIPA)

Cobham Pty Ltd

Qantas Group

Regional Aviation Association of Australia (RAAA)

remuneration rate and benefits will return to the pilots normal rate at the expiry of the relief/transfer or one week, whichever is the latter.

(c) Should a period or periods of flying in a category or classification attracting a higher level of remuneration and/or benefits exceed 90 days in the aggregate in any twelve month period standing alone, excluding a period spent relieving another pilot on long service leave, the pilot will be paid at the higher rate of remuneration and benefit for twelve months.

(d) If, during a relief or temporary transfer a pilot is required to carry out flying duties in a category or classification attracting a lower level of remuneration the pilot will continue on the existing salary scale.

30.2 Permanent

(a) On a change of category or classification of work, years of service with the employer will determine the incremental level in the new category or classification of work.

(b) On promotion to a different category or classification of work, attracting a higher remuneration, the pilot will maintain their existing salary until proficient in the new category or classification.

(c) **Transfer to lower paid duties**

Where a pilot is transferred to lower paid duties by reason of reduction of establishment or phase out or withdrawal of aircraft type. The pilot will be given the following minimum notice or paid at the existing salary rate for the notice specified below:

Under 1 year continuous service	3 weeks
Over 1 year but under 3 years continuous service	6 weeks
Over 3 years continuous service	8 weeks

31. TRAINING - CLASSIFICATIONS

31.1 Clause 31 does not apply to employees engaged in aerial application operations.

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

31.3 Where a pilot fails to reach or maintain a standard required the pilot will receive further re-training and a subsequent check. The pilot may elect to have a different check captain on the second occasion.

31.4 Where a pilot fails the second check in clause 31.3, the pilot may, where practicable, be reclassified to the previous or a mutually agreed equivalent position.

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

32. TRANSFERS

32.1 Permanent

(a) A pilot who is permanently transferred to another base at the direction of the employer will be reimbursed for all reasonable expenses incurred by the pilot for the consequential removal of the pilot, immediate family (including dependent children under 21 years of age), and their furniture, possessions and personal effects as approved by the employer prior to the transfer.

(b) A pilot transferred to a new home base will be reimbursed the costs of appropriate accommodation until the pilot has obtained suitable permanent accommodation and the provision of the reimbursement will be limited to a period of up to two weeks.

(c) A pilot will be given no less than 56 days written notice by his or her employer of an intended permanent transfer, provided that within this period the pilot will be given at least 28 days written notice of the actual date of transfer.

(d) Except that the pilot and the employer may mutually agree in a specific case that a shorter period of time represents adequate notice.

(e) Where a pilot is permanently transferred he or she will be granted upon arrival at his or her new base such period of time, as he or she requires up to a maximum of five days free of all duty to attend to personal matters arising from his or her being so transferred.

(f) Duty-free days prescribed by this award will not be used to meet the requirements of this subclause.

32.2 Temporary

(a) A pilot who is to be sent on a temporary transfer at the direction of the employer will be notified as soon as possible in advance, but unless the pilot consents to less notice, this will in no case be later than 48 hours prior to the pilot's scheduled departure from the pilot's home base to commence such transfer.

(b) A pilot whose child is due to be born will wherever possible, not be required by his employer to transfer away from the pilot's home base during the two week period immediately preceding the anticipated confinement of his spouse/partner and during the two-week period immediately following the birth of the child.

[redacted]

Australian Government
Office of the Employment Advocate
Alisanne Ride
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[redacted]

Australian Government
Office of the Employment Advocate

7/12/05

Simon

Dear Mr Higgins,

Please find attached the draft policy. Please get back to me with your comments as soon as possible

regards, Alisanne Ride

PO Box 9842 Sydney NSW 2001 Phone: 1300 366 632 Website: www.oea.gov.au

Training bonds in the Aviation Industry

In the interests of achieving consistency and fairly applying the no-disadvantage test an industry wide approach is to be adopted with regard to assessing the value of the training bond and the training bond clause.

The OEA's policy is as follows:

Training bond policy

This policy applies if:

1. A training bond clause is contained within an AWA for flight crew.
    a. The classification of flight crew includes the classifications of pilot and first officer.
2. The employee is a permanent employee.

Definitions

1. *'Registered training provider'* is defined as a training provider that is registered in accordance with the Australian Recognition Framework as a provider of particular vocational education and training by a training recognition authority of a State or Territory.
2. *'Training provider'* is defined as a person who, or entity that, provides vocational education and training.
3. *'Proficiency or Re-currency Training'* is defined as the training undertaken by the employee to maintain the employee's current skill set and level.
4. *'Check to line'* is defined as any formal test or other assessment conducted by, or on behalf of, the company towards a pilot being cleared to line duties.

Features of a training bond clause

1. The training provided to the employee is endorsement training that is formally recognised by the Civil Aviation Safety Authority Australia (CASA) and provided by:
    a. a training provider of CASA; or
    b. a registered training provider of CASA.
2. Training is to be distinguished for the purposes of whether the employee undertakes the training on a voluntary or directed basis.
3. A return of service obligation is applicable for employees who undertake voluntary training.
    a. The maximum Return of service obligation period (ROSOP) is two years for turbo-prop and piston equipment.
        i. The return of service obligation diminishes over the period of two years in line with the following:

0-6 months since commencement of training – 50% of the training [1]
6-12 months since commencement of training – 37.5% of the training
12-18 months since commencement of training – 25% of the training
18-24 months since commencement of training – 12.5% of the training

b. The maximum ROSOP is three years for jet endorsements.

i. The return of service obligation diminishes over the period of three years in line with the following:

0-6 months since commencement of training – 50% of the training[2]
6-12 months since commencement of training – 41.67% of the training
12-18 months since commencement of training – 33.33% of the training
18-24 months since commencement of training – 25% of the training
24-30 months since commencement of training – 16.67% of the training
30-36 months since commencement of training – 8.33% of the training

c. The return of service obligation operates from the day training is commenced by the employee.

4. The actual cost of the training be stated in a monetary amount in the agreement.

a. The employee is to be informed prior to undertaking training of the actual cost of the training.

b. The actual cost of the training does not incorporate the cost of re-currency or proficiency training of the employee.

5. An exemption clause be provided to enable employees to be prematurely released from the bond for extenuating circumstances that are beyond the control of the employee.

6. The training bond may be waived or reduced by the employer at anytime at the employer's discretion.

7. Casual employees are excluded from the provisions of training bonds.

Factors considered in determining the training bond features and value

The OEA has determined these features after considering many factors including:

- Relevant determinations by the Australian Industrial Relations Commission, State Magistrates Court and Federal Court of Australia.
- The arguments put forward by industry stakeholders such as employers, industry associations, bargaining agents and employee associations.
- Previous AWAs and assessments done by the OEA
- The age, classification, permanency and income levels of the employees in the relevant industry

[1] Current AWAs with training bonds provide for a starting point of 100% of training costs to be paid by the employee in the event of the employee leaving the employers employment. The reasoning behind utilising the starting point of 50% lies with current NDT assessment practices of halving the training cost of the bond and placing the halved value under the Award side of the NDT.
[2] as per above.

Disagreement with the training bond features and valuation

If the employer or employee disagrees with the OEA features and valuation, then the matter will be forwarded to the DEA for a decision

DEA decisions will be recorded to allow for assistance in future decisions.

Example clause

1. The training provided to the employee is endorsement training that is formally recognised by the Civil Aviation Safety Authority Australia (CASA) and provided by:

    a. a training provider of CASA; or

    b. a registered training provider of CASA.

2. Where the employee is directed to take on training then the employer will bear the costs of the employees training.

3. Where the employee voluntarily undertakes training to the mutual benefit of the employee and the employer:

    a. the employee will bear up to 50% of the cost of the employee's training in the event that the employee leaves the employer's employment within the Return of Service Obligation Period (ROSOP).

4. A return of service obligation is applicable for employees who undertake voluntary training.

    a. The ROSOP operates for a maximum period of:

        i. two years for turbo-prop and piston equipment;

    b. The return of service obligation diminishes over the period of two years in line with the following:

        0-6 months since commencement of training – 50% of the training;
        6-12 months since commencement of training – 37.5% of the training;
        12-18 months since commencement of training – 25% of the training;
        18-24 months since commencement of training – 12.5% of the training

    c. The return of service obligation operates from the day training is commenced by the employee.

5. The actual cost of the training comprises the direct costs to the organisation of the endorsement of the employee as specified in Table below. The direct costs to the organisation include:

        i. The direct operational costs of flying the aircraft;

        ii. The cost of providing a trainer,

        iii. The administrative costs of collating the required documentation to meet CASA obligations;

    b. The employee is to be informed prior to undertaking training of the actual cost of the training.

    c. The actual cost of the training does not incorporate the cost of re-currency or proficiency training of the employee.

Endorsement classification	Costs	ROSOP
Cessna 402 Captain	$3,000.00	2 years
Cessna 441 Conquest Captain	$12,000.00	2 years
Fairchild Metro Series First Officer	$11,000.00	2 years
Fairchild Metro Series Captain	$20,000.00	2 years
Embraer Brasilia first Officer	$18,000.00	2 years
Embraer Brasilia Captain	$25,000.00	2 years
Dash 8 First Officer	$18,000.00	2 years
Dash 8 Captain	$25,000.00	2 years

6. An employee may be prematurely released from the bond for extenuating circumstances that are beyond the control of the employee.

    a. An extenuating circumstance may include but is not limited to:

        i. Ill health

        ii. Redundancy

        iii. Occupational, health and safety

        iv. Termination of employment at the employer's initiative (except for termination for serious misconduct)

    b. Where the employee requests to be prematurely released from the bond for medical reasons, the employer is to be provided with documented evidence such as the non-renewal of the aviation medical certificate.

    c. The employee may be requested to provided documented evidence to the employer for the extenuating circumstance that requires the employee to be prematurely released from the bond.

    d. Where the employee requests to be released due to occupational, health and safety reasons, this will be subject to a determination by State or Territory Occupational, Health and Safety Department or Body.

7. The training bond may be waived or reduced by the employer at anytime at the employer's discretion.

8. The endorsement classification and actual cost of training applicable to this Agreement for the employee are as follows:

Endorsement Classification	Metro 23 Captain
ROSOP	2 years
Training Costs	$20,000.00
Total:	$20,000.00

IN THE FAIR WORK COMMISSION

Matter No.: AM2018/14

Re Application by: Australian Federation of Air Pilots

WITNESS STATEMENT OF SIMON JON LUTTON

1. I am the Executive Director of the Australian Federation of Air Pilots ("**AFAP**").

2. I commenced employment with the AFAP in late 1999, originally as an industrial officer and then as a senior industrial officer. In 2008 I left the AFAP to take up a position as Principal Industrial Relations Consultant for the Victorian State Government in the health sector. I returned to the AFAP in 2010 in the role of General Manager. I was appointed Executive Director in 2012.

3. In 2015, I became aware of the decision *Jetgo Australia Holdings Pty Ltd v Goodsall* [2015] FCCA 1378. A copy of this decision is located at "**Attachment A**". The AFAP was not involved in this case and did not participate in the hearing.

4. When I read the decision, I was surprised that Jetgo was found to be a regional for the purposes of the Air Pilots Award 2010 ("**Modern Award**") by Vasta J because I would not have considered it to be a regional airline because, as detailed in paragraph 2, Jetgo was a charter operation with ambitions to provide RPT services (but had not yet commenced to do so) and also it operated a jet aircraft not listed in Schedule C. From the approach taken by Vasta J, it appeared to me that some airlines which would not previously have been considered to be regional airlines might now fall into that definition.

5. Prior to the creation of the Modern Award, the main award was the *Pilots' (General Aviation) Award 1998* ("**GA Award**"). The GA Award bound the majority of respondent employers with fixed wing operations. The *Regional Airlines Pilots' Award 2003* ("**Regional Award**") was originally a consent award and, at the time of its simplification only had 7 respondents.

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6. Neither the GA Award nor the Regional Award contained a definition of what actually determined which award would be more suitable to a particular operator. Historically, whether a particular employer was roped into the GA Award or the Regional Award was a matter of historical industrial knowledge and industrial common sense.

7. There were several differences between the GA Award and the Regional Award. The way the classifications were structured was one of these differences. The GA Award covered piston aircraft types, turbo-prop aircraft types and jet aircraft types. The difference between these types depends on the type of engine being used. Jet aircraft type have traditionally been entitled to higher minimum salaries because they operate to a more complex flight regime. The classifications for aircraft were by and large structured by weight rather than type (although there were some specific aircraft types included). The Regional Award was structured differently. Instead of classifying by weight, the structure was by specific aircraft type within broad groupings by weight. I do not know exactly why the Regional Award was structured differently to the GA Award.

8. Another difference was that regional airlines have traditionally been only piston or turbo prop operations, although the definition of regional airline in the Air Pilots Award does not state this. General aviation/airline operations may be either jet operations, turbo-prop operations, piston operations or a combination of these.

9. What essentially occurred during the award modernisation process was that 4 awards were combined to create the Modern Award. Regional Airlines and Airline Operations would now be covered by the same award but were assigned different schedules which conferred, amongst other things, the applicable minimum salaries. Which schedule applied to a particular operator was basically determined by accepting that if an employer (or its predecessor) were previously covered by the GA Award, then it was in Schedule B and if an employer was previously covered by the Regional Award, then it was in Schedule C.

