



DECISION

Fair Work Act 2009

s.739 - Application to deal with a dispute

Australian Federation of Air Pilots

v

National Jet Express Pty Ltd

(C2026/8502)

COMMISSIONER THORNTON

ADELAIDE, 22 SEPTEMBER 2026

Section 739 application to resolve an industrial dispute – dispute about matters under the enterprise agreement – whether transfer at employee’s request or at direction of employer.

[1] The Australian Federation of Air Pilots (**AFAP**) notified a dispute to the Fair Work Commission (**the Commission**) on 7 July 2026, asking the Commission to exercise its dispute resolution powers conferred by clause 8 ‘Settlement of Disputes Procedure’ of the *National Jet Express Pty Ltd Pilot Enterprise Agreement 2022 – 2026* (**the Agreement**). The dispute notification was supported by the Transport Workers Union (**TWU**) who, as well as the AFAP, is an employee organisation covered by the Agreement.

[2] In broad terms, the dispute concerned the alleged lack of consultation by National Jet Express Pty Ltd (**NJE or the Respondent**) with 19 pilots employed by NJE who fly BAe146 aircraft. The roles of these employees are at risk of redundancy following the end of a contract between NJE and Qantas for freight operations scheduled to conclude on 1 October 2026 and NJE’s decision to subsequently retire the fleet.

[3] Following the notification of the end of the contract with Qantas, NJE has identified a number of alternative positions available within its operations into which some of the employees at risk of redundancy may be redeployed. The redeployed positions involve flying different aircraft to the BAe146 aircraft and will require the employees to undertake training. The number of positions changed over the course of the dispute, however, crystallised later in the dispute at 12 available positions. Some of the positions available may require the relocation of the pilots from their current base to a base in another state.

[4] The matter was listed before me for conciliation on 4, 18 and 27 August 2026. A number of matters were resolved between the parties including the selection criteria and its application, as well as the timing and communications to employees about an expression of interest (**EOI**) process for the 12 alternative roles available within the company. Employees not selected for a new role in the EOI process will likely be made redundant. NJE advised employees that should they be offered a redeployed role and not accept it, NJE will apply to the Commission pursuant to section 120 of the *Fair Work Act 2009* (Cth) (**the Act**) for an order to reduce their redundancy entitlements to zero.

[5] The issue as to whether NJE is required under the Agreement to meet the cost of relocating employees who may need to move interstate in order to take up redeployed roles, or whether the relevant employee bears the cost of relocation because of a purported choice to move for a new role, remains unresolved between the parties. The Agreement distinguishes between transfers that arise at a pilot's request and those that are at the direction of NJE as the employer. Transfers at the request of a pilot do not, under the terms of the Agreement, require NJE to meet the relocation expenses. Conversely, the Agreement determines that transfers directed by NJE ensure that it bears the cost of relocation.

[6] NJE and the Unions have agreed that the Commission should determine, in accordance with its power to arbitrate disputes under clause 8.5.2 of the Agreement, the question of whether relocation for a redeployed role is at the direction of NJE or is at the request of the pilot.

[7] It was necessary to deal with the dispute on an urgent basis. The contract between NJE and Qantas concludes on 1 October 2026. NJE have secured positions in a training program that is necessary to be undertaken by the pilots accepting alternative roles and flying different aircraft. A number of training positions are available in a course commencing on 5 October 2026 and other positions are available in the next training course scheduled to start on 19 October 2026. NJE says it will incur significant costs if those positions are not taken up because pilots have not been selected through the EOI process in time to start their training.

[8] The Unions are concerned that some pilots may not nominate in the EOI process if they have to meet their own relocation costs, either upfront or on a delayed payment plan that has been offered by NJE. The Unions also strongly assert that the correct interpretation of the relevant clauses in the Agreement lead to a conclusion that NJE is liable to meet the costs of relocation in these circumstances. The Unions have complained that communications disseminated to the relevant employees by NJE advising them that they are to meet the costs of relocation are inconsistent with employees' entitlements under the Agreement and may lead to some employees deciding not to nominate for redeployment. The Unions also held concerns regarding an alternative scenario in which an employee nominates for a redeployed role, the employee's EOI is accepted, NJE is found not liable to meet the expense of relocation and the employee then turns down the redeployed role offered to them on account of the cost of relocation. In that case, the employee risks their redundancy entitlements if NJE is successful in its application to the Commission under section 120 of the Act to reduce their redundancy entitlement.

