

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS]

**IN THE DISTRICT COURT
AT NELSON**

**I TE KŌTI-Ā-ROHE
KI WHAKATŪ**

**CRI-2018-042-000540
[2018] NZDC 17775**

CIVIL AVIATION AUTHORITY
Prosecutor

v

ANDREW SINCLAIR BROWN
Defendant

Hearing: 22 August 2018
Appearances: C H Macklin for the Prosecutor
A J Beazer for the Defendant
Judgment: 22 August 2018

NOTES OF JUDGE D C RUTH ON SENTENCING

[1] Mr Brown, you have pleaded guilty today to being a person who between 17 March and 18 May last year around Nelson, Marlborough and Southland exercised the privileges of your commercial pilot's licence when you did not hold the appropriate Class 1 medical certificate.

[2] The charging document sets out a number of dates encompassed within the representative nature of this charge. The offence is one against s 46A(1)(a) of the Civil Aviation Act 1990 and carries a maximum penalty of 12 months' imprisonment or a fine of \$10,000.

[3] There are a number of other charges which, as a result of your guilty plea to the charge to which I have referred under charging document number 060, there was no evidence offered on those and they will be dismissed and you no longer face those. And so I am dealing purely now with the charge under 060.

[4] The summary of facts for that charge tells me that you are the holder of a commercial pilot's licence for a helicopter. You hold an agricultural rating under part 61 Civil Aviation Rules. As the holder of the particular licence you are required to comply with several currency requirements under the Act including the holding of a current Class 1 medical certificate. Unless you hold a valid Class 1 medical certificate you are unable to exercise the privileges which accompany that licence.

[5] Your Class 1 certificate expired in May of 2016. You also held a Class 2 medical certificate that had expired in May 2017, that is a less stringent class of medical certificate, and to your credit you have not sought to renew either certificate pending the resolution of these matters today.

[6] After the Class 1 certificate expired in May of 2016 you then logged somewhere in the vicinity of 74 or so commercial flight hours for [company 1 deleted] and another operator. From 17 March last year until 18 May last year, you were the pilot in command of 17 flights for hire and reward at a range of locations across the South Island.

[7] The CAA became aware of the potential breaches of the Act following email correspondence between yourself and licensing medical staff. The medical staff of CAA raised concerns that you were engaging in commercial operations but without the current Class 1 medical certificate.

[8] There are a number of references within the summary of facts to many of the reasons for the establishment of these various legislative provisions. Safe to say that what they boil down to is the necessity to ensure that those who deal with persons operating a commercial pilot's licence can expect that the highest standards applicable are being met.

[9] One of the matters that you enjoy as a privilege as a pilot with the correct medical certificate is the ability to operate for hire or reward.

[10] In your case, you were at the time this was drawn up, 67 years of age, residing here in Nelson. It is acknowledged you have an extensive background in the aviation industry. Your first such licence was issued to you back in 1982. You have held the part 61 agricultural rating to which I earlier referred since July 1985. You are the former chief executive officer of [company 1], a company you formed and managed from July in 1997 until November 2013. At various stages of your career you have held senior roles within part 137 Agricultural Aircraft Operations and part 119/135 Air Operations.

[11] You have had a serious underlying medical condition for a number of years that has meant that you have been closely monitored by the medical unit at the CAA. In May of 2016 your Class 1 medical certificate expired and in May 2017 your Class 2 medical certificate expired.

[12] As the holder of the particular licence that you enjoy, you were required to comply with a number of currency requirements including the holding of a Class 1 medical certificate issued under the Act. You were also, of course, required to undergo regular competency checks.

[13] On 18 September 2016 you completed an agricultural competency rating and you were signed off as competent to carry out grade one and grade one agricultural operations. The competency check was completed with Wind and Aviation Limited. The instructor who conducted the check reminded you both before and after that test that you could only exercise the privileges of a private pilot licence whilst holding a Class 2 certificate, as such, you could not operate commercially. Despite those reminders, you continued to operate commercially.

[14] After some investigation by the CAA there was confirmation that you were contracted as a commercial pilot to carry out several part 137 agricultural aircraft spraying operations for a company between 21 and 29 March last year. Copies of the

daily flight records show that you carried out several similar operations on 8 February, 9 March, 15 March, 17 March, 30 March and 11 April.

