

**NORTHERN TERRITORY ANTI-DISCRIMINATION COMMISSION**

**LOCATION: DARWIN**

**TRIBUNAL: SALLY SIEVERS  
COMMISSIONER**

**DATE OF HEARING: 12 August – 14 August 2013**

**HEARING NO: H20130002-01**

**COMPLAINANT: MR HRISTO BEROV**

**RESPONDENTS: First Respondent: AIRCRAFT LOGISTICS  
(T/A AIRNORTH ENGINEERING)  
Second Respondent: MR PHILLIP HARGRAVE**

**COUNSEL: Complainant: SELF-RESPRESENTED  
Respondents: MR MILES CRAWLEY**

**COUNSEL ASSISTING MR SIMON WIESE**

**DATE OF DECISION: Written Decision given on 2 December 2013**

## REASONS FOR DECISION

### **1. FACTUAL BACKGROUND**

- 1.1 Mr Berov commenced employment with Aircraft Logistics Pty Ltd –Trading as Airnorth Engineering (referred to as Airnorth) on 5 March 2007. Mr Berov was employed as a Licenced Aircraft Maintenance Engineer (LAME).
- 1.2 Mr Berov was 50 at the time he was employed by Airnorth; his date of birth is 23 September 1957.
- 1.3 Airnorth, the First Respondent at the time of the hearing, employed twenty four (24) engineers to do engineering maintenance of their fleet of aircraft. Shifts ran from 0500 to 2359, 7 days per week. The engineers were supervised by a shift supervisor, overseen by Engineering Manager and General Manager – Engineering.
- 1.4 Mr Hargrave, the Second Respondent commenced employment at Airnorth on 26 May 2008. He has an Aeronautical degree and Masters in Business and had 15 years experience in the Aviation industry at the time he took up the position. Mr Hargrave was, during the period 15 November 2010 to 21 June 2011 and at the time of the hearing, the General Manager Engineering.
- 1.5 Mr Berov participated in theory training between 2 April 2008 to 24 April 2008, on Embraer (EMB 120) airframe and Pratt and Whitney Canada PW227 (PW 118) engine. Airnorth paid for the training. Mr Berov then completed the work required for the statement of experience to be provided to CASA. He obtained the EMB 120 - PW 110 licence on 24 September 2008.
- 1.6 Throughout Mr Berov's employment he participated in meetings with his shift supervisors to complete the Employee Development Form (EDF), first in May 2008 (exhibit 1 folio 3), May 2009 (exhibit 1 folio 5) and 2011 (exhibit 1 folio 11). No concerns were raised in any of these reviews about Mr Berov's performance.

- 1.7 Mr Berov worked on D shift from the commencement of his employment until 2 February 2009.
- 1.8 In December 2008 Mr Berov complained to his supervisor Mr O'Shea about his fellow workers on the shift.
- 1.9 On 2 February 2009 Mr Berov commenced on C shift. He was to be involved in a heavy maintenance check on VH-DIL. On 26 May 2009 Mr Berov was moved to B shift and in December 2010 he moved back to C shift until he resigned on 21 June 2011
- 1.10 In 2009 Mr Berov made further enquiries of Airnorth in regard to when ERJ 170 training was being conducted. He was advised that years training had been cancelled.
- 1.11 In November 2009, Mr Berov attended ERJ 170 training at QAC at his own expense and whilst on leave from his employment at Airnorth. Mr Berov did not discuss this with Airnorth management and they were unaware that he was participating in the training.
- 1.12 On 18 February 2010 a letter was issued to Airnorth staff from Michael Bridge – Chief Executive of Airnorth outlining the company's position on paying for training and using and paying staff who obtain licences. Mr Berov gave evidence he received this (T 80) (Doc 7 exhibit 1) and was aware of the company's position.
- 1.13 On 27 August 2010 CASA granted Mr Berov his ERJ 170 and engine GE CF 34 licences.
- 1.14 From August 2010 to the end of October 2010 Mr Berov did service checks as a LAME on ERJ 170, airframes.
- 1.15 Mr Berov participated in a meeting with Mr Philip Hargrave and Mr Roud on 21 September 2010. In the meeting he was advised of performance concerns that Airnorth had with his work.
- 1.16 On 15 November 2010 Mr Berov received a letter from Mr Hargrave setting out in writing the performance issues raised at the meeting on 21 September 2010. It is from the 15 November 2010 to the date of his

resignation on 21 June 2011 that the allegations of discrimination are made and which were the focus of the hearing. The above material is by way of background to the allegations of discrimination, which are set out below as two fold; failure to recognise his ERJ 170 licence and secondly failure to send Mr Berov on training courses and provide opportunities, in particular the Garrett TPE 331 training.

1.17 Mr Berov resigned from Airnorth on 21 June 2011.

1.18 Mr Berov lodged a complaint with the Anti-Discrimination Commission on 21 June 2011.

## **2 COMPLAINANT'S CASE**

2.1 The period covered is 15 November 2010 to 21 June 2011 and the earlier material is provided as background. At the hearing Mr Berov alleged discrimination on the basis of the attribute of age at work.