10. However, given the breadth of the definition of regional airline in the Modern Award, and the Jetgo decision, this usual way of determining whether you were a regional airline or not has become unclear. On a strict reading of the definition, Qantas, Virgin, Jetstar and Tiger would all be considered regional airlines, although clearly they are not.

11. The problems that arise from the Jetgo decision are acute. Some employers who were originally respondents to the GA Award now (on Vasta J's strict reading of the definition of regional airline) are regional airlines and as a consequence fall into a different part of the Modern Award.

12. For example, Airnorth was originally a respondent to the GA Award but might now be considered a regional airline, even though Airnorth flies 2 types of aircraft (the Embraer 120 and the Embraer 170) which are not listed in Schedule C. Similarly, Alliance's predecessor, Flightwest, was originally a respondent to the GA Award, and none of its aircraft are listed in Schedule C.

13. After the Jetgo decision was handed down, I am aware of some employers beginning to assert they are regional airlines during enterprise bargaining, even though traditionally they have been considered general aviation/airline operations.

14. It is now unclear for regional airlines who fly aircraft types not listed in Schedule C of the Modern Award, particularly with jet aircraft, what relevant parts of the Modern Award apply for the purposes of the better off overall test. This creates uncertainty in the bargaining environment. It also creates 2 classes of pilots, one which has its minimum salaries set by the Award and one which does not.

15. Training to be a pilot involves meeting various minimum qualifications that are set by the Civil Aviation Safety Authority. There are different minimum qualifications set for different aircraft types, the type of flying that a pilot is required to do and the rank a pilot holds (Captain or a First/Second Officer). If a pilot does not have the relevant qualifications, they are not permitted to fly in a particular way.

16. This provision of services leading to gaining such minimum qualifications may be provided by a range of entities. These include be independent flight schools, in house services, arrangements with the manufacturer of aircraft or simulator operators. There may also be significant costs attached to the training.

17. The training of pilots, to the extent of my historical knowledge, has traditionally been dealt with in the relevant awards that have applied. The GA Award, both before and after it underwent simplification, contained clauses relating to training. So did the Regional Award.

18. The AFAP has always been of the view that training costs required to operate an aircraft are always the responsibility of the employer and that if an employer wishes to bond an employee, then it can do so by way of an enterprise agreement with the appropriate trade offs being made.

19. A bonding agreement is a type of guaranteed return of service. The employer pays for the training, but the employee must remain in employment for a certain period (usually between 1 and 3 years). If the pilot leaves prior to this period ending, then he or she must pay a pro-rata amount of the training costs back to the employer.

20. In my experience of negotiating enterprise agreements, bonding is always in relation to the training to receive the qualifications required by the Civil Aviation Safety Authority. The usual training required is what is known as an "aircraft type rating", sometimes called an "aircraft endorsement". This is the training which covers the aspects of a particular aircraft and how to fly it. Without this qualification, a pilot cannot lawfully operate the relevant aircraft type.

21. In 2005, the AFAP was involved in discussions with the Office of the Employment Advocate ("**EOA**") regarding concerns of the AFAP about Australian Workplace Agreements ("**AWAs**") that contained bonding arrangements as described in paragraph 19 above.

22. Following on from these discussions, the EOA created a draft policy that it proposed to follow when assessing the value of a training bond when applying the no-disadvantage test. That policy clearly contemplated bonding arrangements arising from minimum qualifications required by the Civil Aviation Safety Authority. A copy of the exchange of correspondence is located at "**Attachment B**")

23. If minimum qualifications required by the Civil Aviation Safety Authority were not covered by clause 16.2 of the Award, then I am unclear to what sort of minimum qualifications that clause refers to.

Simon Jon Lutton

13 February 2019

FEDERAL CIRCUIT COURT OF AUSTRALIA

JETGO AUSTRALIA HOLDINGS PTY LTD v GOODSALL *[2015] FCCA 1378*

Catchwords:
INDUSTRIAL LAW – Contraventions of Fair Work Act – assessment of compensation – whether the Applicant and/or respondent breached the employment contract.

Legislation:
Fair Work Act 2009, ss.45, 136, 139, 323(1)(a) and 567(c)
Air Pilot Award 2010 cls.2.2, 2.4, 12.7, 13.1, 16, 16.2, 16.5, 19, 20.1 and 24

Applicant:	JETGO AUSTRALIA HOLDINGS PTY LTD
Respondent:	ANDREW GOODSALL
File Number:	BRG 135 of 2014
Judgment of:	Judge Vasta
Hearing dates:	9 & 10 February 2015, 24 & 25 March 2015, 4 & 8 May 2015
Date of Last Submission:	8 May 2015
Delivered at:	Brisbane
Delivered on:	28 May 2015

REPRESENTATION

Counsel for the Applicant:	Mr Harding
Solicitors for the Applicant:	M + K Lawyers
Counsel for the Respondent:	Mr Murdoch QC
Solicitors for the Respondent:	Mooloolaba Law

ORDERS

THE COURT DECLARES THAT:

(1) The Respondent has contravened:

(a) s.45 of the *Fair Work Act 2009* (Cth) in not giving 2 weeks' notice and is liable to a pecuniary penalty;

(2) The Applicant has contravened:

(a) s.45 of the *Fair Work Act 2009* (Cth) in that it failed to pay superannuation at the time that it was due and is liable to a pecuniary penalty;

(b) s.45 of the *Fair Work Act 2009* (Cth) in that it failed to pay accrued annual leave upon the resignation of the Respondent and is liable to a pecuniary penalty

(3) That the Respondent has breached the contract of employment in not being responsible for the costs of type rating training.

(4) The Applicant is entitled to restitution on the basis that the consideration paid for the July 2013 training wholly failed in circumstances where it would be unjust for the Respondent to retain the benefit of such training at the expense of the Applicant.

THE COURT ORDERS THAT:

(5) The Respondent pay the Applicant the sum $21,000.00 plus interest for the breach of contract in not paying for his training costs.

(6) The Respondent pay to the Applicant the sum of $11,775.00 plus interest as restitution in relation to the consideration for the payment of training.

(7) The Respondent's cross-claim for deductions from pay be dismissed.

(8) The Respondent's cross-claim for underpayment in contravention of the *Fair Work Act 2009* (Cth) be dismissed.

(9) The Respondent's cross-claim for a declaration that the Applicant contravened the *Fair Work Act 2009* (Cth) in relation to training costs be dismissed.

(10) The Applicant pay the Respondent the sum equivalent to 2.0146 days of annual leave with interest.

(11) That the Respondent's cross claim for contravention of Australian Consumer Law be dismissed.

(12) That the Respondent's cross-claim for breach of contract be dismissed.

(13) That the matter be adjourned for hearing in relation to the issues of costs and of pecuniary penalty arising from the declarations set out in these orders.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT BRISBANE

BRG 135 of 2014

JETGO AUSTRALIA HOLDINGS PTY LTD
Applicant

And

ANDREW GOODSALL
Respondent

REASONS FOR JUDGMENT

Introduction

1. This is a matter brought pursuant to the *Fair Work Act 2009* (Cth) ("FW Act"). In short compass it involves the employment of the Respondent Andrew Goodsall, by the Applicant, Jetgo Australia Holdings Pty Ltd.

2. The Applicant is a company that operates aircraft. Initially the company was supplying charter flights from large urban centres to remote mining areas mainly for the benefit of "*fly in fly out*" workers. The company had ambitions to expand their operations to include providing for Regular Public Transport (RPT) but had yet to do so during the period in which this matter is concerned.

3. The Respondent is a pilot who, previous to his employment with the Applicant, had been flying with Emirates Airlines. As a result of this, he was based in Dubai. He was recruited by the Applicant, as it was felt that someone with the Respondent's experience would help the company achieve its expansion program.

4. During the trial, I heard evidence from Mr Jason Ryder, the Chief Executive Officer of the Applicant, Mr Paul Bredereck (for all intents

and purposes the owner of the Applicant) and Mr Arron Mulder the Chief Operating Officer of the Applicant. I also heard evidence from the Respondent. There are many issues to be determined in this matter and findings of both fact and the law that have to be made. Having listened to the evidence, I have made the following findings of fact.

The Employment of the Respondent

5. The Respondent is an experienced and well credentialed pilot. From December 2005, he had been working at Emirates Airlines predominantly flying Boeing 777 aeroplanes in the latter part of his tenure at that airline. During his employment with Emirates, the Respondent provided classroom, simulator and flight training for pilots (including senior captains) as well as conducting checks on the proficiency of the flight crew.

6. The Respondent had wanted to raise his family in Australia. He already had investment properties in Australia but wanted to actually live, and raise his children, in Australia. As a result of this desire, the Respondent, throughout 2012, was looking for employment with an Australian aviation company or airline; his wife and children having already moved from Dubai to the Sunshine Coast area.

7. In the timeframe at the beginning of 2013, the Respondent became aware of the existence of the Applicant company. He became aware of the Applicant's desire to engage experienced flight crew personnel. He knew Mr Bredereck because he had worked for him in 1996. He contacted Mr Bredereck by email and a meeting was arranged.

8. That meeting occurred in early January 2013 and it was between Mr Ryder, Mr Mulder, Mr Bredereck and the Respondent. In that meeting, the officers of the Applicant informed the Respondent about the plans that they had to grow the airline. The role that the Respondent was to fill was that of Head of Training and Checking ("HOTAC"). (I note that the Award uses the term "check pilot" to cover a HOTAC.) For this to occur the Respondent had to obtain a type rating for the aeroplanes that the Applicant operated. These planes were Embraer jets.

9. The Embraer jets were not used in Australia until the Applicant started using them. There were two kinds of jets; the Embraer 135 and the

Embraer 145. These jets were very similar with the difference being that the 135 jet could carry 37 passengers and the 145 jet could carry 50 passengers (though for the period of the Respondent's employment, the Applicant did not have the Embraer 145 jet). The facility that the Applicant used for its pilots to obtain the type rating for these jets was located in St Louis, Missouri in the United States of America.

10. It was explained to the Respondent that he would need to achieve his type rating for the Embraer jets before he could commence employment with the Applicant. It was also explained to the Respondent that he would be responsible for the costs of this training but that the Applicant would reimburse that cost over a period of two years. The cost of the training was $39,600.00.

11. I find that this arrangement is a common arrangement within the aviation industry. Whilst pilots must pay for their training, it is training that can then be used for their personal benefit. A company would generally repay that cost of the training over a period of two years to ensure that the company would have the benefit of that individual for the period of two years. I find that this arrangement would have been of no surprise to the Respondent because he knew that such arrangements were *de riguer* within the aviation industry. Such an arrangement is not a "training bond" in the way that that term is used in the authorities cited to me by the Respondent.

12. During this meeting, the Respondent asked Mr Ryder and Mr Mulder what the Applicant's relationship with CASA was like. One of the two replied to the Respondent that "*we put up with CASA and CASA puts up with us*".

13. At this meeting, Mr Bredereck explained his vision for the Applicant going forward. He said to the Respondent that he hoped to expand the airline's fleet to four planes within the next 12 months. The Respondent was also informed that the Applicant was aiming to commence RPT. The Respondent was told that he would receive a company American Express credit card. Some later time, the Respondent was told that the Applicant hoped to commence operations out of the Sunshine Coast airport.

14. After this meeting, an employment contract was sent via email to the Respondent.

The Employment Contract

15. The employment contract is dated 11 January 2013 and was signed and dated as accepted by the Respondent on 12 January 2013. That contract is Exhibit 27.

16. The significant matters to note are:-

    a) That there was a start date of 1 May 2013, or sooner subject to release from current employment and type rating training;

    b) The notice period was 8 weeks;

    c) The conditions included "*completion of Embraer 145 type rating*" and a note that "*the type rating will be reimbursed to the employee over a 24 month period paid quarterly by the company*".

17. The Respondent deposes at paragraph 38 of his initial affidavit that upon receiving the employment contract he looked again at the website of the Applicant. He says that he saw the page which stated "*CASA regulations dictate minimum certification standards for air transport operators. Jetgo Australia has implemented systems and standards that exceed these minimum requirements*".

18. The Respondent then resigned from Emirates. His employment with that airline required a 90 day notice period which would have expired on 10 April 2013. However, he had been booked to commence his type rating in St Louis on 1 April 2013 so by mutual agreement his employment was to cease with Emirates on 28 March 2013. That training was to be conducted by Flight Safety International in St Louis, Missouri.

The Part C Training and Checking Manual

19. After the acceptance of the employment contract, there were other interactions between the officers of the Applicant and the Respondent. Mr Ryder and Mr Mulder testified that part of the responsibilities of the HOTAC is that this person should be the author of the Part C Manual

involving training and checking. They also testified that it is a CASA requirement that the person in the role of HOTAC be the person who has actually written this document. The Respondent disputes this and claims that he was asked to re-write this part of the manual because "*it was a mess*" and he had the necessary skills to do so.