[15] You did not inform [company 1] that you only held a Class 2 medical certificate and not a Class 1. The company requested a copy of your medical certificates for company records which you did not supply.

[16] The CAA also have contacted a [farmer]. He employed you to carry out agricultural operations on his farm. You did so between September 2016 and May 2017 using [farmer]'s privately registered helicopter. You were paid for the various operations you carried out.

[17] On 19 June last, you sent an email to staff at the CAA regarding the renewal of your Class 2 medical certificate. You said that you were holding off on a job while awaiting a medical decision. Upon reviewing that email, CAA staff were concerned that you may be exercising the privileges of your commercial pilot's licence when you only held a current Class 2 medical certificate.

[18] CAA staff subsequently followed up with you to clarify the type of flying you were undertaking in accordance with your Class 2 medical certificate. The CAA were concerned that commercial operations may have been undertaken when you are not medically certified to the appropriate level.

[19] On 29 June last, the matter was raised with the manager of personnel and flight training unit at CAA who generated an aviation-related concern. That involved an allegation that you might be exercising the privileges of your commercial licence by undertaking commercial agricultural aircraft operations when you did not hold a current Class 1 medical certificate.

[20] On 16 July last you sent an email to CAA in which you admitted undertaking paid commercial work on your Class 2 medical certificate, however, you did not specify the extent of the work. That was uncovered as a result of subsequent investigation. There were then arrangements put in place to formally interview you. On 18 August last you provided information during an interview along the following

lines. Firstly, that you undertook the commercial operations as a contract pilot for [company 1] and an associate who owned a R44 helicopter and a number of farms in [location deleted]. During the interview you supplied CAA with a copy of your pilot log book. A review revealed that entries between 19 May 2016 and 18 May 2017 showed logging of 74.19 commercial flying hours. During that period there was no Class 1 medical certificate that was current.

[21] You said you were unaware you could not operate commercially on a Class 2 medical certificate. You said you believed that as you did not carry passengers during those operations you could legitimately carry out the work you were carrying out.

[22] The matter today is for disposition. It is accepted by both the defence and the prosecution that a fine is the appropriate outcome here.

[23] In his written submissions to which he had spoken today, Mr Macklin, on behalf of the Director of Civil Aviation, has made a number of points to me. He goes over the various points that I have already read out in terms of the summary of facts.

[24] The prosecution view of this matter is that it is moderately serious, that is because it extended over 12 days of operations, over a two month period of commercial flying and because of the possible high end sentence of \$10,000 as a fine, Mr Macklin submits that if I regard it also as being at the moderate level, then as a matter of simple arithmetic somewhere at the four to \$5000 mark should be set as a start point.

[25] From that starting point it is fully acknowledged, both in writing and today in oral submissions by Mr Macklin, that your case is rather fact specific and there are a number of factors for which you will be entitled to significant discount. However, what Mr Macklin urges upon me is that I should not use those factors which are specific to you to stand back from an otherwise appropriate starting point. The reason he makes that submission is because an important aspect of this legislative regime is to reinforce strict compliance with the Act and its related subsidiary rules and regulations. That is self-explanatory of course. We over a period of time are well aware of tragedies which have befallen particularly helicopter pilots in the often

dangerous work they undertake and so the need to ensure that pilots who are operating particularly commercially, adhere strictly to the rules is rather trite to observe.

[26] There are aggravating features that Mr Macklin points to. Firstly, the extent of the offending, again he reiterates this was not just a one-off, there were a number of dates and times involved in this period of offending. The fact that an elevated status for commercial pilots enables them to do things that private pilots cannot carry with it a corresponding responsibility on the part of the helicopter operator to ensure that they have all of the necessary certification to enable them to carry out that work. Mr Macklin points to the sorts of serious and dangerous occupations that this sort of flying exemplifies often carried out over challenging terrain and at low altitude, often carrying significant externally mounted equipment. And of course, it has to be said in that context that is it not as if it can be said you were otherwise a hale and hearty man because it is clear from the summary that you had had underlying health issues which have required close monitoring over a period of time.

