

IN THE SUPREME COURT OF NEW ZEALAND

**SC 49/2008
[2008] NZSC 76**

BETWEEN DAVID McALISTER
 Appellant

AND AIR NEW ZEALAND
 Respondent

Court: Elias CJ, Tipping and McGrath JJ

Counsel: R E Harrison QC for Appellant
 A H Waalkens QC and K M Thompson for Respondent

Judgment: 7 October 2008

JUDGMENT OF THE COURT

A The application for leave to appeal against the judgment of the Court of Appeal in *Air New Zealand Ltd v McAlister* [2008] NZCA 264 is granted.

B The approved ground of appeal is:

Did the demotion of the appellant from his position as a B747-000 Flight Instructor to one of First Officer occur by reason of a prohibited ground of discrimination, namely his age, in terms of s 104(1)(a) or (b) of the Employment Relations Act?

C The respondent should address its alternative argument in support of the Court of Appeal's judgment in submissions that it files as respondent in the appeal. Any reply to those submissions by the appellant must be confined to that alternative argument.

REASONS

[1] The Court doubts that the respondent's alternative argument will amount to another ground of appeal in terms of r 20(4). It appears to be an incidental argument of meaning based on purposive interpretation. We consider that counsel for the appellant may be able to anticipate the argument and adequately address it in his submissions on appeal, thereby obviating any need for a written reply to the respondent's submissions. If, however, counsel for the appellant considers it necessary to file a written response, he may do so confining it to that point. In general the Court expects points of an appellant in reply to be made orally at the hearing of the appeal.

Solicitors:
Shanahans, Auckland for Appellant