20. The Respondent, during a layover in Brisbane with Emirates, after he had signed the employment contract, was told of this requirement by Mr Mulder. Mr Mulder told the Respondent that as he would be the HOTAC he needed to fix up the manual. He told the Respondent that the manual "*...needed a rewrite and I have told CASA this will be done.*" The Respondent said that he was told that this needed to be done by the end of February 2013 and it would be good for his future with the company, however Mr Mulder denies this. I accept Mr Mulder's evidence on this point.

21. The Respondent did complete the task of compiling this manual and he has exhibited this to his initial affidavit. He says that this took 100 hours of his own time.

The Training in St Louis and the ECC contract

22. In December 2012, Mr Ryder and Mr Mulder on the behalf of the Applicant entered into a lease agreement with ECC leasing company. This agreement was for the lease of an Embraer jet. Under this agreement, the Applicant had to pay a non-refundable initial cash deposit of $75,000.00. From then on the company would pay $75,000.00 a month for rental of the aircraft. This agreement is Exhibit 3 in the proceedings. The significant part of this agreement is clause 14 which reads:-

> *"**14. Support Package**: ECC will, through Embraer or third parties, without any additional cost to the Buyer, offer a Support Package as listed below. If Buyer does not take advantage of any of the services provided below, no compensation or discount will be due by ECC under this Proposal.*
>
> - ***Training Familiarization***
> - *Four (4) pilots be trained at an Embraer authorized Training Centre, including Ground School and Simulator.*

- ***Technical Publications:***

- *Manuals: One (1) complete set of operational (hardcopy) and free access to the maintenance and operational manuals on FlyEmbraer website for a period of 2 yrs"*

23. The arrangement between ECC and Flight Safety International is not known. However, it seems that the cost to ECC for training a pilot is considerably less than it would be for the Applicant or any other private citizen. I accept the evidence of Mr Ryder that such training for an individual is $39,600.00.

24. The Applicant had "up its sleeve" the ability to train four pilots because of the lease agreement. This was not a matter that the Applicant, through its officers, let be widely known.

25. The Respondent went to St Louis to commence his training on 1 April 2013. At that time, there had been no payment for this course. Mr Ryder gave evidence that he was contacted by Flight Safety International and told that there had been no payment for the training of the Respondent. Mr Ryder said that he caused an invoice to be sent to the Respondent for the sum of $39,600.00 for the training. The intention was for the Respondent to pay this money to the Applicant who would in turn pay Flight Safety International.

26. Mr Ryder said that he spoke to the Respondent who did not wish to pay for the training. Mr Ryder then came up with a plan that the Applicant would pay for the training and the Respondent would reimburse the Applicant by having quarterly deductions made from his wages. Mr Ryder testified that the Respondent agreed to this course.

27. The Respondent vehemently denies that this conversation occurred. He says that he approached Flight Safety International and asked for an invoice. He was told by administrative staff that ECC had paid for the training and there was no need for them to issue him with an invoice. The Respondent ignored the invoice sent to him by Mr Ryder.

28. What Mr Ryder actually did was to utilise one of the training spots provided by ECC through their support package. This was done because of the need for immediacy of payment and to avoid any cash flow problems.

29. The Respondent testified that he later had a conversation with Mr Mulder who told him that the Applicant has an arrangement with ECC, whereby ECC pays for some of their pilot training. The Respondent testified that even though he knew that he was responsible for his training costs, he didn't think again about the matter and thought that the issue of payment had been finalised.

30. The problem with Mr Ryder's version is that he failed to get an acknowledgement of this arrangement in writing. It would have been very easy to have sent an email confirming the contents of the conversation. This would also have alerted the Respondent as to when such deductions were going to be made. It may also have allowed the Respondent to alter the payments system. It may have been better to have spread the repayments into 24 payments of a lesser amount rather than 8 payments of a sizeable amount so as to not affect the cash flow of the Respondent.

31. When this was put to Mr Ryder, his response was "*more fool us for not putting it in writing*". If matters had occurred the way that Mr Ryder testified, it was obvious to me that Mr Ryder now realised the foolishness of his conduct. Much criticism of Mr Ryder has been justifiably made by the Respondent, however, in my view, this criticism impinges on his competency and not his honesty.

32. Against this version of Mr Ryder is the improbability of the version of events presented by the Respondent. There is no doubt that the Applicant has sent the Respondent an invoice for $39,600.00. On his version, the Respondent does not question this invoice but simply ignores it.

33. While it does seem strange that an administrative officer of Flight Safety International would tell the Respondent that ECC had paid for the training, I cannot discount that this did not occur. However, the Respondent knew that he (the Respondent) was responsible for the cost of his training and did not query with the Applicant as to whether he needed to reimburse the company because of their arrangement with ECC. It is also strange that the Respondent never mentioned the conversation he had with the administrative officer at FSI to either Mr Mulder or Mr Ryder.

34. On the version of the Respondent, the invoice that he received could well have been an invoice to cover any expenditure that the Applicant had made to ECC who had then covered the cost of the training. Yet the Respondent says that he did not raise this matter at all with Mr Ryder. I do not find this version credible.

35. It does not accord with common sense that the Respondent would have a conversation with Mr Mulder about ECC and not query whether the arrangement covered his own costs of training. This observation becomes even more stark when the events of 1 August 2013 are brought to bear.

The Commencement of Employment with Jetgo

36. During the time that the Respondent was being trained in St Louis, CASA conducted an audit of the Applicant. They issued 3 safety alerts, 19 non-compliance notices and 11 observations.

37. At one point during the training period, there was a Skype conversation between Mr Ryder, Mr Mulder and the Respondent. It is more probable than not, that it was during these conversations that the issue of the non-payment of training fees was raised. At no time during these conversations was the issue of the CASA audit raised with the Respondent.

38. It is not in dispute that during these conversations, Mr Mulder said that the Applicant would be employing the Respondent as the Head of Flight Operations (HOFO). (I note that the Award uses the term "chief pilot" to denote a HOFO.) There was a brief discussion to the effect that the Respondent would be paid more in this position.

39. The Respondent claims that Mr Mulder said that "*I have a cunning plan to move you into my job so I can step back and help with the new business*". He also told the Respondent that "*I am putting out spot fires with CASA, no big deal, I will see you when you are back*".

40. There is no dispute that the Respondent commenced his employment on 1 May 2013. The Respondent was able to demonstrate why he was a valuable acquisition for the company in a very short amount of time.

Incidents during Employment

41. Soon after the commencement of employment, the Respondent was involved in the company attending to the CASA audit.

42. The Applicant was tasked with certain duties in response to the CASA audit. He was able to acquit the alerts and notices under his control to the satisfaction of CASA.

43. There has been much made of this audit. The officers of the Applicant have characterised the audit as a matter where the aviation watchdog was doing their job. Whilst any notice issued by CASA is serious, the Applicant contends that such is not symptomatic of an airline not fulfilling its obligations. The Applicant contends that such notices are handed out by the watchdog to airlines regularly. The Applicant contends that if there were any true concerns as to safety, CASA would have "closed them down".

44. The Respondent, however, contends that these notices were contrary to what he had been told was the relationship between the Applicant and the regulatory authority. He testified that these notices were more than just "spot fires" and that the officers of the Applicant were seeking to minimise the true nature of this audit. The Respondent contends that the audit illustrated the falsity of what was contained on the website of the Applicant.

45. I am not convinced that this audit was as serious as the Respondent is making out, but I am also not convinced that this audit was a matter that could be handled in a nonchalant or cavalier manner.

46. During the period of employment of the Respondent, there was concern raised by the Respondent as to the hours being worked by the pilots and crew. I accept that this discussion was somewhat protracted, but it was ultimately resolved to the satisfaction of the Respondent.

47. There was also an incident where a wing tip of one of the planes had some damage. The Respondent contends that this damage was more than superficial and was not reported to CASA at the appropriate time. The Respondent said that this concerned him greatly. The Applicant contends that the damage was superficial and was attended to appropriately by the safety engineers of the Applicant.

Change of Employment to HOFO

48. While there is nothing in writing to indicate any change, there seems to be no dispute that the Applicant was grooming the Respondent to become the Head of Flight Operations. This is in keeping with the conversations that had occurred prior to the Respondent commencing employment.

49. Mr Mulder wrote a letter for the Respondent to use in his discussions with the bank. In this letter the Respondent is described as Head of Flight Operations and his salary is said to be $150,000.00 a year.

50. From the pay records, it would seem that this took effect from 1 July 2013. Even though CASA had not given the tick of approval to the Respondent to be the HOTAC or HOFO, it appears as though the Applicant treated the Respondent as such and paid him accordingly.

July Training in St Louis

51. In order for the Applicant to employ the Respondent as HOTAC or HOFO, the Respondent needed to undergo more training under the eyes of an officer from CASA.

52. In July 2013, the Applicant made arrangements for the Respondent and another captain to be checked by CASA in St Louis. Also to be sent, were other officers that would be supervised by the Respondent while he was, in turn being supervised by CASA.

53. This training was a large undertaking by the Applicant but there were to be many benefits to this trip; not least of which would be the removal of any impediments to the Applicant formally making the Respondent their HOFO.

54. The Respondent left for St Louis in mid July 2013. There was quite some conjecture as to how the Respondent spent his time whilst in St Louis. There is no doubt that he completed the training that he was there to complete. From all accounts he acquitted himself very well in that training. But it is what else that the Respondent was doing at this time that was the subject of much of his evidence before me.

55. This was because the period from when the Respondent arrived in St Louis to when he resigned from the Applicant was very significant.

56. The Respondent said that he attended the training at Flight Safety International. There is no dispute about this. His first full day in St Louis was 18 July 2013. He said he completed the training and left St Louis on 22 July 2013. He arrived in Brisbane on 24 July 2013. He went to the offices of the Applicant on 26 July 2013. He then asked for personal leave and was given 29, 30 and 31 July as personal leave. He resigned on the morning of 1 August 2013.

57. The Respondent said that he worked for 12 hours on 18 July 2013. The Respondent was asked to go through what he did that day and he said that he spent 4 hours on the simulator, one hour preparation before the simulator and then one hour in debriefing. He said that he spent the remaining 6 hours working in his room. He believed those 6 hours of work occurred before he went to the training facility as the work he was doing that day was to prepare for what would occur at the training facility. He spent shorter periods doing work for the next 3 days and then flew back to Australia. He said he worked 10 hours on 26 July 2013 at the office of the Applicant.

58. The hours that were worked would become significant because the Respondent said that under the civil aviation orders, he cannot be rostered to fly if completion of the flight would result in him exceeding 90 hours of duty of any nature associated with his employment in a fortnight. The evidence the Respondent gave was that from 18 July to 26 July, he had worked 82 to 84 hours for the fortnight. Therefore, he contended that if he did **any** work in the period 27 July to 31 July, it would put him over the 90 hours.

59. Significantly, the Respondent failed to mention what else he did on 18 July 2013. Through a series of emails uncovered in the discovery and disclosure process, it emerged that the Respondent had been in contact with a company called Cambridge Communications Limited (CCL). This company is used by Boeing to recruit staff, predominantly pilots.

60. Exhibits 28, 30 and 31 detail the email exchange between CCL and the Respondent. The significant parts of these emails are reproduced

precisely below (with typographical and grammatical errors, as well as discrepancies in the time recorded):-

> *"**From:** CCL- FlightCrew <FlightCrew@cclaviation.com>*
>
> ***To:***
> *"andygoodsall@yahoo.com.au"<andygoodsall@yahoo.com.au>*
>
> ***Sent:** Wednesday, 10 July 2013 4:04PM*
>
> ***Subject:** Line Assist Positions*
>
> *Dear Andrew,*
>
> *I trust this email finds you well.*
>
> *We are pleased to inform you that Boeing would like to contact you regarding Line Assist positions.*
>
> *Prior to that contact we need to receive a completed Boeing COI form from you. Boeing are keen to be able to contact you as soon as possible so please do return this form as soon as you can.*
>
> *In addition this this we will need to know your availability over the coming weeks for an initial telephone interview. Please do provide your availability (preferably in Pacific Daylight Time) so Boeing can propose a suitable time to talk with you.*
>
> *Many thanks Andrew, we look forward to hearing from you.*
>
> *Kind Regards*
>
> *Ben Hopwood*
>
> *Cambridge Communications Limited*
>
> ***Subject:** Re: Line Assist Positions*
>
> ***From:** Andy Goodsall (andygoodsall@yahoo.com.au)*
>
> ***Date:** Wednesday, 10 July 2013, 2:38*
>
> *Much appreciated Ben,*
>
> *Please find attached my completed COI form. Kindly advise Boeing I am available all day this coming saturday 13JULY. Perhaps if not too soon for Boeing, a suggested time might be*

1300-1500PDT friday 12JULY equating to 0600-0900EST (Australia)saturday 13JULY. Beyond this, I will be travelling to the USA monday 15JULY to conduct simulator proficiency checks on some of our flight crew 17-21JULY inclusive with the following week free of duty. Therefore, I could extend my stay in the USA depending on their schedule.

Thank you for sending me this great news, & hope to hear from you/Boeing soon.

Kind Regards,

Andrew Goodsall

From: *Andy Goodsall [mailto:andygoodsall@yahoo.com.au]*

Sent: *12 July 2013 04:24*

To: *CCL-FlightCrew*

Subject: *Boeing interview times – Andrew Goodsall*

Morning Ben,

Trust you received the completed COI form as requested. If tomorrow ***12JULY 1300-1500 PDT*** *is un-suitable for Boeing to conduct the initial phone interview please be advised I will be travelling to St Louis, USA next tuesday 16JULY as previously mentioned.*

Therefore, I have provided a schedule below of sim times, outside of which, I will make myself available a time to suit your Boeing team. Kindly note STL is 2 hrs ahead of SEA.

