

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Pegasus NZ Airline Services Society Inc (First Applicant)

AND Flight Attendants and Related Services Association (Second Applicant)

AND Air New Zealand Limited (Respondent)

REPRESENTATIVES Simon Mitchell, Counsel for First Applicant
Paul Wicks, Counsel for Second Applicant
Andrew Caisley, Counsel for Respondent

MEMBER OF AUTHORITY Alastair Dumbleton

INVESTIGATION MEETING 27 and 28 October 2005

SUBMISSIONS RECEIVED 1 and 2 November 2005

DATE OF DETERMINATION 7 November 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The problem that has been investigated and is now determined by the Authority is a dispute about the interpretation, application or operation of an employment agreement. To resolve the problem the Authority has been asked to declare the respective rights and obligations the parties to the agreement have in relation to the matter in dispute.

[2] The applicants Pegasus NZ Airline Services Society Inc. and the Flight Attendants and Related Services Association (together referred to as “the Unions”) provide union coverage for employees who work on passenger aircraft as members of the cabin crew. The respondent Air New Zealand Limited (referred to as “Air NZ”) is an employer of cabin crew, particularly in relation to ‘long haul’ flights operated by the International division of the airline.

[3] The dispute is about the employment of Inflight Service Directors, or ISDs, a position in which Air NZ employs 130 staff. An ISD is the most senior member of the cabin crew working onboard an aircraft during flight.

[4] Two separate collective employment agreements have been negotiated by the Unions to cover their members who work for Air NZ as cabin crew, but in relation to this dispute there is no material difference between the provisions of those agreements.

[5] On 29 July 2005 all ISDs were advised in writing by Air NZ that it had decided to implement a restructuring of their position of employment. This decision followed a period of gathering and considering feedback from cabin crew, and of discussion and consultation with the Unions about specific restructuring proposals that had been put forward by Air NZ at the end of 2004.

[6] The restructuring Air NZ intends to implement involves the disestablishment of all ISD positions and the establishment of positions called Flight Service Manager, or FSM. There will be 130 FSMs, the same number as there are ISDs. Air NZ has advised the ISDs and the Unions that the restructuring will take effect from Monday 19 December 2005, coinciding with the completion of one roster and the commencement of a new one.

[7] The ISDs have also received advice from Air NZ as to the options they have to lessen the consequences of losing their positions. The options for ISDs are;

- to apply for selection and appointment as an FSM,
- to apply for redeployment in other positions available within Air NZ,
- to volunteer for redundancy.

[8] Air NZ intends to regard as redundant those ISDs who apply for either an FSM position or for redeployment but who are unsuccessful. Whether redundancy is voluntary or involuntary, the entitlements to compensation of any ISD put in that situation will be no more or less than provided by the applicable employment agreement.

The parties' contentions

[9] The Unions contend that although the name FSM is new, the position of employment itself is the same as that of ISD, or is at least substantially similar. They argue that nothing will be achieved by disestablishing ISD positions and establishing FSM positions, which cannot be achieved by Air NZ simply requiring changes to be made to the way ISDs have to date been performing their jobs. In those circumstances the Unions contend that no redundancy situation arises. They seek a determination from the Authority declaring that;

- the position of FSM and ISD is in substance one and the same, and is covered by the current collective employment agreements applying to ISDs, and
- the position of ISD will therefore not be redundant in the circumstances Air NZ intends to bring about on 19 December 2005.

[10] Air NZ contends that a restructuring or reorganisation is being carried out by it and that as a consequence the position of ISDs will become surplus to requirements on 19 December when employment will begin to be performed by those appointed to the position designated as FSM. The airline seeks a determination of its rights accordingly.

[11] The Unions and Air NZ have presented evidence from which the Authority must decide whether or not the positions of ISD and FSM are the same or substantially similar. There has been evidence from those within management of Air NZ who considered the need for change and who devised the FSM position. It has been described in detail in a formal Position Description, whose wording has been closely focussed upon in evidence and argument. There is also an ISD Position Description, although it is somewhat less detailed.

[12] There has been evidence from two current ISDs about the way they perform their job. The pair have combined experience of nearly 20 years in that position.

[13] Evidence was also given by three independent pay consultants who were engaged by Air NZ to professionally evaluate or measure the two positions, and report on the degree to which they were considered to be the same.