2.1.1 There were two areas where Mr Berov believed he was treated differently at work;

2.1.1.1 Mr Hargrave and Airnorth's failure to recognise Mr Berov's ERJ 170 licence during this period.

2.1.1.2 Loss of training and course opportunities during the relevant period, particularly training on the Garrett TPE 331.

2.1.2 Mr Berov alleged that the different treatment was due to his age as he saw his younger colleagues being sent on this course and given opportunities that he was not afforded.

2.1.3 It is firstly for Mr Berov to prove on the balance of probabilities that the actions constituted a "restriction" or "exclusion" for the purpose of s 20(1) (a) of the *Anti-Discrimination Act* or that he was treated less favourably than others in his work place and then secondly that this restriction, exclusion or less favourable treatment was because of the attribute of age.

2.1.4 Also to establish discrimination under the Act is far more onerous than just making the allegation in our everyday life, and requires evidence to substantiate each allegation.

2.1.5 The use of the phrase discrimination in the legislation is much more precise than the general use of the phrase in the community. It is not as broad and requires evidence on each aspect and a causal connection between what has occurred and the attribute of age.

2.2 Mr Berov bears the onus of proof as set out in s 91 of the Act. The standard of proof is the civil standard, that is, on the balance of probabilities. The Commissioner has to decide what was more likely to have happened: not in a broad sense, but looking at each of the allegations, is it more likely or not that the allegation is made out?

### **3. RESPONDENT'CASE**

3.1 Airnorth and Mr Hargrave's case concedes that Mr Berov was a dedicated and hardworking employee with a demonstrated work ethic.

3.2 Airnorth and Mr Hargrave's case was that Mr Berov was not offered further training opportunities, as he had not consolidated his experience and capability whilst using his EMB 120 licence, and further that there were ongoing performance issues.

3.3 Further that selection for training courses and recognition of licences was based on merit, performance, resourcing and budget and the specific requirements of the company based on aircraft types and or projects.

3.4 Airnorth did not concede that if liability were found then Airnorth would be vicariously liable for the actions of its employees (particularly Mr Hargrave) under s105 of the Act.

3.5 Airnorth and Mr Hargrave concede that there are no records that document concerns with Mr Berov's performance and that Mr Berov had not been approached prior to 21 September 2010 and performance issues discussed with him directly.

#### **4. OBSERVATION ON EACH WITNESS WHO GAVE EVIDENCE AND PROVIDED MATERIALS.**

- 4.1 This is not a case where there is a need for extensive comment on the manner in which various witnesses gave evidence, as there are few real areas of dispute where factual findings need to be made. It is not a credit case.
- 4.2 The background events are largely not in dispute, it is the interpretation or inferences that I am being asked to draw from the events that requires the exercise of my decision making power.
- 4.3 However I will make brief comment on each of the main witnesses.
- 4.4 Mr Berov was assertive in stating his case, and firmly believed the allegation he was making.
- 4.5 Mr O'Shea and Mr Berov's previous supervisor and current Airnorth employee walked a fine line. He had assisted Mr Berov in acquiring skills e.g. engine runs. It is clear at the time he worked with Mr Berov he viewed Mr Berov as a dedicated worker. Mr O'Shea did not take on board the early comments made by peers about the speed of Mr Berov's work etc.
- 4.6 Mr Hargrave's evidence in examination in chief was more like submissions than evidence of the facts and events as they occurred. However, during cross-examination his passion and commitment to job safety, and maintaining planes was evident. Also his approach to a difficult management and sensitive decision became clear, first seeing it as a personality clash and then trying different mentors with different approaches, to assist and then later seeing it as a performance issues. He conceded there were no documents to support the mentoring approach, or performance concerns raised before 21 September 2010.
- 4.7 Mr Roud gave his evidence very frankly and was very clear on the areas where he held concerns. Mr Roud was not as generous as Mr Hargrave, about whether Mr Berov's improvement after September/November 2010 until his resignation.

## **5. ISSUES, FACTS IN DISPUTE AND FINDINGS**

### **5.1 Request for and access to ERJ 170 and TPP 331 training prior to 15 November 2011**

- 5.1.1 Mr Berov's evidence made it clear that he was promised training as part of his employment. This as set out below was at the commencement of his employment and via the meetings to complete the yearly Employee Development Forms (EDF's).
- 5.1.2 Mr Berov's evidence was that when he was employed he was promised training on ERJ 170 by the then General Manager Mr John Stewart (T 130). No evidence was called to contradict this.
- 5.1.3 On the EDF completed by Mr O'Shea on 6 May 2008 (exhibit 1 folio 3 & T15) recorded on the form under heading "Goals and Career (Succession) Planning - EMB120 and E170 Licenses. EMB120 license by end of June". Also on page 6 of "Other training not specified" is recorded "E170 Course TPE331 Engine (High Priority)".
- 5.1.4 Mr Berov in his evidence said it would be very fast for him to get the ERJ 170 licence as he has 5 years' experience in the workshop (T 17).
- 5.1.5 In the 2009 EDF (exhibit 1 folio 5) again under Goals etc. is recorded - "ERJ 170 training Engine/Airframe". Mr Berov gave evidence that training availability was discussed with the reviewer Gary Roud and he was told he had missed the May training but there was training later in the year (T 23).
- 5.1.6 Mr Berov stated in his evidence (T25) that late in 2009 he was aware that other employees were attending TPE 331 training and he asked Mr Hargrave what was happening with his training. Mr Berov's evidence was that Mr Hargrave told him "We have other plans for you".