I will be in the simulator in St Louis the following times:

17JULY OFF

18JULY 2000-2400

19JULY 1600-2000

20JULY 1200-1600

21JULY 1600-2000

The following week monday 22JULY-25JULY I am rostered OFF so would be willing to extend my stay in the USA should Boeing wish to meet me in person.

Thank you once again for your consideration in this matter. I look forward to your reply.

Regards,

Andrew Goodsall

From: *CCL- FlightCrew <FlightCrew@cclaviation.com>*

To:
"andygoodsall@yahoo.com.au"<andygoodsall@yahoo.com.au>

Sent: *Friday, 12 July 2013 6:12PM*

Subject: *Boeing interview times – Andrew Goodsall*

Dear Andrew,

I trust your well.

After the interview phase is complete Boeing will usually move to arrange the SIM check. Given the tight timescale that Boeing are adopting for your interviews it seems prudent to gather the information they would normally ask for prior to the SIM check now.

I just need to confirm a few details with you, so we can provide Boeing with them prior to the SIM:

In particular your full legal name (please do confirm if you have any middle names, Boeing will need this should they arrange travel/accommodation etc).

Should Boeing not be able to arrange a SIM check whilst you are in the US they will need to know your preferred Port of trave in Australia to arrange travel for you.

If you have any contact numbers beyond those we have on file [H +61406877467; W: +971509508575] that would be more convenient for you, please confirm these as well.

Many thanks Andrew, I look forward to hearing from you.

Kind regards

Ben Hopwood

Cambridge Communications Ltd.

Subject: *FW:Boeing interview times – Andrew Goodsall*

From: *CCL- FlightCrew (FlightCrew@cclaviation.com)*

To: *andygoodsall@yahoo.com.au;*

Date: *Tuesday, 16 July 2013, 12:11*

Dear Andrew,

I trust you are well and hope this email reaches you as I'm aware you are due to be travelling.

Please do confirm the appointment below is acceptable to you asap.

July 18th at 11:00 PDT

Boeing are keen to be able to speak to you and if the appointment as it stands is not workable for you they are happy to provide alternative times when everyone can be available for the interview.

Please do get in touch as soon as you are able so we can feedback to Boeing.

Many thanks.

Kind Regards

Ben Hopwood

Cambridge Communications Limited

From: *'Logan, Shea', <shea.logan@boeing.com>*

To:

'andygoodsall@yahoo.com.au' <andygoodsall@yahoo.com.au>
Cc: *Ben Hopwood <BenH@cclaviation.com>; "Logan,Shea <shea.logan@boeing.com>*

Sent*: Friday, 19 July 2013 6:17PM*

Subject: *Sim session*

Good day, Andrew –

Please advise if you are available for a 777 sim session in Singapore with Carl on Tuesday, July 30th, 2100-2300.

If so, please advise where you will be repositioning from and we will make travel and hotel accommodations.

Thank you!

Shea

Shea Logan

Staff Analyst-Pilot Services

206 661 3885~ Desk

206 304 7697 ~ Mobile

shea.logan@boeing.com

Subject: *Re:Sim session*

From: *Andy Goodsall (andygoodsall@yahoo.com.au)*

To: *shea.logan@boeing.com;*

Cc: *BenH@cclaviation.com;*

Date: *Monday, 22 July 2013, 9:33*

Thank you Shea,

Trust you enjoyed the weekend. I would be delighted to attend your Captain Car Davis' simulator assessment SINGAPORE Tuesday 30JULY at our nominated times.

My travel preference is BNE-SIN-BNE. If I may request to depart BNE Monday 29JULY & return Wednesday 31JULY (unless you

need me there longer). May I offer a travel preference with Etihad Airways as their schedule provides good arrival/departure times for this detail?

Please Shea, my friends call me Andy. Thanking you in advance.

Kind Regards

Andy"

61. What is clear from this exchange is that the Respondent was actively seeking employment with Boeing before he left for St Louis. There is nothing wrong with this in and of itself. The opportunity for a pilot to work with Boeing would be almost the pinnacle of a career. There can be no criticism of the ambition of the Respondent.

62. However a number of other details emerge:-

a) the Respondent was interviewed on 18 July 2013; a fact he did not disclose when questioned by Counsel for the Applicant as to what he did that day;

b) The Respondent committed himself to staying in St Louis for the week of 22 July 2013 to 25 July 2013 even though he could not be assured of being rostered off that week;

c) The Respondent committed to being able to travel to Singapore on the 30 July 2013. He gave this commitment on 22 July 2013 without having yet approached Mr Mulder for any time off;

d) The Respondent flew to Singapore on 29 July 2013, was interviewed on 30 July 2013 and flew back to Australia on 31 July 2013. These were the days that he had asked Mr Mulder to have off as personal leave.

The Termination of Employment

63. On 31 July 2013, the Applicant sent the Respondent his payslip for the month of July. From that payslip, it can be seen that the salary of the Respondent is now $150,000.00 a year. The payslip also discloses that the Applicant deducted a sum of $4,950.00. This sum was to represent a payment to the Applicant of the fees for the April 2013 training in St Louis.

64. According to the Respondent, he received email notification of the payment on 31 July 2013. This must have occurred after he arrived back from Singapore. The Respondent went to the offices of the Applicant on 1 August 2013 and gave his verbal resignation to Mr Mulder. He said that he also requested that the $4,950.00 be returned to him. He recounted that Mr Mulder said that the Respondent had "*left him in the lurch*" to which he replied that "*you should have thought about that before you garnished $4950 from my salary for type rating costs. You have no right to garnish my wages; I never agreed to that. I can't know if this will happen again. I will not be exposed to CASA for your illegal rostering*".

65. The Respondent said that he told Mr Mulder that "*I have pressing family matters that need my attention. I wish JETGO all the best for the future*".

66. The Respondent said that he spoke to Mr Ryder via telephone later that morning and told Mr Ryder "*you have no right to deduct from my salary; I have no such agreement with you*". The Respondent said that Mr Ryder replied "*this was an administrative error and I'll see what can be done.*" The Respondent said that Mr Ryder then asked "*what, no notice period?*" And that the Respondent replied "*no, Jason*".

67. The Respondent said that on 3 August 2013 he received a telephone call from Mr Ryder who said "*I've repaid you the money. What are you going to say to CASA? Think of all the families that won't have a roof over their head. I won't give you a bad reference*". The Respondent said that he replied "*Jason, if CASA asked me a question, I will tell them the truth*".

68. Mr Mulder's account of this event, is that the Respondent had taken personal leave and had been non contactable for a four-day period. Mr Mulder says that upon the Respondent's return, he came into Mr Mulder's office and resigned on the spot. He told Mr Mulder this was because of family issues and that he needed to deal with those issues and could not do so if he were to take up a position with the company as HOFO. Mr Mulder said that he told the Respondent to take some time to think about it.

69. Mr Mulder said that the Respondent then changed his story and said that he could not work with Mr Ryder, the Chief Executive Officer. In cross examination, Mr Mulder said that he could not dispute that the Respondent said what he claims to have said in paragraph 64 and 65 above, though he has no recollection of the Respondent wishing JETGO all the best for the future.

70. Mr Ryder said that he was not at the office on the morning of 1 August 2013. He said that he had authorised the deduction of $4,950.00 from the Respondent's salary pursuant to the agreement that he had with the Respondent over the costs of the type rating training. He said that he was surprised when the Respondent protested against this deduction.

71. Mr Ryder said that the Respondent in a conversation (presumably later that day) threatened to make an unfavourable report to CASA if he did not have the amount reinstated. Mr Ryder said that he took the threat seriously because the Respondent was friendly with a senior officer at CASA. Mr Ryder said that even though he had nothing to fear from such a complaint, the investigatory process can be very resource and time intensive. As a result of this, he instructed the payroll section to immediately reinstate that amount. The amount was reinstated on 2 August 2013.

72. Added to the recollections of the Respondent, Mr Mulder and Mr Ryder, are an email trail between the Respondent from CCL on 31 July 2013. These emails are Exhibit 32 and are reproduced below:

> *"**From:** CCL- FlightCrew <FlightCrew@cclaviation.com>*
>
> ***To:***
> *"andygoodsall@yahoo.com.au"<andygoodsall@yahoo.com.au>*
>
> ***Sent:** Wednesday, 31 July 2013 4:17PM*
>
> ***Subject:** PSP Program – Success!!*
>
> *Dear Andrew,*
>
> *We have been notified by Boeing of your successful application for a Line Assist Position, congratulations!*
>
> *These positions are highly sought-after, and that you have been chosen from among many candidates is a great vindication of*

your skills and experience as a pilot. All of us at CCL are looking forward to working with you and to looking after your interests during your PSP duties with Boeing.

We are currently working with Boeing to confirm your training and so your potential starting date.

We are aware of a course currently available ***on 13th September 2013*** *(contract start:1st Sept). I appreciate this is somewhat short notice but if you are available to start at this time please confirm.*

If the above date is not suitable for you please provide as detailed a breakdown of your upcoming availability as you can (along with your preference for starting time) and we will work with Boeing to find a course best suited to you.

Once we have confirmed your start date we will be able to issue you with a contract.

We will also require you to provide all the necessary joining documents, this can be done now in preparation for your joining. Pleas log on to Connect (https://connect.cclaviation.com) where you will see a new section marked: "PSP Documents". Please upload all the information requested in this section and submit the necessary forms for background checks to Verifications Inc.

Should you have any questions at all regarding the documents required please do not hesitate to contact us.

Congratulations once again Andrew, we look forward to hearing from you.

Kind Regards

Ben Hopwood

Cambridge Communications Limited

Subject: *Re: PSP Program – Success!!*

From: *Andy Goodsall (andygoodsall@yahoo.com.au)*

To: *FlightCrew@cclaviation.com;*

Cc: *shea.logan@boeing.com*

Date: *Wednesday, 31 July 2013, 3:42*

Ben,

Many thanks for your teams' professionalism & timely execution of my application for the Boeing PSP interviews. I cannot stress enough how thoroughly professional both your CCL & the Boeing company have been & feel privileged to be included within that team.

I would be absolutely delighted to attend the course 13SEPT2013 with a contract start date of 01SEPT2013.

I shall log into Connect & commence completing the prerequisite forms as soon as I return to Australia (overnight). Please forward the contract at your convenience.

I also look forward to working with you & your team Ben.

Thank you & best regards,

Andy"

73. What can be seen from this email exchange is that the Respondent had already made the decision to leave the employ of the Applicant before he had been sent his payslip.

Repudiation of the Employment Contract

74. Notwithstanding that it is for the Applicant to prove that there has been a breach of the Modern Award, the logical way for me to decide this point is to look at whether or not the Applicant's conduct amounted to a repudiation of the employment contract. The Respondent claimed that he resigned from the Applicant because of a series of matters of which the deduction from his salary was the "last straw".

75. These other matters were:-

a) not having received the AMEX credit card that he had been promised;

b) no additional aircraft had been delivered to the Applicant during the time of the Respondent's employment;

c) Regular Public Transport flights had not occurred contrary to what the Respondent believed would happen after his meeting in January 2013;

d) no application to CASA for either a "high-capacity" or "low capacity" airline licence was prepared during his employment;

e) no operations commenced from the Sunshine Coast airport nor did the Respondent see any evidence of negotiations to that effect;

f) the various "safety breaches" and Work practices that were in conflict with CASA regulations and guidelines.

76. The Respondent claims that all these matters add up to a repudiation of the employment contract he had with the Applicant. In resigning on 1 August 2013, the Respondent claims that he was merely accepting the Applicant's repudiation of the contract they had with him.

77. I do not accept that the Applicant has in any way repudiated the employment contract.

78. I do not accept the Respondent's account of how and why the events of 1 August 2013 unfolded. I find that it is inherently implausible that, if the deduction of this amount from his salary caused the Respondent the degree of indignation that he claims, he did not remind Mr Mulder of the conversation he had with Mr Mulder about the agreement with ECC.

79. One would have thought that this conversation would have been at the forefront of the Respondent's mind, as this conversation justified to him, the reason why he did not have to pay for the training costs. The fact that it wasn't mentioned illustrates to me both that the deduction played no part in the Respondent's decision to resign immediately and that the conversation that the Respondent claims to have had with Mr Mulder about ECC simply did not happen.

Findings Concerning Repudiation

80. I find the Respondent knew that he was responsible for the costs of his Embraer type rating training. I find that, for whatever reason, he had refused to pay for that training. I find that this circumstance was reported to Mr Ryder. I find that because of the immediacy of payment being needed and to avoid cash flow problems, Mr Ryder utilised one

of the training spots that the Applicant had pursuant to the ECC leasing agreement.

81. I find that there was an agreement for the Respondent to repay money to the Applicant. I will explore this issue later in these reasons.

82. I find that there were issues involving CASA regulations that were the subject of discussions between the Respondent and Mr Ryder and Mr Mulder. I will explore this issue later in these reasons. However, I do not accept that these issues played any part in the Respondent resigning as he did on 1 August 2013.