[27] The prosecution view is that if there was some misunderstanding on your part that should not operate as any sort of mitigating factor. You have, after all, been the subject of these regimes since the 1980s and although the specifications may have changed from time to time, I have no doubt the general safety requirements have been pretty static.

[28] Also, the fact that there was not any passenger or any accident in fact is not, of itself, mitigating and it might be viewed as a matter of chance.

[29] It is a matter that Ms Beazer raised with me in her submissions, she stands by her submissions, which I will come to in a moment, where she says there were no passengers and that I should take that into account. She says that you were operating in remote areas on agricultural contracts. The reality, Mr Brown, seems to me to be rather different because if you had a medical event of some sort in one of these areas and there was a crash in a remote area, then there seems to me to be an almost inevitable risk to persons who might be tasked with rescuing you, particularly if the area is very remote and so I rather temper Ms Beazer's claim in that respect on your behalf.

[30] The prosecution then takes me through a number of cases which have gone on before yours. I make the point immediately that almost all of them are going to be different to some extent but they are important in terms of principles and in particular starting points for this level of offending.

[31] One of the matters that the prosecution urges upon the Court, and this is not an unusual submission, is that this should be regarded for deterrence purposes as something much more than just a regulatory infringement situation because there should be no reward, as it were, for contravening these very important statutory requirements.

[32] It is accepted that you have been particularly co-operative in this process and I have already said, and I repeat, it is very much to your credit that you have not sought to continue until these matters are sorted out.

[33] You have a longstanding relationship with the aviation industry and it has until now, so far as I can see, been without blemish and so you need, in my view, to be treated accordingly.

[34] The prosecution reiterates its submission that a midway point start point of around four or \$5000 must be sustainable here.

[35] On your behalf, Ms Beazer talks about your early guilty plea, that is accepted; your remorse, I accept that without question; your previous good character, I have just spoken about that; and your co-operation including I should add not only your responsible attitude of not seeking to continue flying but also the fact that it was really from your own mouth that much of this prosecution has arisen and I bear that in mind when I look at the factors that are specific to you.

[36] Ms Beazer has provided me with some excerpts taken from various job sheets created by the CAA and there is some room for the view that you may well have thought that you were only doing private work but of course, as Mr Macklin properly points out, anything for reward is outside the terminology of private work.

[37] Ms Beazer responsibly accepts on your behalf that it was your responsibility to know what the applicable law was in terms of your operation of these vehicles and to comply with them.

[38] In her submission, Ms Beazer contends for a lower starting point having regard to the factors that she has raised, including those matters I have touched on in the course of this discussion.

[39] She makes another distinction properly on your behalf and that is in some of the cases to which I have been referred there has been certainly a degree of what I might call obfuscation, in other words, persons who have been similarly not properly certified but have in addition complicated and worsened their position by being devious, by completely inaccurate logbooks and acting to conceal their activities. I think it is, in your case, perfectly clear that you have acted in a pretty transparent way throughout, misguided or not. And it is for those reasons, I think, that Ms Beazer says that I could come to a lower starting point.

[40] My view of the matter is that I think that for deterrent and public policy reasons, that Mr Macklin has got this right, that what I should not do is give a lower starting point and create, as it were, some precedent. The situation in my view to uphold the statutory regime requires that I put into place a starting point that is commensurate with the aims and objectives of this legislation and so my starting point is \$4000, however, as I have already indicated, you are due not only the full discount for a guilty plea, you are also due a lot of discount for your co-operation including all the factors that I have referred to and your good character.

[41] I assess, from the starting point of \$4000 that that should be reduced by \$1500 to \$2500. I then add in, in your favour, a 25 percent discount or one-quarter, which reduces by \$625 to reach an end point of \$1875. I then stand back and look at your case in comparison with others and outcomes that have been imposed on the more serious charges, ones that have been imposed on the less serious charges, and ones where there has been a number of different categories of offending which is not the case for you. Having undergone that exercise, Mr Brown, I come to the view that the level of fine that I have indicated is, indeed, the correct level and so on your guilty

plea, you are convicted. You are fined the sum of \$1875. There will be Court costs at \$130. There are no other costs sought from your, Mr Brown, so the total will be \$1875 by way of a fine, Court costs \$130 and you may be able to make arrangements with the registry as to how you may undertake those payments.

D C Ruth
District Court Judge