- 5.1.7 Further at the end of 2009 Mr Berov asked about training with the ERJ 170 and was told that the training had been cancelled.
- 5.1.8 Mr Berov researched the training himself and found a course and took recreation leave to undertake the month long training. He undertook the training in November 2009. He then received his ERJ 170 Airframe Licence from CASA in August 2010.
- 5.1.9 Mr Hargrave and Airnorth stated at the hearing that the selection for courses was on merit, to accommodate operational needs and on the basis of skills, attitude, and performance of the employee.
- 5.1.10 Airnorth and Mr Hargrave's view was firmly that Mr Berov was not offered training as he was still consolidating skills, not because of his age (See material set out below). Also that there was no available training that Airnorth was prepared to pay for in 2009.

## **5.2 Refusal to recognise Mr Berov's ERJ 170 license.**

- 5.2.1 It is clear in the relevant time period 15 November 2010 to 21 June 2011 Airnorth and Mr Hargrave declined to recognise and utilise Mr Berov's ERJ 170 licence obtained in August 2010.
- 5.2.2 Mr Berov gave evidence that after obtaining his licence from CASA in August 2010 he spoke to Mr Simmons his supervisor about using the licence. Mr Berov's evidence was Mr Simmons said "don't see why not". Mr Berov started doing service checks, certification on the ERJ 170 airframe as a LAME. This was not disputed and 'work cards' were part of the evidence received during the hearing.
- 5.2.3 Mr Simmons declined to give evidence before the hearing so this evidence was not able to be tested. However it is clear Mr Berov certified on the ERJ 170 airframe.
- 5.2.4 Mr Hargrave's evidence was that this was not approved by Airnorth and he was shocked when he saw documents that Mr Berov had been certifying the ERJ 170. Mr Hargrave would not normally see



these documents. However as part of Airnorth's quality control engineers have to be authorised by Airnorth to certify.

5.2.5 Mr Hargrave's evidence was also that Airnorth did not need any more ERJ 120 LAMES at this time.

5.2.6 Once Mr Hargrave became aware and after the meeting on 21 September 2010, it was made clear on a table on the white board in the engineering room that Mr Berov was not approved to use his ERJ 170 licence.

5.2.7 Mr Berov's evidence was that at the end of August he raised with Mr Hargrave that he had the ERJ 170 but that Mr Hargrave was too busy to talk at that time and he asked for a meeting.

5.2.8 Mr Berov's evidence was that this then led to the meeting on 21 September 2011 with Mr Hargraves and Mr Roud (T 31). Mr Berov's evidence was he wanted to discuss the status of this license.

5.2.9 Mr Hargrave's evidence of the circumstance of how the meeting occurred is different. However the recall of what occurred is very similar, even though precise words are different because of the perspective of the two participants.

5.2.10 Mr Berov's account of the meeting was set out in his evidence (T 31):

"We don't need your licence. Your training is not good enough. The company has higher standards than the CASA, and you cannot – we cannot accept your licence, because you are, basically, bad engineer. You cannot do a lot of things."

5.2.11 Mr Berov was shocked and asked for something in writing. Until that meeting no one had expressed issues with the quality of his work and performance. Mr Berov was as set out above also told there was no need for his licence.

5.2.12 Mr Hargrave in his evidence agrees that Mr Berov was shocked, however on the issue of recognising the ERJ 170 licence he emphasised the matters as set out in the letter from Airnorth dated 18 February 2010, (Exhibit 1 Folio 7) sent by Airnorth former Chief Executive Michael Bridge. That it was not Airnorth's policy to recognize all licences obtained by its employees.

5.2.13 The letter also advised that:

" ...we are not in a position to 'over-train' our workforce for the sake of it. Likewise we are not in a position to 'over-pay' our workforce for licences that are either not required or of questionable value to us."

5.2.14 Mr Hargrave's letter to Mr Berov dated 15 November 2010 reiterated the Chief Executive's letter dated 18 February 2010 and advised that:

"We wish to reiterate that the employee employment contract is "LAME - Mechanical", and the Employee has a Company Approval to Certify on EMB120 and M23 types in accordance with his CASA Licence scope. In accordance with the CEO letter dated 18 February 2010 (copy attached), Airnorth is committed to and has delivered upon its training promises since the inception of the Collective Agreement (CA). We remain committed to that process; however, we are not in a position to 'over-train' our workforce. Likewise, we are not in a position to 'over-pay' our workforce for Licences that are either not required or of questionable value for us. In this instance the value of your Licence and the Competency standard does not meet the CAR 30 standard, as clarified with the short falls described in this letter.'