[9] To mitigate against those circumstances, the parties agreed that the EOI process will continue to progress and to my knowledge, also agreed on a communication to employees that the dispute regarding the application of the Agreement to relocation expenses will be determined by the Commission. Following this determination, if I find that NJE is not liable to meet relocation expenses, any employees that have nominated for a redeployed role that wish to withdraw from the EOI process can do so within a period of 48 hours following the publishing of this decision, without NJE subsequently applying to the Commission to reduce the employee's redundancy entitlements.

[10] The parties consented to this matter being determined on the papers. The AFAP filed submissions, reply submissions and a witness statement of Mr James Mattner, Senior Industrial

Officer of the AFAP. The TWU filed submissions in support of those filed by the AFAP and submissions in reply. NJE filed submissions.

[11] For the reasons set out in this decision, I find that the proposed transfers of the pilots are at the direction of NJE and consequently, clauses 47.2 and 47.3 of the Agreement are applicable to the circumstances of this matter.

The question to be determined

[12] The AFAP says the question to be determined is:

“[W]hether, where NJE offers an affected BAe146 pilot an alternative, interstate position as part of the process arising from the cessation of that operation, the resulting transfer is at the pilot’s request under clause 47.1 or at the Employer’s direction under clause 47.2 and 47.3.”¹

[13] NJE submits the question in similar terms:

“[W]hether an affected BAe146 Pilot who, following the cessation of the BAe146 operation, expresses interest in an alternative position, nominates a preferred base and accepts an offer, has transferred “at the Pilot’s request” under clause 47.1 or “at the direction of the Employer” under Clauses 47.2 and 47.3” of the Agreement.²

[14] The questions both ask whether, under the respective clauses of the Agreement, a pilot taking up a redeployed position at a different, interstate location is relocating at their own request or at the direction of NJE. The answer reveals the entitlement or otherwise to relocation expenses to be paid by NJE.

The Agreement

The dispute resolution provisions

[15] It is not in dispute that the Commission can deal with this matter including by arbitrating the matter or making a determination binding on the parties.

[16] Clause 8.4 of the Agreement says: *“If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to the FWC”*.

[17] Clause 8.5 sets out the power given to the Commission to resolve disputes between the parties:

“8.5 The FWC may deal with the dispute in 2 stages:

8.5.1 the FWC will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or

¹ Submissions of the AFAP at paragraph 2.

² Submissions of NJE at paragraph 1.

making a recommendation, all of which the Parties are at liberty to accept or reject; and

8.5.2 if the FWC is unable to resolve the dispute at the first stage, the FWC may then:

- (a) arbitrate the dispute; and
- (b) make a determination that is binding on the parties.

If the FWC arbitrates to determine the dispute, it may also use the powers that are available to it under the Act. The Parties have a right of appeal against the decision.”

[18] As set out, the dispute was initially dealt with by conciliation which resolved some issues in dispute. This decision is a determination made in accordance with clause 8.5.2(b), which is binding on the parties in respect of the issue of liability for relocation expenses. I am satisfied that the parties have empowered the Commission to arbitrate this dispute under the terms of the Agreement.