83. I accept the general gist of the evidence of Mr Mulder and Mr Ryder regarding their relationship with CASA. It is a fact of life in the aviation industry that adverse notices will be given by the regulatory authority. There is no airline in this country that has not attracted the adverse scrutiny of CASA at some time in their existence. The real issue is how the airline deals with this scrutiny. On the evidence before me, there is no reason to suggest that the Applicant was running anything other than an appropriately safe operation.

84. I find that the Respondent knew full well why the deduction had been made from his salary. I find that he had made an agreement for such deduction to occur.

85. I find that there was no reason for the Respondent to resign as he did other than the fact that he had obtained another job with Boeing.

86. Though not strictly necessary, I also make the following findings.

87. I find that the Respondent was thinking of himself rather than the Applicant when he made the arrangements, through CCL, to be interviewed by Boeing. I find that the Respondent was deceitful in asking for personal leave for the dates of 29, 30 and 31 July 2013. I find that the Respondent's claim that he had worked over 82 hours from 18 July to 26 July is a contrivance to attempt to now justify his taking leave on the dates of 29, 30 and 31 July 2013. I find that there is nothing in the civil aviation orders that would have stopped him from working on those dates. I find that the civil aviation order only applies to rostering a pilot to fly after he has performed 90 hours of duty.

88. I find the Applicant had not repudiated the contract and that the Respondent did not ever believe that the Applicant had done so. I find that this claim of repudiation by the Respondent is a subterfuge to now justify his actions because of the Applicant's initiation of these proceedings.

The Claim of the Applicant

89. The Applicant initiated these proceedings. Even though I have approached this matter by looking at the defence to the statement of claim first, it is for the Applicant to prove their case rather than the Respondent having to prove his defence.

90. There has been no dispute that the Respondent is covered by the *Air Pilots Award 2010*. A copy of the Award was provided and marked as Exhibit 21. That Award is a Modern Award. Pursuant to s.45 of the FW Act, a person must not contravene a term of a Modern Award.

91. Clause 12.7 (a) of the Award states:

> *"A pilot with less than one year's continuous service is required to give two weeks notice."*

92. As is obvious, the Respondent resigned immediately on 1 August 2013 and did not give two weeks' notice. The Applicant claims that the Respondent thereby breached the Award. The Respondent claims that he was accepting the repudiation by the Applicant of the employment contract.

93. I have already found that the Applicant had not repudiated the employment contract.

94. Therefore I find that the Respondent has contravened a term of the Modern Award.

95. I declare pursuant to s.567(c) of the FW Act that the Respondent has contravened s.45 of the FW Act. The remedy for such a contravention is a pecuniary penalty. I will hear the parties on the nature and quantum of such a penalty.

Breach of Contract

96. The Applicant claims that the Respondent has breached the varied oral contract to repay the Applicant $39,600.00. I have already found that such an agreement did exist.

97. However the real question is whether such an agreement can be enforced. As I said earlier, the problem with this agreement is that it was not in writing and the terms were vague. It was an agreement made during a Skype call where the exact terms were never fully spelt out.

98. It seems to me that the only certain part of the agreement was that the Applicant would now pay for the costs of the training and that the Respondent would reimburse the Applicant.

99. Another problem with the agreement is that it allows the Applicant to profit from the changed arrangement. The original arrangement was that the Respondent would pay the Applicant $39,600.00 as per the invoice that is Exhibit JR-4 to Mr Ryder's affidavit which is Exhibit 2 in these proceedings. The Applicant would pay this sum to Flight Safety International for the training of the Respondent. The Applicant would then reimburse the Respondent by 8 quarterly payments of $4,950.00. In this way the Respondent would be reimbursed in two years' time.

100. The manner in which the agreement was altered reversed that position. It meant that the Applicant paid Flight Safety International for the training costs and that the Respondent instead reimbursed the Applicant for that outlay. Whilst Mr Ryder felt that this agreement worked out the same for everyone, this was not the case. For the reasons previously mentioned, the Applicant had to use one of their ECC funded training spots for the Respondent. There was no actual outlay by the Applicant. The best that can be done to quantify what the Applicant "paid" for the training is $21,000.00. The varied agreement would mean that the Applicant unfairly profited.

101. Because of these two aspects, I find that the agreement entered into by Mr Ryder and the Respondent in April 2013 regarding the training costs is not enforceable.

102. But that is not the end of the matter. As the Respondent conceded a number of times during his evidence before me, he was responsible for his training costs. He had contracted in his acceptance of employment to pay the costs of his training. That contract was still binding.

103. By not paying his training costs, the Respondent had breached the contract of employment. I make a finding that the Applicant has proved that the Respondent has breached his contract of employment.

What remedy is there?

104. The next task is to quantify the damages. I do not accept that the damages are $39,600.00 because that is not what the Applicant lost by the breach committed by the Respondent. What the Applicant has lost because of the breach of the contract by the Respondent, is the ability to choose, at a time convenient to them, any of their employees that they wish to receive training at Flight Safety International.

105. This is further complicated by the fact that the Applicant and the ECC have a number of agreements and a working relationship that has either of them in a positive or negative account with the other at any time. The lease agreement, under which the training of the Respondent was undertaken, was an agreement that was never fulfilled. As stated earlier, that agreement was for a $75,000.00 non-refundable initial payment and then for monthly payments of $75,000.00 upon delivery of Embraer aircraft. The training of four pilots was a bonus under the agreement.

106. That lease agreement was terminated, but not before the Applicant was able to take advantage of the bonuses offered to it by ECC. When that lease agreement was rescinded, the Applicant had already redeemed pilot training for 3 of its employees as well as other work. In document 3 of Exhibit 11, ECC has confirmed that it has quantified the value of the bonuses as being $95,800.00.

107. In other words, the Applicant received services valued at $95,800.00 for the non-refundable sum of $75,000.00. There seems to be no issue from ECC about this fact and Mr Ryder has treated it as part of the "swings and roundabouts" of the relationship the Applicant has with ECC.

108. While I accept the evidence of Mr Ryder that it would cost the Applicant (and any other private citizen) the sum of $39,600.00 to engage in type training at Flight Safety International, it is clear that the loss to the Applicant by the breach of the contract is considerably less than that sum. On the state of the evidence, it seems to me that the loss should be quantified at $21,000.00.

109. But I must consider the terms of the *Air Pilots Award 2010* before I can proceed further.

The Air Pilots Award 2010

110. As previously mentioned, the *Air Pilots Award 2010* was marked as Exhibit 21 in these proceedings. Many issues revolve around the interpretation of the Award and it is best that I work through these matters and then apply them to the matters that I have to consider.

111. A very relevant part of this Award is cl.2.2 which reads:-

> *"**2.2** The monetary obligations imposed on employers by this Award may be absorbed into overaward payments. Nothing in this Award requires an employer to maintain or increase any overaward payment."*

112. Arguments have been made that there have been breaches of this Award which have resulted in underpayments. It is the contention of the Applicant that the Respondent was paid well over the Award and that the allowances and other payments that would be made by the Applicant to the Respondent under this Award, have been absorbed into the overaward payment.

113. In cl.3.1, there are a number of definitions. Importantly in this matter are the following definitions:-

> *"3.1 In this Award, unless the contrary intention appears:...*
>
> ***airline operation means** employers operating aircraft for the purposes of providing commercial scheduled passenger and freight air transport services in, and from a base in Australia, excluding regional airlines...*
>
> ***check pilot** means a pilot who is approved by CASA to conduct, and who does so conduct, flight proficiency test for*

the issue and renewal of pilots' approvals, ratings, licences , and who certifies to the competency of pilots so tested...

chief pilot *means the pilot appointed by the employer and who is approved by CASA to perform the duties and responsibilities of the chief pilot...*

general aviation employer *means an employer in the industry of operating aircraft for purposes other than providing commercial scheduled passenger and freight air transport services, including non-scheduled commercial air transport (private, business and instructional flying) in, and from a base in, Australia but not including aerial application operations or helicopter operations...*

regional airline *means an employer operating aircraft for the primary purpose of transporting goods and passengers by scheduled commercial air services or charter by air to and/or from regional airports throughout Australia (including between regional airports and airports in capital cities)...*

standard rate *means the minimum salary for a Captain single engine UTBNI 1360kg in Schedule B divided by 52..."*

Was Jetgo a Regional Airline?

114. The first question to be asked is whether the Applicant is a regional airline. The word "*airline*" is not defined in the Award. The Respondent claims that before one can look at whether the Applicant was a regional airline, it must be shown that they were an airline. The Respondent points to the Civil Aviation Regulations which defined an "*airline*" as being "*the operator of a regular public transport service*". There is no dispute that the Applicant was not an operator of a Regular Public Transport service at the time in question, and therefore could not have been an airline as defined in the Civil Aviation Regulations.

115. However, it is the definitions in the Award that I must be concerned about, rather than definitions contained in other sources. The fact is that the Award has defined "*airline operation*" and "*regional airline*". It is my view that I must look at the definition of "*regional airline*" in the Award and decide whether the Applicant fits into that definition or not.

116. The Respondent submits that the operations of the Applicant at the time of his employment consisted solely of flights from Brisbane to Osborne mine and back, or to Townsville from Osborne mine and back. It is submitted that Osborne mine is not a regional airport and therefore providing charter services to Osborne mine could not be "*charter by air to and/or from regional airports throughout Australia*".

117. The term "*regional airport*" is not defined. At Osborne mine, there is a landing strip and it is assumed, some form of structure where persons congregate before departure and after arrival. Does this mean that Osborne mine has no airport? On many islands within the Great Barrier Reef, access can only be made via seaplane. At these islands there is a floating platform that allows for the seaplane to have passengers embark and disembark even though transport to and from that floating platform is by boat. Does this mean that these islands do not have airports?

118. To my mind, anywhere a plane can regularly take off and land is sufficient for that place to be called an airport for the purposes of this Award. The differentiation here is that a regional airport is not an airport in a capital city.

119. Therefore in looking at the operations of the Applicant, I find that they are "*an employer operating aircraft for the primary purpose of charter by air to and/or from regional airports throughout Australia (including between regional airports and airports in capital cities)*".

120. I find that the Applicant is a regional airline.

The Respondent's Minimum Wage

121. There was much debate as to what the minimum wage a person in the Respondent's position would receive under the Award. This was difficult because the aircraft, Embraer 135 or 145 was not mentioned in the Award. I assume that this is because no other company bound by the Award used Embraer jets before the Applicant.

122. It seems to me, because of the conclusion I have made that the Applicant is a regional airline, that Schedule C is the appropriate schedule to be looked at. However, there is no allowance made in Schedule C for a Captain of a jet plane. In looking at Schedule B

(which involves airline operations or general aviation employers) there are allowances for Captains of jet planes.

123. The Respondent argues that the minimum salaries in Schedule B should be looked at in deciding what the Award wage for the Respondent should be.

124. This is a situation where the Award has not kept up to modern realities. When this Award was put together, the thought that a regional airline would use a jet was unrealistic. Before the Applicant began operations, it was industry wisdom that a regional airline could only be economically viable if it were to use a fleet of Turbo prop planes.

125. Schedule B of the Award has a mixture of Turbo prop and jet planes. There is quite a rise in minimum annual salary from a captain of a turboprop plane to a Captain of a jet plane. A Captain of a Dash 8 400 has a minimum salary of $66,725.00 whereas a captain of a small jet (Fokker 28 or CRJ-50) has a minimum salary of $107,401.00. This is in contrast to a Captain of a Dash 8 400 coming under Schedule C where the minimum salary is $80,925.00.

126. Apart from the Fokker 28 and the CRJ 50 (which have minimum salaries of $107,401.00), Schedule B mentions the BAe 146, the Fokker 100 B and the Boeing 717 (all having minimum salaries of $116,271.00). The schedule then mentions narrow body aircraft, wide body aircraft (single deck) and wide body aircraft (double deck).

127. The Respondent argues that because the Embraer 135 is not mentioned, the appropriate classification for it is a narrow body aircraft. Whilst the term "narrow body aircraft" is not defined, it seems that an aircraft with a single passenger aisle fits that definition. This is distinct from a "wide body aircraft" that has more than one passenger aisle.

128. Examples of a narrow body aircraft would be the Boeing 727 and 737 or the Airbus A320. Examples of a wide body aircraft (single deck) would be the Boeing 767 or the Airbus A330. Examples of a wide body aircraft (double deck) would be the Boeing 747 or the Airbus A380. Looking at the definitions section of the Award, it seems that Schedule B only contemplates jets being used by "airline operations" and not by "regional airlines".

129. If this were a case of statutory interpretation, the Respondent would argue that, in finding what the minimum wage for a Captain of an Embraer 135 under Schedule B, the maxim *Expressio Unius et Exclusio Alterius* ought be the principle applied. The argument is that in specifically naming 5 jets in the Award and then generalising aircraft after that, the proper approach is that if the aircraft is not one of these 5 specific jets mentioned, it must then be part of the generalised description.