5.2.15 Further Mr Hargrave states that Mr Berov was told at a brief meeting between them on 13 November 2010, that the company did not require Mr Berov to work as an ERJ 170 LAME and that Mr Berov's skills and competence on the EMB 120 were still being

developed. Mr Berov does not recall this and disputes the occurrence of such a meeting.

5.2.16 Mr Hargrave and Airnorth raised two further reasons why they would not utilise Mr Berov's licence, first they were not happy with the quality of the training provider, and second, and the primary reason, because Mr Berov had not consolidated his skills on EMB 120, and they had ongoing concerns in regard to Mr Berov's performance.

5.2.17 Airnorth and Mr Hargrave had concerns with the quality of the training provided by QAC, who Mr Berov did the ERJ 170 training with. Airnorth had sent engineers to QAC training in September 2008, but were not happy with the quality and standard and had not used the trainer since. Airnorth put other arrangements in place to source this training for their engineers.

5.2.18 The issue of Mr Berov's performance will be explored in more detail below however the evidence from Mr Roud the Engineering Manager was that in his opinion Mr Berov did not have the experience to exercise the licence on Mr Hargrave's behalf. Airnorth and Mr Hargrave's views were informed by Mr Roud and the other shift supervisors of Mr Berov.

### **5.3 Mr Berov's performance**

5.3.1 It is clear from Mr Berov's evidence that concerns about his performance were only raised directly with him for the first time by Mr Hargrave in their meeting on 21 September 2010. The four matters raised were then set out precisely in a letter from Mr Hargrave dated 15 November 2010:

- There are performance gaps with the EMB120 and M23 licenced LAME to work autonomously;
- There are performance gaps with the EMB 120 and M23 licenced LAME to certify autonomously;
- Licenced on the EMB120 since September 2008 but unable to carry out Engine Ground Runs;

- Lacks confidence in his ability to perform tasks and certify independently in a timely manner”.

5.3.2 The letter went on to state as follows:

**"Employer Development Program**

In Jan 2009 the Employer sort (sic) to develop the Employee's technical skill set and mutually agreed for the Employee to support VH-DIL Heavy Maintenance event. This would allow the Employee to gain valuable and in-depth understanding of the EMB120, whilst working closely as a team member.

Furthermore, in late 2009 the Employee was transferred to a different shift in order to assist with his interpersonal relations within a Shift; this provided an opportunity for the Employee to further establish confidence on Airnorth aircraft, perform as an EMB120 Licenced Engineer, establish new professional relationships within the shift and receive mentoring by the Shift Supervisor."

5.3.3 The main focus of the evidence elicited during hearing went to the issue of Mr Berov's performance, Mr Berov disputed the allegations and lead evidence and produced materials he said contradicted Airnorth and Mr Hargrave's contentions.

5.3.4 ***Positive material regarding performance issues***

5.3.4.1 Mr Berov's evidence was aimed at proving that he had performed the work, which Airnorth's case had said he couldn't or had commented on adversely. This included:

- Mr Berov's evidence in regard to documents and work cards he produced showing that he had certified the work listed (T35 -36).
- Mr Berov's evidence (T 37 & 38) that he did do engine runs. Mr Berov did this with an engineer who had taxiing approval because he did not.

- In response to the allegation that he lacked confidence in performing the role of LAME, Mr Berov referred to documents, particularly work packs he had worked his way through (T 39).

5.3.4.2 The difficulty with this evidence is that whilst it shows Mr Berov did this work and certified it, it does not assist in assessing the quality of the work, or the speed or proficiency with which it was done. However a qualitative measure of how Mr Berov performed his work is found in the Employee Development forms (EDF's) and the circumstances of their completion.

5.3.4.3 In regard to the 2008 EDF (exhibit 1 folio 3) which was completed by Mr O'Shea and Mr Berov, Mr Berov thought it was an evaluation of him as engineer (T14). There were no marginal boxes ticked, the majority of boxes that were ticked were high or satisfactory. They were ticked by Mr O'Shea as the employer representative. The only comment made was under "Time management and Administrative ability" is written "Sometimes misunderstands due to language"

5.3.4.4 Mr O'Shea supported this with his positive view of Mr Berov's skills as an engineer in his evidence, during the hearing and also at the time of his email dated 17 September 2008, supporting Mr Berov's obtaining his EMB 120 licence from CASA (exhibit 1 folio 2).

5.3.4.5 However Mr O'Shea's evidence must be viewed in the light of the time period over which he was assessing Mr Berov. Mr O'Shea was largely assessing Mr Berov when he worked as an Aircraft Mechanical Engineer (AME), whilst Mr Berov was gaining practical experience to obtain his EMB120 licence. Mr Berov was under Mr O'Shea's

supervision as a LAME for a limited time period once he had his EMB 120 licence.