The relevant clauses

[19] Clause 47 is titled “Transfers” and relevantly provides:

- “47.1 A Pilot when *transferring from one base to another at the Pilot’s request* will bear all expenses associated with that transfer. However, at the request of the Pilot the Employer may meet all such costs incurred and subsequently recover such costs by salary sacrifice of a mutually agreed amount.
- 47.2 If a *Pilot is either posted to a base on appointment or is transferred from one base to another at the direction of the Employer* the Pilot shall be provided with suitable accommodation by the Employer for a maximum period of 14 days or until permanent accommodation is obtained whichever is the lesser. While occupying such accommodation the Pilot shall be paid meal and layover allowances to a maximum of seven days at the rate prescribed in clauses 1 and 2 of Schedule 2. *Where the Employer proposes to transfer a pilot from one base to another* the proposal shall be regarded as a Significant Change and will invoke the provisions of clause 6.2, in these circumstances the Employer will exhaust all reasonable options before a forced transfer is invoked.
- 47.3 A Pilot when transferring from one base to another at the Employer’s direction shall receive payment from the Employer for expenses resulting from the removal as follows: [sets out a range of entitlements including for personal effects, household goods and furniture, two cars etc].”

(emphasis added).

[20] Clause 48 is titled “Redundancy”. Clause 48.3 says that “[p]rior to any decision to make a Pilot’s position redundant the Employer will consult with the Pilots affected and the Union or

other representative of the Pilot ... Matters to be discussed will include efforts to avoid or mitigate the potential effects ... Compulsory redundancy will be a last resort only to be implemented after all reasonable alternatives as described above have been genuinely discussed and considered.”

[21] Clause 48.4 says:

“In the event of a potential redundancy, affected Pilots shall be offered transfer of employment within the Group provided that a suitable vacancy exists. Training where required will be at the Employer’s cost in order to allow the Pilot to become proficient on relevant aircraft type. If necessary, this will include mobility of employment across aircraft types.”

Principles of interpretation

[22] The relevant principles applicable to the interpretation of an enterprise agreement have been the subject of numerous Court and Commission decisions.³ The principles were outlined by the Federal Court in the matter of *James Cook University v Ridd*,⁴ which can be summarised as follows:

- (a) The starting point is the ordinary meaning of the words, read as a whole and in context.
- (b) A purposive approach is preferred to a narrow or pedantic approach — the framers of such documents were likely to be of a practical bent of mind. The interpretation turns upon the language of the particular agreement, understood in the light of its industrial context and purpose.
- (c) Context is not confined to the words of the instrument surrounding the expression to be construed. It may extend to the entire document of which it is a part, or to other documents with which there is an association. Context may include ideas that gave rise to an expression in a document from which it has been taken.
- (d) Recourse may be had to the history of a particular clause.
- (e) A generous construction is preferred over a strictly literal approach.
- (f) Words are not to be interpreted in a vacuum divorced from industrial realities but in the light of the customs and working conditions of the particular industry.

Submissions and evidence of the AFAP

[23] The AFAP submits that the construction of clauses 47.1 and 47.2 distinguishes the transfers as either initiated by the employee or initiated by NJE. It says the relocation expenses

³ See *City of Wanneroo v Holmes* [1989] FCA 553; 30 IR 362, 378; *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; 153 IR 426 [53]; *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; 264 FCR 536 [197], *Kucks v CSR Limited* (1996) 66 IR 182, 184; *Shop Distributive and Allied Employees’ Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 [16]; *Amcor Limited v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; 222 CLR 241 [2]; *Short v FW Hercus Pty Ltd* [1993] FCA 51; 40 FCR 511, 518; *Australian Municipal, Administrative, Clerical and Services Union v Treasurer of the Commonwealth of Australia* [1998] FCA 249; 82 FCR 175, 178; *Geo A Bond and Co Ltd (in liq) v McKenzie* [1929] AR 499, 503-4.