130. That approach does create somewhat of an absurdity. Aircraft such as the BAe 146 and the Boeing 717 are both bigger planes in weight and capacity than the Embraer 135. It is obvious in the framing of the minimum salaries that captains of jet planes are paid more than captains of turboprop aircraft. It is also obvious that the greater the weight and capacity of the plane, the greater the minimum wage. To interpret this Award as mandating that a captain of an Embraer 135 should have a greater minimum wage than the captain of a Boeing 717 is totally contrary to the framework of this Award.

131. If this were a case of statutory interpretation, the *absurdity rule* would be applied. Therefore it would be more in keeping with the intent of the Award to use the rule *ejusdem generis*. Using this rule would see the Embraer 135 in the same category of jet as the Fokker 28 and the CRJ 50. The Embraer 135 has a capacity of 37 people so it sits between these two other planes.

132. Of course, this would only apply if Schedule B were the proper schedule. As I have found that the Applicant is a regional airline, it is my view that Schedule C is the appropriate schedule. The maximum wage for a Captain of a regional airline under the Award is $80,925.00. The Respondent was paid well over this amount. This disposes of any claim that the Respondent was underpaid.

133. Even though I have found that Schedule B does not apply, I will still go through the exercise as if I had to determine what the minimum wage for the Respondent was under the Award. As Schedule C does not contemplate the use of a jet, I should look to Schedule B as a guide to what might be the appropriate minimum wage for a Captain of an Embraer 135.

134. In my view, the hypothetical minimum wage for the Respondent under this Award would be $107,401.00 using the finding I have made in paragraph 131 above. The Respondent was paid at a rate of $120,000.00 per annum for the first two months of his employment and $150,000.00 per annum for the last month of his employment.

135. The Respondent has claimed, in his cross-claim, that there has been an underpayment of wages. That claim is based on his having a minimum wage of $121,894.00, which is the minimum wage of captain of a narrow body aircraft. With the addition of a number of allowances, the Respondent claims that he should have had a minimum wage of $145,591.31.

136. The Award has an addition to the minimum salary. It states that a pilot (excluding Fokker 28 pilots) required to hold a senior commercial pilot's licence will be paid 604% of the standard rate per annum. It also states that a pilot (excluding Fokker 28 pilots) flying a turbo jet aircraft will be paid 1280% of the standard rate per annum. It further states that a pilot (excluding Fokker 28 pilots who are required to carry out flying using an instrument rating will be paid an additional allowance (in the case of the Respondent) 732% of the standard rate per annum.

137. The Award also gives allowance for a check pilot (with 10 pilots or less) a further 7% allowance of the minimum wage.

138. Using the definition of standard rate, my calculations have the standard rate equalling $746.54 ($38,820.00 divided by 52). Using the definition of check pilot in the Award, it can be seen that the Respondent does not fit this category because he was not approved by CASA.

139. On my calculations, the minimum wage would have been $107,401.00 plus $4,509.10 plus $9,555.71 plus $5,464.67 giving a total of $126,930.48. If one divides this sum by four (because the Respondent worked for the Applicant for three months) the total that the Respondent should have been paid is $31,732.62. The Respondent was paid a total of $32,500.00 by the Applicant.

140. If I accepted the argument of the Respondent that the calculation of minimum wage should be done by utilising Schedule B (which I have not accepted), I would nevertheless find that the Respondent was paid

more than what he was entitled to be paid under the Award and that the principles in the cl.2.2 of the Award have been observed.

Clause 19 of the Award

141. The Respondent makes a further claim for allowances pursuant to cl.19 of the Award. This claim concerns the travel to St Louis in July.

142. However, cl.19 is very clear that this clause does not apply to pilots employed by regional airlines. As I have found that the Applicant is a regional airline, any claim by the Respondent against the Applicant pursuant to this clause cannot be successful. Therefore I dismiss any claim made relying upon this clause of the Award.

The Part C Manual

143. The Respondent claims that the writing of the manual that he completed before he commenced employment is an undertaking for which he should be paid. He said that he spent 100 hours of his own time writing this section.

144. In my view, this was part of the tasks that he was undertaking in his role with the Applicant. It was not something extra that he did. I do not accept that the Respondent was told by Mr Mulder that such a task needed to be done before the Respondent commenced employment. I find it far more likely that this task was undertaken by the Respondent to illustrate his value to the Applicant.

145. There was no reason why this task could not have been undertaken after 1 May 2013. I do note, that even at the time of the resignation of the Respondent, the manual that the Respondent had written had not been given the "tick of approval" by CASA.

146. I dismiss the claim by the Respondent for monies owed for completing this task.

Superannuation

147. There has been an admission by the Applicant that they did not pay the appropriate amount of superannuation. They have since paid that sum and, because of the failure to pay that sum at the proper time, the

Applicant has suffered a penalty imposed by the Australian Taxation Office.

148. Nevertheless, there has still been a breach of the Award and of the National Employment Standards. I find that the Applicant has breached s.45 of the FW Act in not paying superannuation.

Annual Leave

149. Similarly, the Applicant has conceded that there was a failure to pay the Respondent his accrued annual leave. The Applicant concedes that the Respondent had accrued 5.041 days of annual leave pursuant to cl.24 of the Award.

150. This sum has not been paid. The Applicant submits that there should be allowance taken for three days of personal leave which was taken illegitimately. I have earlier found that these three days were taken by way of deceit. They should be taken as annual leave.

151. I therefore find that the Respondent has accrued 2.041 days of annual leave and that the Respondent must pay the sum that is still to be calculated. I find that the Applicant breached cl.24 of the Award and has therefore contravened s.45 of the FW Act.

Was the Deduction of Pay a Breach of the Act?

152. The Respondent claims that the deduction from his pay by the Applicant was a contravention of s.323(1)(a) of the FW Act. For the reasons that I have previously mentioned, I find that this deduction was the result of an agreement between the Applicant and the Respondent.

153. I therefore find that there was no breach of the FW Act.

Training Costs

154. The issue of training costs requires me to interpret clause 16 of the Award. Clause 16 states:-

> ***16. Training – classifications***
>
> ***16.1*** *This clause does not apply to employees engaged in aerial application operations.*

> ***16.2*** *Where the employer requires a pilot reach and maintain minimum qualifications for a particular aircraft type in accordance with this Award, all facilities and other costs associated with attaining and maintaining those qualifications will be the responsibility of the employer.*
>
> ***16.3*** *Where a pilot fails to reach or maintain a standard required the pilot will receive further re-training and a subsequent check. The pilot may be elect to have a different check captain on the second occasion.*
>
> ***16.4*** *Where a pilot fails the second check in clause 16.3, the pilot may, where practicable, be reclassified to the previous or a mutually agreed equivalent position.*
>
> ***16.5*** *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."*

155. I have already found that the Respondent has breached his employment contract by not paying for his training costs incurred in April 2013. The Respondent argues that the damages for such a breach should be nominal at best. This is based on a reliance on cl.16.5.

156. I see no problem with the employment contract and cl.16.5 standing together. The employment contract seems to recognise what is contained in cl.16.5.

157. The Applicant required the Respondent to have his type rating before employment could commence. The Applicant did recognise this period and was to reimburse to the Respondent the cost of that training. This was to be done over a period of two years whilst the Respondent remained in the employ of the Applicant.

158. The Respondent argues that two years have now passed and so the Applicant is in no worse position at this point, than if the Respondent had honoured his contract. That submission fails to take into consideration that the Applicant would have had the advantage of the services of the Respondent for those two years. It was not disputed that the Respondent was a very valuable employee and, with him on board, the Applicant would have grown far quicker than it has without him.

159. Clause 16.5 does not set any time limit for the reimbursement of those costs. Training costs are not expense claims and thus cl.20.1 of the Award offers no assistance to the Respondent.

160. Therefore, I find that cl.16.5 has no effect on the Respondent's liability for his breach of the employment contract in not paying for his training costs.

161. Alternatively, the Respondent submits that cl.16.2 would affect his liability for the breach. I do not accept this submission.

162. Firstly, cl.16.2 only applies to persons who are already in the employ of the employer and must submit to further training; for an example, if they were to be the pilot for a different type of plane. The Respondent was not an employee of the Applicant until 1May 2013 which post-dated the training.

163. Secondly, the clause only speaks of a pilot reaching and maintaining minimum qualifications for ***a particular aircraft type in accordance with this Award***. As has been well and truly noted, the Embraer 135 and 145 are not mentioned in the Award. Therefore this clause cannot apply to the Respondent.

164. The Applicant submits that cl.16 has no effect. The submission is that the clauses are not terms that are permitted or required by any of the subsections in s.136 of the FW Act. The submission is that a Modern Award may include terms that it is permitted to include only to the extent necessary to achieve the Modern Awards objective and the minimum wages objective under s.139(1) of the FW Act.

165. The submission is that training is not part of those objectives and therefore cl.16 is unenforceable. The Respondent counters this argument by saying, in effect; regular (and expensive) training is needed for pilots to properly perform their tasks and thus fall under s.139(1)(g)(i) and (ii). Therefore the FW Act would permit training in such a field to be part of the Award because, unlike the vast majority of other professions and occupations, the training is intrinsically linked to the performance of the role.

166. In my view, cl.16 is valid and the Applicant and Respondent are bound by those clauses. However, a strict reading of the clauses is needed and

that is what I have done in applying the Award to these facts. That strict reading, in my view, does not assist the Respondent for the reasons I have previously outlined.

167. Even if I am wrong in these conclusions about the effect of the Award, I would find that the Applicant received no consideration of the outlay they made on behalf of the Respondent and that it would be unjust for the Respondent to retain the benefit of this training at the expense of the Applicant.

The July St Louis costs

168. The Applicant claims restitution of costs associated with the July trip to St Louis undertaken by the Respondent. The Applicant contends that they received no benefit for the following items of expenditure:-

a) the sum of money paid to CASA for check pilot approvals;

b) the sum paid to Flight Safety International in respect of the briefing and operation of the simulator; and

c) the sum paid for the Respondent's simulator training.

169. It emerged during the trial that the Applicant had initially believed that they had paid for the travel and accommodation costs of the Respondent as well as the training costs. It became clear that the Respondent had paid for his own travel and accommodation.

170. The Respondent, in his counterclaim, asks this Court to order that the sum of $4,834.52 for travel and $3,633.96 for accommodation expenses be paid to him by the Applicant.

171. The Respondent also claims that, in not paying these sums, the Applicant is in breach of cl.16.2 and therefore asks this Court to declare that the Applicant has breached s.45 of the FW Act.

172. The Applicant had some trouble in quantifying the consideration that it expended solely for the Respondent. This is because there was another pilot that was assessed by the CASA regulator and a number of other pilots who were assessed by the Respondent and that other pilot under the supervision of the CASA regulator. So while the Applicant received

no benefit for the money it expended for the Respondent, it received a benefit through all of the other monies expended for this trip.

173. Added to this is the confusion as to what was actually paid. Exhibit 34 suggested that the sum originally thought to be paid of $10,800.00 may well have been discounted. However, it is clear that $10,800.00 was paid to Flight Safety International.

174. I cannot accept that the $10,800.00 was solely for the training of the Respondent. It would seem to me that, at best for the Applicant, that half of that cost might well have been because of the training of the Respondent. The Applicant paid $7,950.00 for the CASA supervision and approvals but only half of that sum is attributable to the Respondent. It seems that the Applicant paid $2,400.00 for the Respondent's simulator training.

175. On my calculations, the Applicant claims that they received no benefit from the expenditure of $11,775.00 in respect of the training of the Respondent.

176. What has occurred is expenditure by the Applicant for a purpose that was necessary for the advancement of the business. What occurred in the Respondent not giving the notice required under the Award (and indeed nowhere near the notice required in the contract of employment) exacerbates the contravention of s.45 of the FW Act.

177. The remedy for a contravention of the Act is a pecuniary penalty which can be paid to a person if the Court is of the view that it is appropriate to do so. It is trite to say that what the Applicant desired from the expenditure of this money was that the Respondent would utilise that training to enhance the company and train the more junior pilots.

178. With this training now under his belt, there was no real impediment for the Applicant to become the HOTAC and the HOFO. I accept that the sudden resignation of the Respondent set back the operations of the Applicant significantly.

179. The Respondent submits that these training costs were payable by the Applicant in any event. The Respondent relies on cl.16.2 which, as previously discussed, imposes upon the employer the need to meet the costs of training of this type. The Respondent submits that even if the

Embraer training is not for an aircraft within the Award, the spirit of this Award would dictate that the employee can be no worse off.

180. But this is not the gravamen of the claim by the Applicant. The Applicant recognises that it is responsible for the costs of training, even if that is not by reason of the operation of cl.16.2. The Applicant would be pleased to pay those costs for the betterment of the business.

181. What the Applicant says is that, notwithstanding the fact that it is responsible for the payment of that training, the Respondent's behaviour in resigning as, and when, he did, means that they received no consideration for the monies that they had to expend.

182. It is the fact that there was no consideration for the payments that it made, that caused the Applicant to seek relief in this Court. The claim of the Applicant is that it is unjust for the Respondent to retain the benefit of this training at the Applicant's expense.

183. In the circumstances of this case, I agree that it would be unjust for the Respondent to retain the benefit of this training at the Applicant's expense. Therefore, I will order, in relation to this aspect of the claim, that the Respondent shall pay the Applicant $11,775.00 with interest.