- 5.3.4.6 Also in his statement and evidence Mr O'Shea spoke of an incident at the end of 2008 where Mr Berov spoke to him about concerns his colleagues had raised with him about the speed at which Mr Berov worked and his timeliness in completing jobs (Exhibit 3, folio 9 paragraph 5).
- 5.3.4.7 Mr O'Shea was aware Mr Berov moved shifts after this to develop Mr Berov's knowledge, skill and experience on the EMB 120 and consequently to develop his confidence on the aircraft type Mr Berov was certifying as a LAME.
- 5.3.4.8 However in his evidence Mr O'Shea said he did not think comments by these colleagues were justified. At the meeting in December 2008 he had reassured Mr Berov. Mr O'Shea also gave evidence that no-one came directly to him with concerns about Mr Berov's performance.
- 5.3.4.9 Mr O'Shea gave further evidence that he showed Mr Berov four or five times before he left in early 2009 how to do engine runs as Mr Berov did not feel comfortable doing these. Mr O'Shea's view was that Mr Berov was competent to do engine runs just not proficient at them.
- 5.3.4.10 Mr O'Shea confirmed in this evidence that he stood by his comments and never had a problem with the speed at which Mr Berov worked, or with Mr Berov working unsupervised or independently.
- 5.3.4.11 Further in the 2009 Employee Development form (exhibit 1 folio 5) again there were no negative comments, or marginal boxes ticked. However Mr Roud who completed the EFD with Mr Berov had only worked with Mr Berov for a limited amount time when it was completed.

5.3.4.12 Mr Berov gave evidence of being nominated for a High Flyer Award by his colleagues at the end of March 2011.

5.3.4.13 Mr Hargrave gave evidence in regard to his first meeting with Mr Berov in December 2008, his view was he was dealing with a dedicated staff member.

5.3.4.14 Mr Hargrave also gave evidence of the aim and purpose of the various shift changes for Mr Berov in 2010 & 2011. The aim was to find the right support and to build up Mr Berov's confidence and proficiency. Apart from the discussion in December 2008 he had no direct conversations with Mr Berov concerning his proficiency. However there were discussions between Mr Hargrave and Mr Berov's shift supervisors and Mr Roud.

5.3.5 ***Negative material regarding performance issues***

5.3.5.1 The evidence provided and given at the hearing make it clear that the concerns with Mr Berov's performance raised in the hearing were not directly raised with Mr Berov at the time that they were said to be an issue throughout 2009 and 2010.

5.3.5.2 Mr Berov was taken to each area in his evidence in chief and also in his cross-examination. Briefly his responses and then the evidence lead by Airnorth are set out below.

5.3.5.3 Mr Berov's evidence was that there were difficulties with other staff in 2008 on D shift. He raised these with Mr O'Shea his supervisor. They included, he recalls being called 'Borat" (T 19). Mr Berov does not recall that he raised with Mr O'Shea his colleagues concerns with the speed at which he worked, and his ability to finish work in a timely manner. Mr Berov denies complaints were made about his work at this time (T 75 &76).

- 5.3.5.4 Mr Berov's evidence was that the change of shift after this was just a part of the usual rotation (T39) and also for him to obtain a better understanding of the aircraft.
- 5.3.5.5 Mr Hargrave's evidence about the reason for the first change of shift after the December 2008 complaint has common aspects with Mr O'Shea's evidence that Mr Berov was not getting on with other staff. Mr Hargrave also stated that Nathan Cook raised with him, that Mr Berov constantly demanded supervision and avoided using his licence because he lacked confidence in his own abilities. The reason behind the change in shift was to develop Mr Berov's knowledge, skill and experience on the EMB 120 and develop his confidence.
- 5.3.5.6 I find that whilst concerns were not raised by management in December 2008 with Mr Berov, matters were raised by colleagues and are consistent with Mr Hargrave's evidence that he commenced via a mentoring approach to assist in skills enhancement for Mr Berov.
- 5.3.5.7 Mr Roud, as Engineering Manager, began to formulate an impression of Mr Berov during the time he was on C shift from 2 February 2009 to 26 May 2009. Mr Roud's view was Mr Berov was having trouble making decisions.
- 5.3.5.8 On 26 May 2009 Mr Berov was moved to B shift, he was not told why. Mr Berov was on this shift for 18 months and Mr Berov's evidence is that there were no concerns raised with him, by coworkers, by the chief engineer or Mr Hargrave (T 24-25).
- 5.3.5.9 Mr Hargrave's, statement (exhibit 3 folio 6) sets out concerns raised by Peter Campbell with him that Mr Berov was unable to work unsupervised and regularly required another EMB120 LAME to look at his work and advise him about what to do. Also those other co-workers complained



that Mr Berov lacked demonstrated knowledge and willingness to take responsibility for his work. His peers were frustrated.

Mr Cairns acted as Engineering Manager in February and March 2010 and had to call on Mr Berov. Mr Cairns had no confidence in Mr Berov to be left without supervision. Mr Cairns raised the issue of his capacity to start an auxiliary power unit (APU) involved in engine runs and also complained about his timeliness.

5.3.5.10 Mr Berov response to Mr Cairns criticism was firstly that Mr Cairns was from a different trade; he was an avionic manager. Mr Berov gave evidence an engine run/change of propeller (T 44), needed two trained engineers; one to run the engine and one to do readings on the equipment. Also he had no taxiing approval.