⁴ [2020] FCAFC 123 at [65].

are then allocated to the initiating party. In these circumstances of redundancies, the need to relocate arises because of the Respondent's business operations and its decisions about how it manages its business. In addition, the AFAP says that NJE are obliged to avoid or mitigate the resulting redundancies and if relocation is necessary in that regard then the relocation is at the initiation of NJE. An employee "*who identifies a preference among alternatives created by NJE does not thereby initiate the need for a transfer.*"⁵

[24] The AFAP also says when an employee voluntarily accepts an alternative position, rather than lose their employment, a transfer that may be necessary as a result is not a transfer requested by the employee. The AFAP submits that that proposition is supported by a decision of the Commission in *Australian Federation of Air Pilots v National Jet Systems Pty Ltd T/A Cobham Aviation Services*⁶ (**the Darwin Base decision**). In the decision, the Commission construed a materially equivalent transfer clause,⁷ and considered the "*essence of the change*" to the affected employee's circumstances that resulted in a transfer from his home base of Darwin was due to a reduction in overall numbers of employees at the Darwin Base. The AFAP relies on the following findings of the Vice President:

"[28] In my view the essence of the change with respect to Captain Larkin was the movement away from Darwin. He did not wish to move but NJS's business circumstances dictated that he do so. The necessity for a move is the key ingredient and the most appropriate clause is that which applies to the initiator of the move. In my view NJS was the initiator of the move away from Darwin. But for NJS's business position, and Captain Larkin's position on the seniority list, he would have remained in Darwin. NJS was effectively the initiator of his transfer although the chronology does not strictly bear this out. In my view it is appropriate to look at the substance of the matter rather than the form."

[25] The AFAP says the Darwin Base decision is "*directly persuasive*" because, as in this circumstance, the move away from the home base is the essence of the change and the employer initiated the move because of its operational circumstances and decision to retire the BAe146 fleet. The AFAP asks the Commission to find in this case, as it did in the Darwin Base decision, that employees submitting an expression of interest to relocate does not alter the answer of who initiated the relocation. The AFAP submits that I should treat these circumstances similarly by finding the relocation was employer-directed because the employer's decision in how it manages its operations created the need for the relocation. In this case, the AFAP says that NJE decided that the BAe146 operations would cease after the contract with Qantas ceased and it was NJE that identified the alternative vacancies and invited the employees to state their preferences, ultimately determining to whom offers would be made and where the employees will be offered relocation.⁸

[26] The AFAP set out in their evidence and submissions the communications of NJE to its employees that roles of pilots flying the BAe146 aircraft may be made redundant unless suitable

⁵ Submissions of the AFAP at A-1(4).

⁶ [2015] FWC 8588 ('Darwin Base decision').

⁷ Submissions of the AFAP at A-1(5).

⁸ Ibid at B-1(30).

redeployment or alternative duties were secured.⁹ The AFAP says that it was those events that triggered the redundancy process under clause 48 of the Agreement and it was NJE's decision to cease the BAe146 operations which resulted in the positions of the pilots flying those aircraft to no longer be available.

[27] By 19 August 2026 NJE had identified 12 alternative positions in which the pilots could be redeployed: 6 roles in Perth flying E190 aircraft and 6 flying Q400 aircraft from Adelaide, Brisbane or Perth. Pilots were required to submit an EOI addressing a number of matters including qualifications, training history and operational performance before NJE decided who was to be offered the roles, in the event that the number of interested employees exceeded available positions.

[28] Relevantly, NJE advised the pilots that if they were applying for an interstate role they would be treated as if they had requested the transfer and consequently clause 47.1 would apply such that the employees would bear the cost of their relocation. NJE offered to meet the cost of relocation up front with the overall amount recovered over time from the employee's wages.

[29] On 20 August 2026, following conciliation, NJE wrote to employees removing their characterisation of the relocation as a request of the employees but maintaining its position that it would not meet the costs of relocation. NJE also included a note in the correspondence that NJE and the Unions "*currently reserve their respective legal positions regarding the interpretation of the Enterprise Agreement relocation clauses for this transition.*"¹⁰

[30] The parties then requested the Commission determine the responsibility for relocation expenses.

[31] In order to advance the matter and move closer to finalising the upcoming training arrangements, the Respondent resolved to continue with the EOI process in the meantime and assess the EOI applications, notify pilots of the selection decisions and make offers for the available positions. It was agreed between NJE, the AFAP and the TWU that if an employee's interest in or acceptance of a position changed in the event it was determined they had to meet the costs of relocation, the relevant employee has 48 hours to withdraw their EOI or acceptance of a redeployed role without the NJE relying on the submission of the EOI or acceptance of a position to seek a reduction in the employee's redundancy entitlements.