184. I do not find that the Applicant has breached cl.16.2 by not paying the travel expenses of the Applicant. I note that it was his desire to travel business class that caused the Respondent to pay for the airfares and that the Respondent has claimed these expenses as a tax deduction.

185. I find that there had been discussion between the Applicant and Mr Mulder as to some form of reimbursement for this travel. This discussion would have continued had it not being for the sudden resignation of the Applicant. I find that there had been no deliberate action by the Applicant not to pay these expenses before the resignation.

186. If the Applicant had paid those travel expenses before the resignation, such costs would have been part of the award that I would have ordered that the Respondent now pay to the Applicant.

187. I dismiss the Respondent's counterclaim in this respect for the reimbursement of those travelling expenses.

Was there a Breach of Australian Consumer Law?

188. The Respondent, in his counterclaim, contends that there was a breach of Australian Consumer Law. The Respondent points to representations that were made to him that he claims were misleading or deceptive. These are:-

> *"i. the cross-respondent did not take immediate steps to appoint the cross-applicant to the position of HOFO or Chief Operating Officer upon commencement of employment;*
>
> *ii. the cross-respondent did not, during the course of the cross-applicant's employment, commence operating in RPT;*
>
> *iii. the cross-respondent did not, during the course of the cross-applicant's employment, commence flying out of the Sunshine Coast;*
>
> *iv. the cross-respondent did not advise the cross-applicant in a timely manner the findings made by CASA as a result of the April 2013 audit;*
>
> *v. the cross-respondent was non-complaint with the regulatory and statutory requirements of CASA in major ways;*
>
> *vi. the cross-respondent did not take delivery of additional aircraft;*
>
> *vii. the cross-respondent did not provide the cross-applicant with an AMEX card."*

189. Taking these claims seriatim, I find as following:

a) The Applicant could not make the Respondent the HOFO until he had the "tick of approval" by CASA. That could not be done until the July training had concluded. This was not deceptive conduct by the Applicant;

b) The Applicant did not commence RPT operations during the course of the Respondent's three-month employment, however this was not misleading or deceptive. There was no time frame put on the commencement of such operations and it could not have been of any surprise to the Respondent that this had not commenced before August 2013;

c) The same finding is made in relation to the aspiration to fly out of the Sunshine Coast;

d) The Applicant advised the Respondent of the audit by CASA soon after he commenced employment. He became part of the acquitting of these notices. I do not see that there was anything misleading in not informing the Respondent of this audit before he commenced employment;

e) I have already commented on the relationship between the Applicant and CASA. I do not find that there is anything misleading or deceptive about how the Applicant described that relationship to the Respondent;

f) Whilst the Applicant did not take delivery of additional aircraft in the 3 months in which the Respondent was employed by them, there was no promise that this would happen. I do not find anything misleading or deceptive in this claim;

g) Whether or not the Respondent was supplied with an AMEX card was not a deal maker in any way, shape or form. The Respondent himself did not ever mention this after he began employment.

190. I do not find that these matters played any great part in the Respondent deciding to sign the Contract of Employment. I do not find that the Applicant has been deceptive or misleading. I do not find that there has been any contravention of Australian Consumer Law.

191. Even if the Respondent had relied upon any of the representations and those representations had been misleading, I do not find that the Respondent suffered any loss.

Conclusion

192. I make the following orders.

193. I declare that the Respondent has contravened s.45 of the Fair Work act in not giving two weeks' notice and is liable to a pecuniary penalty.

194. I declare that the Respondent has breached the Contract of Employment .

195. I order that the Respondent pay the Applicant $21,000.00 plus interest for the breach of contract relating to the above order.

196. I declare that the Applicant is entitled to restitution on the basis that the consideration paid for the July 2013 training wholly failed in circumstances where it would be unjust for the Respondent to retain the benefit at the expense of the Applicant.

197. I order that the Respondent pay to the Applicant the sum of $11,775.00 plus interest as restitution relating to the above order.

198. I order that the cross-claim for a declaration that the Applicant contravened the FW Act in relation to the deductions from pay be dismissed.

199. I order that the cross-claim for a declaration that the Applicant contravened the FW Act in relation to underpayments be dismissed.

200. I order that the cross-claim for a declaration that the Applicant contravened the FW Act in relation to training costs be dismissed.

201. I declare that the Applicant has contravened s.45 of the FW Act in that it failed to pay superannuation at the time that it was due and is liable to a pecuniary penalty.

202. I declare that the Applicant has contravened s.45 of the FW Act in that it failed to pay accrued annual leave annual leave upon the resignation of the Respondent and is liable to a pecuniary penalty.

203. I order that the Applicant pay the Respondent the sum equivalent to 2.0146 days of annual leave with interest.

204. I dismiss the cross claim for contravention of Australian Consumer Law.

205. I dismiss the cross-claim for breach of contract.

206. I will hear the parties in relation to the issues of costs and of pecuniary penalty arising from the orders contained in paragraphs 193, 201 and 202 above.

I certify that the preceding two hundred and six (206) paragraphs are a true copy of the reasons for judgment of Judge Vasta

Date: 28 May 2015

AUSTRALIAN FEDERATION OF AIR PILOTS

ATTACHMENT B

MEMBER OF THE INTERNATIONAL FEDERATION OF AIR LINE PILOTS' ASSOCIATION

President: Richard Higgins
Executive Director: Terry O'Connell

9 January 2006

Ms Alisanne Ride
Workplace Relations Adviser
Office of the Employment Advocate
GPO Box 9842
PERTH WA 6848

Copy via email: allisanne.ride@oea.gov.au

Dear Ms Ride

RE: PILOT TRAINING BONDS IN AUSTRALIAN WORKPLACE AGREEMENTS

Thank you for providing a copy of the OEA's draft policy regarding "training bonds in the aviation industry", received December 2005.

The Federation broadly supports the framework and principles detailed in the draft policy.

Overall, we accept that the OEA's draft policy addresses the major issues and finds a fair and reasonable balance between employers' need for a return on training investment and pilots' fair expectation that there is at least some compensatory benefit under the global NDT where their existing right to training and freedom of movement is restricted via a training bond.

We are currently in the process of negotiating formal agreements that include training bonds as both parties to certified agreements and bargaining agents for AWAs. Once adopted, the policy will be of assistance to all negotiating parties.

Please advise Senior Industrial Officer, Simon Lutton, on (03) 9699 4200 or email simon@afap.org.au when the draft policy becomes formal OEA policy so that we may advise members and the industry parties with whom we deal.

Yours sincerely

[redacted]

Richard Higgins
President

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[redacted]

Australian Government
Office of the Employment Advocate

7/12/07
Simon

Dear Mr Higgins,

Please find attached the draft policy. Please get back to me with your comments as soon as possible

Regards, Alisanne Ride

PO Box 9842 Sydney NSW 2001 Phone: 1300 366 632 Website: www.oea.gov.au

Training bonds in the Aviation Industry

In the interests of achieving consistency and fairly applying the no-disadvantage test an industry wide approach is to be adopted with regard to assessing the value of the training bond and the training bond clause.

The OEA's policy is as follows:

Training bond policy

This policy applies if:

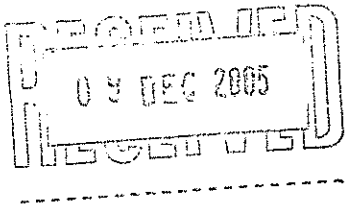
1. A training bond clause is contained within an AWA for flight crew.
    a. The classification of flight crew includes the classifications of pilot and first officer.
2. The employee is a permanent employee.

Definitions

1. *'Registered training provider'* is defined as a training provider that is registered in accordance with the Australian Recognition Framework as a provider of particular vocational education and training by a training recognition authority of a State or Territory.
2. *'Training provider'* is defined as a person who, or entity that, provides vocational education and training.
3. *'Proficiency or Re-currency Training'* is defined as the training undertaken by the employee to maintain the employee's current skill set and level.
4. *'Check to line'* is defined as any formal test or other assessment conducted by, or on behalf of, the company towards a pilot being cleared to line duties.

Features of a training bond clause

1. The training provided to the employee is endorsement training that is formally recognised by the Civil Aviation Safety Authority Australia (CASA) and provided by:
    a. a training provider of CASA; or
    b. a registered training provider of CASA.
2. Training is to be distinguished for the purposes of whether the employee undertakes the training on a voluntary or directed basis.
3. A return of service obligation is applicable for employees who undertake voluntary training.
    a. The maximum Return of service obligation period (ROSOP) is two years for turbo-prop and piston equipment.
        i. The return of service obligation diminishes over the period of two years in line with the following:



0-6 months since commencement of training – 50% of the training [1]
6-12 months since commencement of training – 37.5% of the training
12-18 months since commencement of training – 25% of the training
18-24 months since commencement of training – 12.5% of the training

b. The maximum ROSOP is three years for jet endorsements.

i. The return of service obligation diminishes over the period of three years in line with the following:

0-6 months since commencement of training – 50% of the training[2]
6-12 months since commencement of training – 41.67% of the training
12-18 months since commencement of training – 33.33% of the training
18-24 months since commencement of training – 25% of the training
24-30 months since commencement of training – 16.67% of the training
30-36 months since commencement of training – 8.33% of the training

c. The return of service obligation operates from the day training is commenced by the employee.

4. The actual cost of the training be stated in a monetary amount in the agreement.

a. The employee is to be informed prior to undertaking training of the actual cost of the training.

b. The actual cost of the training does not incorporate the cost of re-currency or proficiency training of the employee.

5. An exemption clause be provided to enable employees to be prematurely released from the bond for extenuating circumstances that are beyond the control of the employee.

6. The training bond may be waived or reduced by the employer at anytime at the employer's discretion.

7. Casual employees are excluded from the provisions of training bonds.

Factors considered in determining the training bond features and value

The OEA has determined these features after considering many factors including:

- Relevant determinations by the Australian Industrial Relations Commission, State Magistrates Court and Federal Court of Australia.
- The arguments put forward by industry stakeholders such as employers, industry associations, bargaining agents and employee associations.
- Previous AWAs and assessments done by the OEA
- The age, classification, permanency and income levels of the employees in the relevant industry

[1] Current AWAs with training bonds provide for a starting point of 100% of training costs to be paid by the employee in the event of the employee leaving the employers employment. The reasoning behind utilising the starting point of 50% lies with current NDT assessment practices of halving the training cost of the bond and placing the halved value under the Award side of the NDT.
[2] as per above.

Disagreement with the training bond features and valuation

If the employer or employee disagrees with the OEA features and valuation, then the matter will be forwarded to the DEA for a decision

DEA decisions will be recorded to allow for assistance in future decisions.

Example clause

1. The training provided to the employee is endorsement training that is formally recognised by the Civil Aviation Safety Authority Australia (CASA) and provided by:

    a. a training provider of CASA; or

    b. a registered training provider of CASA.

2. Where the employee is directed to take on training then the employer will bear the costs of the employees training.

3. Where the employee voluntarily undertakes training to the mutual benefit of the employee and the employer:

    a. the employee will bear up to 50% of the cost of the employee's training in the event that the employee leaves the employer's employment within the Return of Service Obligation Period (ROSOP).

4. A return of service obligation is applicable for employees who undertake voluntary training.

    a. The ROSOP operates for a maximum period of:

        i. two years for turbo-prop and piston equipment;

    b. The return of service obligation diminishes over the period of two years in line with the following:

        0-6 months since commencement of training – 50% of the training;
        6-12 months since commencement of training – 37.5% of the training;
        12-18 months since commencement of training – 25% of the training;
        18-24 months since commencement of training – 12.5% of the training

    c. The return of service obligation operates from the day training is commenced by the employee.

5. The actual cost of the training comprises the direct costs to the organisation of the endorsement of the employee as specified in Table below. The direct costs to the organisation include:

        i. The direct operational costs of flying the aircraft;

        ii. The cost of providing a trainer,

        iii. The administrative costs of collating the required documentation to meet CASA obligations;

    b. The employee is to be informed prior to undertaking training of the actual cost of the training.

    c. The actual cost of the training does not incorporate the cost of re-currency or proficiency training of the employee.

Endorsement classification	Costs	ROSOP
Cessna 402 Captain	$3,000.00	2 years
Cessna 441 Conquest Captain	$12,000.00	2 years
Fairchild Metro Series First Officer	$11,000.00	2 years
Fairchild Metro Series Captain	$20,000.00	2 years
Embraer Brasilia first Officer	$18,000.00	2 years
Embraer Brasilia Captain	$25,000.00	2 years
Dash 8 First Officer	$18,000.00	2 years
Dash 8 Captain	$25,000.00	2 years

6. An employee may be prematurely released from the bond for extenuating circumstances that are beyond the control of the employee.

    a. An extenuating circumstance may include but is not limited to:

        i. Ill health

        ii. Redundancy

        iii. Occupational, health and safety

        iv. Termination of employment at the employer's initiative (except for termination for serious misconduct)

    b. Where the employee requests to be prematurely released from the bond for medical reasons, the employer is to be provided with documented evidence such as the non-renewal of the aviation medical certificate.

    c. The employee may be requested to provided documented evidence to the employer for the extenuating circumstance that requires the employee to be prematurely released from the bond.

    d. Where the employee requests to be released due to occupational, health and safety reasons, this will be subject to a determination by State or Territory Occupational, Health and Safety Department or Body.