5.3.5.11 Also in response to Mr Cairns criticism Mr Berov provided work packs where he had done this type of work (T 44-45).

5.3.5.12 In December 2010 Mr Berov was moved back to C shift, and no concerns were raised directly with him by his supervisor Matt Costello then. Mr Hargrave's statement sets out that he was advised that on this shift Mr Berov continued to need supervision and constant instruction regarding maintenance work.

5.3.5.13 Mr Roud also formed views of Mr Berov over this time; his nine concerns are set out in paragraph 11 of his statement and include lack of confidence, indecisive etc. The evidence lead was that Mr Berov's shift supervisors were actively mentoring him during this time and even with this Mr Roud states he still had concerns about Mr Berov's depth of knowledge and timeliness.

5.3.5.14 Mr Roud's view was there was no improvement in competency between September 2010 and the time Mr Berov resigned on 21 June 2011. Mr Roud did not discuss his concerns directly with Mr Berov (T 49).

- 5.3.5.15 Mr Roud gave evidence that the key concern was Mr Berov lacked self-confidence and he was not able to cope with the urgency and pressure of line maintenance work.
- 5.3.5.16 Mr Hargrave's broad concerns were informed by the supervisors on the floor. He was advised that Mr Berov was not able to work independently.
- 5.3.5.17 Mr Hargrave and Airnorth made the concession that there was no record at all of the performance concerns raised with Mr Berov for the first time on 21 September 2010. However their evidence was that the first concerns arose in December 2008 and the ongoing concerns were addressed by a shift change in February 2009 and then a further three changes of shift to try and improve performance.
- 5.3.5.18 Mr Hargrave's explanation for this was that he was looking at various ways to try and maximize Mr Berov's skills without disrupting his confidence.
- 5.3.5.19 Mr Hargrave gave evidence that he thought after the change to Matt Costello's shift in September 2010 there was a marked improvement. Mr Hargrave's explanation for why it took so long to raise the matter with Mr Berov was, that initially he thought there was a personality clash, later he identified there were competency issues, and put in place different ways to address this via mentoring, and different styles of supervision.
- 5.3.5.20 Also Mr Roud's evidence was he thought that improvements could be obtained by mentoring, training and placing Mr Berov with different people. They did this with three different people, to try and impart their knowledge. He gave evidence that did not think there was any improvement.
- 5.3.5.21 Mr Roud conceded jobs got done, but took too long and where done in consultation with other people.

## 5.4 Training TPE 331

- 5.4.1 It is also clear from the evidence presented by Airnorth and Mr Berov that during the period under consideration 15 November 2010 to 21 June 2011, a number of engineers at Airnorth undertook TPE 331 training. Two employees in late 2009 and two employees in May 2011.
- 5.4.2 The evidence of Mr Hargrave and confirmed by Mr Roud is that Mr Berov was not considered for the same training because his competency on the EMB 120 was still being developed.
- 5.4.3 Airnorth also put forward an alternative explanation that there would be difficulties in acquiring post course experience due to the limitations in Airnorth's fleet. However this was contradicted by the evidence of Mr O'Shea.
- 5.4.4 Further Mr Berov did not accept this as a limitation on why he could not be sent on this course as he maintained that he already had experience from New Zealand on TPE 331 engine, and only needed to undertake the theory course (T 54 & 66).
- 5.4.5 I do not find that Airnorth's explanation of there being difficulties in obtaining post theory experience on TPE 331 as substantiated particularly as in late 2009 and May 2011 other employees attended the training.
- 5.4.6 Mr Hargrave's evidence throughout the hearing was that the selection of staff for training courses was based on merit, to accommodate operational needs and on the basis of skills, attitude and performance of the employee.
- 5.4.7 Mr Roud the Engineering Manager was of the view that the Garrett TPE 331 was a far more complicated engine than the EMB120 and he would not recommend Mr Berov for training on it because he struggled with his competency on the EMB120.
- 5.4.8 Airnorth and Mr Hargrave's evidence was firmly that Mr Berov was not offered further training as he was still consolidating skills, not because of his age (see the material set out above).

## 5.5 Age

- 5.5.1 As can be seen from the discussion of the evidence above there was no discussion of Mr Berov's age, in regard to the training which was to be undertaken, or in regard to his performance prior to or in the relevant period 15 November 2010 to 21 June 2011.
- 5.5.2 Mr Hargrave was asked questions directly about this and was clear that Mr Berov's age was not a consideration in him being offered training or in his ERJ 170 licence being recognised by Airnorth.
- 5.5.3 Further Mr Hargrave's evidence was he never mentioned Mr Berov's age in any conversation with him and that age had never been a factor in the decisions made in regard to Mr Berov.
- 5.5.4 The evidence from Mr Berov in regard to his age is from two sources, from the statements provided in Exhibit 3 and his evidence during the hearing. Mr Berov's submissions that he made at the end of the 3-day hearing sum up what he states I should find.
- 5.5.5 Mr Berov's statement dated 17 April 2013 – (Exhibit 3 folio 5) at paragraphs 17 & 18 states:

"The respondents knew that I had less than 10 years before retirement and did not think it was worth investing in my training and development since they would have to do it all again."

and

"The respondents knew that if I was told that I would not be sent on ERJ 170 training I would have started looking for alternative employment and they still needed people to do the EMB 120 certification. The respondents also knew that if they kept promising to send me on the ERJ 170 course for a few more years it would have been harder for me to leave. I would have been nearer retirement age, making it harder for me to find alternative employment and I would have been forced to stay with the company."