[32] The AFAP submits that clause 48 gives the context to the application of clauses 47.1 and 47.2 to this matter. Clause 48.3 requires consultation about measures to avoid or mitigate redundancy, including alternative duties, transfer and secondment. Clause 48.4 provides for redeployment to other related entities. The proposed redeployments in this case are within NJE and not to a related entity. The AFAP also says that clause 48.3 identifies transfer as a means to mitigate against the effect of, or avoid, a redundancy, but nothing in clause 48 provides that a pilot who accepts a transfer as a means to mitigate against or avoid redundancy has then requested the transfer for the purposes of clause 47.1.¹¹

⁹ Annexures JM2–7 of the Statement of Mr Mattner.

¹⁰ Annexure JM7 to the Statement of Mr Mattner.

¹¹ Submissions in reply of the AFAP at A-2(5).

[33] The AFAP submits that the principles of construction applicable to finding the correct meaning of an enterprise agreement are settled and “[c]onstruction begins with the ordinary meaning of the words, read as a whole and in context.”¹² The AFAP says the Commission must take a practical and not pedantic approach to construction, and construe the language used in its industrial setting and light of its “*evident purpose*.” It also cautions the Commission against re-writing the Agreement to produce what the Commission considers to be a fair result.

[34] The AFAP says that the text of the Agreement is “*bilateral and exhaustive for present purposes*”; that is, a transfer is either at the employee’s request or the employer’s direction and “[t]he provisions use the source of the transfer to allocate its financial consequences.”¹³ The AFAP highlights that there is no third category¹⁴ where relocation emerges from a potential redundancy and redeployment as exists here, that allows NJE as the initiator of the redundancy process to “*convert the resulting transfer into the pilot’s request by asking the pilot to express a preference from NJE-selected vacancies*”.¹⁵ The consequence of that submission is that one or other of the categories referenced in clause 47 must apply.¹⁶

[35] The case of the AFAP is centred on a construction of the words in the Agreement identifying the source or initiative of the transfer to reveal which of the initiators is responsible for relocation costs. It submits that clause 47.1 places costs on the pilot where the pilot initiates the relocation and clauses 47.2 and 47.3 place the costs on the employer where it initiates the relocation. The AFAP submits that this construction fits surrounding provisions:

- clause 47.2 makes clear that a transfer is a significant change that invokes the consultation process in clause 6.2 of the Agreement; and
- clause 48.3 identifies a transfer as a measure for avoiding or mitigating the consequences of a decision of the employer that the work is no longer required.

[36] The AFAP submits that NJE controlled the circumstances – it made a decision to change the operations and as a result the work being done by the relevant pilots would cease, it identified the alternative positions and their locations, set the number of available positions, adopted the selection criteria and made a decision about who would be offered a position and where. The AFAP says that as a consequence, a pilot could only accept an offer NJE elected to make, and the pilot’s ultimate acceptance was necessary for the transfer to occur, but was not the “*source of the need for it*.”¹⁷

Submissions of NJE

[37] NJE accepts that its decision to cease the BAe146 operation triggered the redundancies and the mitigation process under clause 48. However, it says the fact it triggered the redundancy process “*does not mean NJE directed the subsequent transfer of each Pilot*.”¹⁸

¹² Submissions of the AFAP at A-4(18).

¹³ Ibid at A-4(19).

¹⁴ NJE agrees with this construction. See submissions of NJE at paragraph 2.

¹⁵ Submissions of the AFAP at B-1(25).

¹⁶ Ibid at B1-(24).

¹⁷ Submissions in reply of the AFAP at A-2(4).

¹⁸ Submissions of NJE at paragraph 3.