7. The training bond may be waived or reduced by the employer at anytime at the employer's discretion.

8. The endorsement classification and actual cost of training applicable to this Agreement for the employee are as follows:

Endorsement Classification	Metro 23 Captain
ROSOP	2 years
Training Costs	$20,000.00
Total:	$20,000.00

AUSTRALIAN FEDERATION
OF AIR PILOTS

President: Richard Higgins
Executive Director: Terry O'Connell

Emailed & Posted 18/8/05

18 August 2005

Mr David Rushton
Senior Legal Manager
Office of the Employment Advocate
GPO Box 9842
Sydney NSW 6848

Copy via email: david.rushton@oea.gov.au

Dear Mr Rushton

RE: PILOT TRAINING BONDS IN AUSTRALIAN WORKPLACE AGREEMENTS

Thank you for your letter of 2 August in response to my letter of 18 April 2005 regarding the issue of training bonds in agreements covering pilots.

We are pleased that the OEA intends to develop a policy to deal with the issue on a broader basis and welcome the opportunity to discuss the matter with an OEA officer.

We have recently been negotiating a number of formal agreements that incorporate training bonds and it would be of great benefit to the Federation, and the employers in the industry, to understand the framework under which they will be assessed by the OEA for the global no disadvantage test.

Our Executive Committee has recently met to determine policy on the matter of training bonds and we have recently written an article on the issue for our membership magazine, AIR PILOT.

We would be happy to forward the Executive Committee Discussion Paper and AIR PILOT article to the nominated OEA officer, perhaps before a face to face meeting at our office in Melbourne to discuss the issue.

The Federation officers with coverage and knowledge of this area are our Senior Industrial Officer, Simon Lutton, or Industrial Officer and Solicitor, Martin Reid. They can be contacted on (03) 9699 4200 or email simon@afap.org.au or martin@afap.org.au to discuss the above.

Yours sincerely

[redacted]

Richard Higgins
President

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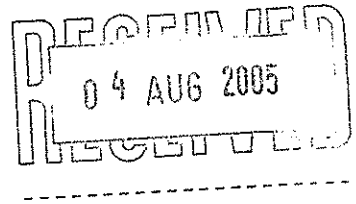
Australian Government

Office of the Employment Advocate



2 August 2005

Mr Richard Higgins
Australian Federation of Air Pilots
Level 6/ 132-136 Albert Road
South Melbourne VIC 3205
Fax 03 9699 8199

Dear Mr Higgins

I refer to your letter of 18 April 2005 to Ms Julie Tracy the Office's Acting Regional Manager for Western Australia. I apologise for the delay in responding.

The issue of training bonds is a particularly complex one, especially as it appears in recent times that such bonds are being more frequently used. The OEA has previously dealt with the issue on a case by case basis-as you would be aware the Employment Advocate or his delegate must be sure that an AWA meets the no disadvantage test (NDT) before that AWA can be approved. The OEA now intends to develop a policy to deal with the issue on a broader basis. An OEA officer has commenced this task and the views contained in your letter will be taken into account. In addition the officer will be in contact with you to discuss your concerns and issues. As such the following are preliminary responses to the matters raised in your letter.

I note that you accept that the NDT is a global test and that accordingly the value of certain items can be reduced or increased as compared with the award with the AWA still meeting the NDT. In also note that you accept the conduct of the NDT is a matter for judgement rather than a purely mathematical process.

I further note that you place particular emphasis on the AIRC Full bench decision of *Re: MSA Security Officers Certified agreement 2003 PR937654* (the MSA decision). It is important to make a number of points regarding that matter:

1. The OEA carefully considers all relevant decisions of the AIRC (as it did with the MSA decision). Nevertheless as the AIRC is an arbitral body it does not make decisions that are binding on the Employment Advocate.
2. The MSA decision was a majority decision of 2-1 overturning a previous decision of a Senior Deputy President. In other words there were a range of different views on the issue within the AIRC
3. The MSA decision involved a certified agreement rather than an AWA. Whilst the NDT is expressed in the same terms in the *Workplace Relations Act 1996* (the Act) for both type of industrial instruments, in this office's view the individual nature of an AWA means that in application the particular circumstances and wishes of the employee may be more readily taken into account for an AWA.

4. Following on from point 3 it is squarely OEA policy in relation to the issue of employees working particular hours (the issue at the heart of the MSA decision) that the wishes of the employees as to when they want to work are taken into account and given value in the NDT. The fact that such employee choice may not be encompassed in the relevant award has not been interpreted by this office as excluding it in the NDT consideration.

In relation to the issue of training bonds employee choice as to working hours is not pertinent. The point of principle however is that in the OEA's view other factors in addition to the words of the award and those of the AWA need to be considered in the NDT.

It seems that the Federation shares the OEA's view that such bonds are not unlawful as such. Without derogating from that view the OEA agrees that there may be issues in particular cases as to whether the quantum and nature of the bond gives rise to it being a penalty or unconscionable in some way and hence unenforceable.

Further factors that will be looked at in the OEA's analysis of training bonds will include but not be limited to:

1. Cost of training
2. The regulatory requirements for training
3. The contingency issue-ie the likelihood of pilots leaving employment prior to the expiration of the relevant bonded period
4. Whether the undertaking of training is voluntary or directed
5. The benefit in financial terms gained from the training

In due course the OEA would be pleased to receive your comments on the above matters. You will be contacted in relation to the OEA's formulation of a general policy as foreshadowed above. In the meantime if you have been appointed a bargaining agent for particular employees and wish to make submissions regarding particular AWAs the OEA will carefully consider such submissions.

Yours sincerely

[redacted]

David Rushton
Senior Legal Manager

AUSTRALIAN FEDERATION
OF AIR PILOTS

MEMBER OF THE
INTERNATIONAL FEDERATION OF
AIR LINE PILOTS' ASSOCIATIONS

President:
Richard Higgins

Executive Director:
Terry O'Connell

18 April 2005

Ms Julie Tracy
Assistant/Regional Manager
Office of the Employment Advocate
GPO Box 9842
PERTH WA 6848

Dear Julie

Australian Workplace Agreements: Approval by the Employment Advocate of Agreements that contain a Training Bond clause

The Australian Federation of Air Pilots (Federation) would like to raise its concerns with the Office of the Employment Advocate (the OEA) about Australian Workplace Agreement's (AWA's) that contain provisions requiring Pilot's to enter into a bond arrangements (Training Bonds) with their prospective employer.

The Federation has specific concern's with the continuing approval by the OEA of AWA's that contain Training Bonds. We believe that approval is being granted without the appropriate analysis mandated by the *Workplace Relations Act* 1996 (the Act).

Training Bonds- how they operate

Training Bonds typically form an appendix or Schedule to a Pilot's AWA. The relevant clause will generally state that the employer agrees to meet the training costs of a Pilot on the condition that the Pilot agrees to a "return of service obligation period" (ROSOP). During such ROSOP's, were a pilot to resign from the employ of the employer, or somehow cause the relevant AWA to be nullified, a Pilot must reimburse his or her employer the actual cost, or a percentage of the actual cost (on a pro-rata basis), incurred by the employer in providing such training.

Usually, an employee that resigns during an ROSOP will be responsible for training costs fixed at levels anywhere between $10 000.00 up to $25 000.00.

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This cost is a significant penalty for any Pilot who chooses to resign from his employment for whatever reason.

The Present Regulatory Framework
The current no-disadvantage test (**"NDT"**) contained in Part VIE of the *Workplace Relations Act 1996* provides:

Section 170XA When does an agreement pass the no-disadvantage test:
(1) An agreement passes the no-disadvantage test if it does not disadvantage employees in relation to their terms and conditions of employment.

(2) Subject to sections 170XB, 170XC and 170XD, an agreement disadvantages employees in relation to their terms and conditions of employment only if its approval or certification would result, on balance, in a reduction in the overall terms and conditions of employment of those employees under:

> *(a) relevant awards or designated awards; and*
> *(b) any law of the Commonwealth, or of a State or Territory, that the Employment Advocate or the Commission (as the case may be) considers relevant.*

This statutory context is informed by the second reading speech of the then Minister Peter Reith in introducing the Bill which, in amended form, became the Act:

> *"However, agreement-making under the government's legislation will be subject to a set of statutory minimum conditions to ensure due protection for workers...*
>
> *Both AWA's and Certified Agreements will have to meet these minimum conditions. Consistent with our election guarantee, pay must be no less than that prescribed under the relevant award— whether you are a regular worker, a casual or a pieceworker. Other guaranteed minima cover conditions relating to annual leave; personal/carer's leave; parental leave; long service leave; equal pay for work of equal value; and jury service...*
>
> *Prior to certification, the commission will test agreements to ensure the statutory minima are met. In that regard, as is the case with Labor's no disadvantage test, the minimum pay guarantee may be satisfied on a collective basis. Thus, the guarantee may be met for each employee of a particular kind covered by an agreement if the commission considers that, when considered overall, the wages payable to all employees of that kind under the agreement satisfy the minimum pay requirement."*

It follows from this language that the NDT was designed to ensure the protection of workers conditions and the benchmark against which the NDT requires the agreement to be compared is either a 'relevant award' (or, if one does not apply, a 'designated award') and 'relevant' laws.

How to apply the NDT

The way the NDT is to be interpreted and applied has been the subject of comment by a Full Bench of the AIRC in only a handful of cases, and neither the Federal Court nor the High Court have had cause to consider and pass judgement upon the test. The most central of the AIRC Full Bench decisions is *Re: MSA Security Officers Certified Agreement* 2003 PR937654.

Although this decision was in relation to an application pursuant to s.170LK of the Act, in reaching this decision, the majority of the Full Bench seems to have endorsed certain 'guiding principles' on the application of the NDT in general.

The first of these seems to be that the decision-maker must have some foundation for his or her satisfaction that the agreement passes the NDT 'over and above generalised satisfaction'.

Secondly, the NDT 'does not involve an analysis of matters other than the terms and conditions of the Award as against the Agreement. The OEA should not act in reliance on extraneous material such as 'the employer's prediction of what the operational circumstances of the business would or might be', or on the employer submissions as to the legal effect of award provisions'.

Thirdly, the correct approach to the NDT 'is by reference to the terms and conditions of the competing instruments (i.e. a 'comparison' or an 'analysis' of such terms and conditions laid side by side).

What is plain from this decision is that the NDT requires the OEA to properly examine the conditions set down in the AWA against those in the relevant award, in order to ensure that the terms of the AWA do not 'disadvantage' the employee when compared with the employee's conditions under the previously applying regulatory arrangements.

If we are to take into consideration the principles enunciated by the Full Bench in the *MSA Securities Officers Case*, it is open to question that the NDT at least requires the AIRC and the OEA to undertake a serious comparative and reasonably transparent assessment of the relative benefits conferred in the relevant Award and the AWA. Whilst the test is a 'global' test, and a matter for judgment and impression rather than a purely mathematical process, there is nothing in the Act that prevents the OEA, in the initial stages, from performing a line by line comparison of the Award and the AWA in order to form at least a

preliminary impression of whether or not the AWA results in a reduction in the overall terms and conditions of employment 'on balance'.

When compared with the Relevant Award
In relation to the majority of Pilots, the relevant Award for the purposes of the NDT is the Pilots (General Aviation) Award 1998 (**"the Award"**). The issue of Pilots training costs is directly addressed in Clause 19.1 of the Award. Clause 19.1 states:

"Where the employer requires a pilot to reach and maintain minimum qualifications for a particular aircraft type in accordance with clause 32 – Classification and salary of this award, all facilities and other costs associated with attaining and maintaining those qualifications will be the responsibility of the employer."

Clause 19.1 mandates that all training costs must be met by the employer. For the NDT to operate effectively when such a fundamental right is removed, the OEA must ensure that the Pilot is adequately compensated for its removal. The Federation is concerned that this does not happen. At present, Pilot salaries do not reflect the confiscation of this Award entitlement.

Conclusion
Whilst we acknowledge that some disadvantage may arise from the 'global' nature of the test; and that some award rights may be lost and not adequately replaced by the terms of the Agreement. This will always be a question of 'judgment' or 'impression'. However it is the Federations submission that the appropriate comparison has not been taking place.

Clause 19.1 of the Award clearly mandates that all training costs be met by the employer. The removal of that fundamental entitlement, coupled with the inclusion of a training bond without compensation elsewhere in the AWA, cannot in any reasonable estimation, be considered "No-Disadvantage" to the employee.

The Federation submits that were the proper analysis of such an AWA conducted it would reveal the appalling inequity of such Agreements. Agreements that result in a real reduction in the overall terms and conditions of employment. It is contrary to both the Objects and Part VIE of the Act, to allow this practice to continue.

The Federation accepts that Training Bonds will continue to form part of the contractual relationship between Pilots and their employers. We do not accept however, that Training Bonds can be included in an AWA, and that AWA satisfy Part VIE of the Act, without containing adequate compensation to that Pilot for its inclusion.

We have sent a copy of this letter to both the Minister and Shadow Minister for Workplace Relations and we request that this letter is forwarded to the Employment Advocate, Peter McIlwain for his consideration.

The Federation welcomes the opportunity to discuss this matter further with the OEA.

Yours Faithfully

Richard Higgins
President