- 5.5.4 Further in his evidence (T 58-59) Mr Berov stated during the relevant time that Airnorth only had one licenced engineer older than him; a man named Joe Goldfi in his 60s the next in age was Peter Campbell - who was five or six years younger.
- 5.5.5 During his evidence Mr Berov was given every opportunity to provide evidence to substantiate his allegation that the different treatment was due to his age. As set out below he was asked (T59):
- “Is there anything else you want to say in relation to that?---And I can say that some of these employees even was on the – on the probation period, like, Sergio and ..... which was sent on training – TPE-331 – in the beginning of May 2011. The other 35 thing is that John Peterson – he went – 2011, January – together with Mike Ashton, and John Peterson, I think, was transferred from casual to the permanent work. And the other employee, like Chris Kent and Peter Campbell – they have the same training, the same licence, and their licences have been accepted.”
- 5.5.6 During the hearing (T61) a series of questions were asked in regard to why he believed his age was the reason for the way he was treated. Mr Berov said it was because he does not accept their explanation that he was not sent on training due to his performance and competency.
- 5.5.7 Mr Berov’s view was that they were not prepared to invest in him because he was close to retirement. However he conceded he had no conversation with any one from Airnorth about this, not Mr Hargrave, not any one. Others went on training particularly in 2011 but not him.
- 5.5.8 Mr Berov did not claim that he was ever subjected to any direct comments, behaviours or actions related to his age.
- 5.5.9 The basis of Mr Berov’s complaint was summarised in his closing submissions as follows:

"My age was never really discussed and no one told me directly we don't see any point in investing in you. But as no issues with my performance were discussed with me, and I received positive EDP forms, I assumed that the company was satisfied with the standard of my work. So when you see over and over again much younger colleagues being sent on training that has been discussed with you and you were expecting to progress to, you can only assume the company is choosing not to send you because of your age."

5.5.10 Mr Berov's case at its highest is that I should draw the inference that the way he was treated was because of his age as he can put forward no other explanation and he does not accept Airnorth and Mr Hargrave's explanation that it was due to his need to consolidate his EMB 120 licence before being considered for further training.

## **6. LAW AND INTERPRETATION RELEVANT LAW**

- 6.1 The relevant sections of the Act are at attachment A.
- 6.2 In regard to vicarious liability: Airnorth at the outset did not concede that they would be liable for the actions of their employees. Which made this a live issue in the hearing and shifts the evidentiary burden to Airnorth under s 105.
- 6.3 The requirement as set out at the commencement under s 20(1) and (2) is proof of a distinction, restriction, exclusion or less favourable treatment, which is on the basis of an attribute, in this case age.
- 6.4 As is clear from the presentation of the case the area of public life under consideration is work, so the requirements of s 31 in particular s 31(1) (d) and 31(2) (d) must also be satisfied, these are set out in full in Attachment A.
- 6.5 The onus of proof is on Mr Berov, and he must prove his allegation as required by s 91 on the balance of probabilities. As set out above if prohibited conduct is found against Mr Hargrave then it is for Airnorth to

prove on the balance of probabilities the matters set out in s105 (2) and (3).

6.6 This case, due to the absence of direct evidence of the less favourable treatment being on the basis of age requires consideration of and assistance from case law on the approach to drawing inferences from evidence which is lead and how to balance making of an inference when an explanation inconsistent with the inference is lead as the explanation for the conduct by the responding party.

6.7 The decision of *Greater Taree City Council v Craig Michael Peck* [2002] NSWCA 331 at paragraph 70 provides guidance;

"As Lord Robson observed in *Richard Evans & Co Ltd v Astley* [1911] AC 674 at 687:

".[The] Court must look at all the circumstances to see if they give rise to a reasonable and definite inference on the matter in question. If they give rise to conflicting inferences of equal degrees of probability, so that the choice between them is mere matter of conjecture, then the applicant has failed to prove her case." [Emphasis added]

6.8 This passage was referred to with approval in *Luxton v Vines* [1952] HCA 19; [1952] 85 CLR 352, Dixon, Fullagar and Kitto JJ and has been cited in numerous other Australian decisions.

## **7. APPLYING FACTUAL FINDINGS TO THE LAW**

7.1 In this matter it is clear that Mr Berov's employer Airnorth trained Mr Berov on and provided the practical experience for him to obtain his EMB 120 licence in 2008. However whilst training on the ERJ 170 & TPE 331 was discussed in 2008 and 2009 with Mr Berov by his supervisors, he was never sent on this training.