[38] NJE submits that clause 47 and 48 should be considered together: clause 48 dealing with redundancy supplies the context including the requirement to consult about the redundancies but clause 47, separately determines the character of the transfer and does not require an assessment of who caused the underlying redundancy, but rather “*who initiated the specific base transfer.*”¹⁹ The NJE says the AFAP has conflated the redundancies with the transfers, and the “*contractual language does not support this automatic conclusion.*”²⁰

[39] NJE submits that if the AFAP’s construction is correct then every transfer resulting from a redundancy decision is “*automatically classified as employer-directed*” and clause 47.1 is deprived of work to do whenever alternative employment is offered, which is inconsistent with the principles of construction.²¹

[40] NJE distinguish this case from the Darwin Base decision because the pilot at the centre of the dispute “*actively protested*” his relocation and submitted an EOI that was marked “*without prejudice*” in respect of the responsibility for moving expenses.²²

[41] NJE submits that the broader industrial context within this corporate group demonstrates that transfers resulting from a formal Expression of Interest process are standardly understood to sit within the employee-cost category. NJE pointed to a another decision²³ made under section 739 of the Act concerning an enterprise agreement in the “*broader Cobham group ecosystem*” wherein NJE says “*considerations regarding transfers in response to a formal EOI place responsibility for relocation expenses squarely on the employee.*”²⁴ No particular submissions were made about the comparability of the ‘Surveillance Australia Pilot and Observer Enterprise Agreement 2016’ and its terms and no attention was drawn to the elements of the decision that NJE says are applicable in this case. I note that the clause addressing transfers in that agreement says, at clause 5.10.2: “*Where transferred from one home base to another in response to a formal Expression of Interest (EOI) the Employee will be responsible for all expenses associated with the Employee’s relocation.*”

[42] NJE say that the employees have shown “*active, informed consent*” to the transfers and liability for relocation costs because they have received more applications than available roles for the redeployed positions located in Perth, and two thirds of the applicants “*explicitly accepted NJE’s relocation position in their EOIs*”.²⁵ NJE says that the fact the EOIs were submitted with knowledge and acceptance of the Respondent’s position regarding relocation expenses, that those requiring interstate transfer “*made an active, informed and documented choice to pursue the Perth roles knowing they would bear the costs.*”²⁶

¹⁹ Ibid at paragraph 6.

²⁰ Ibid at paragraph 7.

²¹ Ibid at paragraph 8.

²² Ibid at paragraph 9.

²³ *Australian Federation of Air Pilots v Surveillance Australia Pty Ltd T/A Cobham Aviation Services Australia - Special Mission* [2021] FWC 5162.

²⁴ Ibid at paragraph 10.

²⁵ Ibid at paragraph 12.

²⁶ Ibid at paragraph 13.

[43] NJE also say that it is necessary for the Commission to take into account the industrial context and commercial reality. NJE submits that they are already bearing the full cost of training the pilots to fly alternative aircraft and are not imposing a training bond on the pilots who are being redeployed. Clause 48 is designed to mitigate redundancies, and NJE says that a construction of the Agreement that “*imposes massive relocation liabilities on every interstate redeployment on top of substantial unbonded training costs renders the mitigation process punitive and commercially detrimental.*”²⁷

[44] The essence of NJE’s argument is that its decision to cease the BAe146 operations triggered the redundancy mitigation process under Clause 48, but simply because it triggered the redundancy process it “*does not mean NJE directed the subsequent transfer of each pilot*”: “*a Pilot who actively elects to take an alternative position at another base is not transferred at NJE’s direction merely because NJE caused the original position to become redundant.*”²⁸ It submits that clause 47.1 “*requires the Pilot to demonstrate genuine commitment to the new role, proving their transfer request is mutually beneficial and strictly voluntary.*”²⁹

Submissions of the TWU

[45] The TWU supported and adopted the initial submissions of the AFAP, but filed its own submissions in reply.

[46] The TWU asks the Commission to reject the construction of clause 47.1 asserted by NJE and argues that contrary to the Respondent’s position that clause 47.1 would be inoperable if every redundancy decision was classified as Employer-directed, it has work to do both if an employee requests a transfer outside of a redundancy process³⁰ and also in the context of redeployment on account of redundancies to determine who bears the cost of relocation.³¹

[47] The TWU submits that a transfer resulting from a redundancy is employer-initiated if the employer makes clear to an employee that if they do not accept a transfer to a redeployed position then they will be made redundant. It says that clause 47.1 comes into operation in these circumstances: “*[t]o characterise pilot’s submissions of EOIs as a voluntary transfer made at their own request deliberately ignores the context in which they submitted the EOI. ... Pilots have filled out EOIs on the basis that if they did not, they would be made redundant. They did not simply choose to provide an EOI at random, on their own initiative.*”³²

[48] The TWU asks that the Commission adopt the reasoning of the Vice President in the Darwin Base decision and find that the initiator of the transfer determines who bears the cost of relocation. Additionally, the TWU submits that I should consider the “*substance of the matter rather than the form*”.³³

²⁷ Ibid at paragraph 15.

²⁸ Ibid at paragraphs 3 and 18.

²⁹ Ibid at paragraph 16.

³⁰ A point also made by the AFAP in its submissions in reply at A-2(7).

³¹ Submissions in reply of the TWU at paragraph 5.

³² Ibid at paragraphs 7-8.

³³ See Darwin Base decision at [28].

[49] The TWU strongly rejects the submission of NJE that clause 47.1 requires employees to demonstrate genuine commitment to the new role which in turn shows the voluntary nature of the transfer. The TWU submits that clause 47.1 “*simply determines who must pay for the transfer in specific circumstances.*”³⁴

[50] The TWU also challenged the factual assertions of NJE, in particular about how many EOIs were received, and how many pilots accepted NJE’s position that the employee bear the relocation expenses, because NJE elected not to file evidence in this matter. This submission was consistent with a similar submission made by the AFAP.³⁵

Consideration

[51] As I have set out, the task before the Commission is to construe the relevant clauses of the Agreement to ascertain their meaning in order to settle the dispute between the parties. In doing so it is necessary that I apply the principles of interpretation as applied in *James Cook University v Ridd*.

[52] I turn first to the meaning of the words, read as a whole and in context.

[53] The parties agree that the words of the Agreement provide only two possible options when a pilot is to be transferred: that the pilot is transferred either at their own request or at the direction of the employer. I agree the words of clauses 47.1 and 47.2 plainly convey only those options. In applying a purposive approach to the words, and having in mind that the drafters were likely to be ‘of a practical bent of mind’, the options available based on the words in the Agreement must have application to circumstances in which pilots are to be transferred between bases for reasons including redeployment to avoid redundancies. However, the words do not make this expressly clear.

[54] In my view, the reflection of the Vice President in the Darwin Base decision that “*the facts do not involve the pure application of either clause*” and “[i]t is therefore necessary to determine which parts of [the clause] better fit the circumstances”³⁶ also applies to the facts in this case. The words in the Agreement do not fit neatly with the transfers implemented to avoid redundancies. I accept there is an arguable case that, consistent with NJE’s position, the pilots have a choice not to submit an EOI or otherwise refuse a transfer and be made redundant. Should they elect to transfer it could arguably be said to be at their request. Whilst that view is arguable, I do not think it is the correct interpretation and application of the relevant Agreement clauses.

[55] Whether the ‘transfers resulting from a formal Expression of Interest process are standardly understood to sit within the employee-cost category’ in this ‘corporate group’ is not relevant to my determination. The subjective view of either party about what they consider the Agreement to mean, or what they say is the corporate approach to determining whether the expenses sit in the ‘employee-cost category’ is not relevant to the task I have to perform.

³⁴ Submissions in reply of the TWU at paragraph 15.

³⁵ Submissions in reply of the AFAP at A-5(17).

³⁶ Darwin Base decision at [25].