7.2 When Mr Berov undertook ERJ 170 training and then obtained his ERJ 170 airframe licence in August 2010 it was not utilised by Airnorth. Further in 2010 and 2011 his work colleagues undertook ERJ 170 and TPE 331 training paid for and then recognised by Airnorth.

- 7.3 The matter is to be decided on the basis of inferences to be drawn from this evidence; was this treatment of Mr Berov, because of his age and if it was on the basis of the attribute of age, is Mr Hargrave and then Airnorth responsible.
- 7.4 Mr Berov submits that the inference is available and should be accepted that different treatment was due to his age, however there is no direct evidence or specific incidents from which I can draw this inference.
- 7.5 The alternative proposition submitted by Mr Hargrave and Airnorth, is at its highest that it was due to performance issues that Mr Berov was not considered for training, or that Mr Berov needed to consolidate his skills under his EMB 120 licence before he was considered for further training. Also that for the same reasons Airnorth would not utilise his ERJ 170 licence.
- 7.6 I do not need to find positively that Mr Berov's performance fell below what was expected, I do find and accept that Mr Hargrave and Airnorth believed Mr Berov needed to consolidate his EMB 120 before being provided with further training or using his ERJ 170 licence. This is an alternative inference from the material led by Airnorth than that which Mr Berov relies on that the different treatment was due to his age.
- 7.7 As Mr Berov bears the onus of proof it was for him to elicit evidence to support his case, on the balance of probabilities. I find Mr Berov has not discharged this onus and I am not able to accept the case is proven on the basis of the inference he asked me to draw.
- 7.8 Whilst it is clear Mr Berov was not given the training he requested and the training he paid for was not utilised I am not able to find a link to the attribute of age which is required to prove prohibited conduct under the Act.
- 7.9 There is no need to consider the issue of vicarious liability as prohibited conduct has not been found.



## 8. CONCLUSION

- 8.1 Airnorth left themselves open to the type of allegation Mr Berov has made by not discussing the concerns they held with Mr Berov with him at the time they arose or shortly after. They did not utilise any process to document concerns. It is entirely explicable that Mr Berov would look for an alternative explanation such as his age as to why he was not sent on training or the licence he obtained was not used.
- 8.2 The explanation that Airnorth gave in 2010 that they were enhancing and improving his skills before considering further training was not provided to Mr Berov at the time he was seeking training or recognition of his licence. The reason why he was moved between shifts was never discussed openly with him.
- 8.3 Airnorth's approach, as set out in the evidence of Mr Hargrave of trying to be gentle and maintain Mr Berov's confidence in the end, as Mr Berov says, has led to him feeling humiliated and distressed.

## 9. DECISION:

For the reasons set out above, I find that the prohibited conduct alleged in the complaint is not substantiated, and I dismiss the complaint.



Sally Sievers

Anti-Discrimination Commissioner

2 December 2013

ANTI- DISCRIMINATION ACT

**19 Prohibition of discrimination**

- (1) Subject to subsection (2), a person shall not discriminate against another person on the ground of any of the following attributes:

.....;

(d) age;

.....;

**20 Discrimination**

- (1) For the purposes of this Act, discrimination includes:

(a) **any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity; and**

(b) harassment on the basis of an attribute,  
in an area of activity referred to in Part 4.

- (2) Without limiting the generality of subsection (1), discrimination takes place if a person treats or proposes to **treat another person** who has or had, or is believed to have or had:

(a) an attribute; or

(b) a characteristic imputed to appertain to an attribute; or

(c) a characteristic imputed to appertain generally to persons with an attribute,

**less favourably than a person who has not, or is believed not to have, such an attribute.**

- (3) For discrimination to take place, it is not necessary that:

(a) the attribute is the sole or dominant ground for the less favourable treatment; or

(b) the person who discriminates regards the treatment as less favourable.

- (4) The motive of a person alleged to have discriminated against another person is, for the purposes of this Act, irrelevant.

**31 Discrimination in work area**

- (1) A person shall not discriminate:

- (a) in deciding who should be offered work; or
  - (b) in the terms and conditions of work that is offered; or
  - (c) in failing or refusing to offer work; or
  - (d) **by failing or refusing to grant a person seeking work access to a guidance program, vocational training program or other occupational training or retraining program; or**
  - (e) in developing the scope or range of a program referred to in paragraph (d).
- (2) A person shall not discriminate:
- (a) in any variation of the terms and conditions of work; or
  - (b) in failing or refusing to grant, or limiting, access to opportunities for promotion, transfer, training or other benefit to a worker; or
  - (c) in dismissing a worker; or
  - (d) **by treating a worker less favourably in any way in connection with work.**
- (3) A person shall not discriminate against a worker on the grounds of the worker's religious belief or activity by refusing the worker permission to carry out a religious activity during working hours being an activity:
- (a) of a kind recognized as necessary or desirable by persons of the same religious belief as that of the worker; and
  - (b) the performance of which during working hours is reasonable having regard to the circumstances of the work; and
  - (c) that does not subject the employer to any detriment.