[56] I agree with the reasoning of the Vice President in the Darwin Base decision wherein he found that the liability for relocation expenses lied with the employer because the “*essence of the change*” to relocate from the employee’s current base to a new one was dictated by the employer’s “*business circumstances*”: “*The key ingredient and the most appropriate clause is that which applies to the initiator of the move.*”³⁷ The Commission found that “*but for*” the employer’s business position, the relevant employee would have remained at their home base in Darwin.³⁸ I adopt this reasoning. The genesis of the need for pilots to transfer was the decision of NJE to cease the operation of the BAe146 aircraft following the conclusion of the contract with Qantas. NJE has obligations to mitigate or limit redundancies under the Agreement and pursuant to clause 48.4 to offer transfers to affected pilots if suitable vacancies exist. Those vacancies clearly exist within NJE’s operations and have been subject to the EOI process. NJE, it seems to me, has acted consistently with those obligations. In doing so, NJE has initiated the transfers. Consequentially, clause 47.2 best fits the facts in this matter, noting that a transfer can only occur at the pilot’s request or the employer’s direction.

[57] Also consistently with the findings of the Commission in the Darwin Base decision, it is my view that the substance of the matter, being the surrounding factual circumstances of likely redundancies and the nature of the actual “choice” available to employees (that in my view is necessary to suggest a request has been made), must override the form, which is the purported choice given to the employees at the very end of a process, otherwise directed by the employer. I do not agree with the submission of NJE that the AFAP has conflated redundancies with transfers to produce an outcome inconsistent with the Agreement. The redundancy and redeployment process is the overall process and transfers are a possible outcome of following mitigation obligations in clause 48 of the Agreement.

[58] I do not accept the submission of NJE that the decision can be distinguished because (as NJE submits) the employee concerned in the Darwin Base decision did not agree with his relocation and did not expressly make clear his acceptance of responsibility for relocation expenses on his EOI. In my view, whether the employer or the employee is responsible for relocation expenses depends on how the Agreement is framed, not on whether an employee has indicated a willingness to meet the expenses in circumstances where the employer has said they do not intend to pay them. Put another way, the entitlement to relocation expenses payable on a transfer occasioned by redeployment to avoid redundancy is based on whether the Agreement provides for such an entitlement, not on the subjective views expressed by the parties. The objection of the affected employee in the Darwin Base decision to paying relocation expenses has no bearing on whether employees have an entitlement to relocation expenses in this case and is an insufficient basis to distinguish the Darwin Base decision.

[59] The relevance of the Surveillance Australia Pilot and Observer Enterprise Agreement 2026 is also not apparent to me. That agreement contains a clause that appears on its face to contemplate these circumstances and make it expressly clear that the costs of relocation where an employee submits and EOI for a transfer from one base to another are met by the employee. There is no such clause in this Agreement.³⁹

³⁷ Ibid at [28].

³⁸ Ibid.

³⁹ See submissions in reply of the AFAP at A-4(13).

[60] For completeness, I also note that I do not agree with the submission of NJE that clause 47.1 requires a pilot to demonstrate a genuine commitment to the new, transferred role and that, by implication, their commitment is evidenced by accepting liability for the costs of relocation. Such an implication is not evident from the words of the clause. I agree with the TWU that clause 47.1 only determines who must pay for a transfer in specific circumstances.

[61] A practical approach must be taken to construing clauses 47.1, 47.2 and 47.3 of the Agreement and consideration must be given to the purpose of the clauses. As the purpose of the clauses is to determine responsibility for relocation expenses when there is a need for a pilot to relocate, the reason for the relocation must be examined in light of the words that provide for that determination to be made on the basis of pilot request or employer direction only. Given the circumstances of this case, where NJE has determined to reorganise its operations in a certain way and has directed a process of reorganisation that requires it to offer transfers where vacancies exist, which has occurred, then NJE has directed the transfer of the relevant pilots to other areas of its operations.

Conclusion

[62] For the reasons set out, I find that clauses 47.2 and 47.3 are applicable to the facts of this case. The affected pilots who are transferring from their current base to a new base to avoid a redundancy, are doing so at the direction of NJE. This finding answers the questions asked by each party.



COMMISSIONER

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