Definition and Description of positions

[14] In 2003 Air NZ and the Unions contractually agreed upon a description of the work for the position of an ISD. It is set out with identical wording in both current collective employment agreements. In the absence of any effective variation to it, the provision remains the paramount definition of the ISD position, as follows;

CLAUSE 2 DEFINITIONS

2.1 An Inflight Service Director (ISD) is responsible for the consistent delivery of all aspects of inflight service to passengers and for the maintenance of discipline, standards of dress, conduct and operational performance of Inflight Service Coordinators and Flight Attendants, as required by the Airline.

[15] A formal Air NZ Position Description of 'Inflight Service Director' contains the following;

Role Purpose

This position is responsible inflight to the Pilot in Command for the safety and welfare of passengers and crew. In addition to the safety role, the Inflight Service Director is responsible for the consistent delivery of Inflight Service to the customers and to ensure all crew under their direction comply with laid down company procedures and policies.

Also:

Provide motivation, guidance and coaching to employees and reinforce high standards with regard to performance, safety customer service and adherence to company values.

Actively ensure the safety and security of all people, assets, systems and procedures engaged in or associated with own area of responsibility or otherwise under own control or influence.

Comply with all applicable business and industry specific legislative/regulatory requirements.

Other ISD 'Position Description' documents have some variations in the wording, but their essence is the same as above.

[16] The Air NZ 'Position Description' for the intended FSM position contains the following;

Role Purpose

Operating in a combined flight/ground position, manage the needs and safety of

International cabin Crew, customers and the business with an emphasis on the Airlines principles and values in areas of leadership, customer satisfaction, performance and financial management whilst adhering to operational and regulatory policy.

Legal principles

[17] The body of relevant case law referred to by the parties in submissions, must be read and applied in the light of the definition of ‘redundancy’ Air NZ and the Unions have agreed upon and have also placed in the two current collective employment agreements. The wording and numbering of the provisions is identical in each agreement, and are as follows;

CLAUSE 19 SECURITY OF EMPLOYMENT

19.1 Redundancy: Inflight Service Director

.....

19.2 Definition

19.2.1

Redundancy is a condition in which an employer has Inflight Service Directors surplus to requirements because of.....reorganisation.....requiring a permanent reduction in the number of permanent Inflight Service Directors ...

[18] A key consideration in applying this definition is whether the intended reorganisation by Air NZ dictates a permanent reduction in the number of ISDs. It is not in my view simply a matter of whether subjectively the employer requires a reduction. I conclude that the definition of redundancy in this respect addresses the scale or degree of change of reorganisation and raises a question of fact and degree as to whether any change itself has the effect of “requiring” the severance of ISDs.

[19] Some of the cases referred to by the parties in submissions have been decided in circumstances where an employer has sought to implement some degree of change but has viewed the scale of that as involving not a redundancy but only a ‘redeployment’ or a rearrangement of duties within the scope of an existing position. In those cases it has been the affected employees claiming that they had been made redundant and asking for confirmation of their entitlement to be treated as such.

[20] It is the reverse situation in this case. The employer wishes to implement changes in job content and work methods which it considers are so great that in law it has no alternative but to treat existing positions of employment as redundant. The ISDs through their Unions claim that their positions will not become redundant as a consequence of the proposed changes. They ask the Authority to confirm their entitlement to retain the positions they currently hold. In either case, the core principles to be applied as referred to below are the same.

[21] In *Carter Holt Harvey v Wallis* [1998] 3 ERNZ 984, the Employment Court approved of the following test to be applied when comparing restructured positions with existing positions;

Would a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of [those employed in the position], consider that there was sufficient difference to break the essential continuity of the employment?

[22] The personal circumstances of the employees, as well as the characteristics of the positions under comparison, were therefore held to be relevant.

[23] The Court went on in the *Wallis* case (above) to adopt the approach taken in the earlier case of *Group Rentals NZ Ltd v Canterbury Clerical Workers IOUW* [1987] NZILR 255, which was to ask the question;

Did this proposed redeployment amount to a fundamental alteration in the nature of her employment?

In relation to the ability of an employer to require change in the way work is to be performed within a position, the Court observed;

A worker employed generally cannot expect that his or her duties will never be altered.

[24] The fact that employees currently working as ISDs might require training or an upgrading of their skills (even a review of pay) before they could reasonably be expected to perform the position of FSM, is not by itself an indication that the two positions are substantially different. As the Court observed in *McCulloch v NZ Fire Service Commission* [1998] 3 ERNZ 378 at page 392;

Not infrequently, an employer needs to require its staff to increase the level of their technical competence in the skills for which they are employed; so long as the nature and extent of the improvement or other change in method is adequately explained and the employees are assisted to attain the required standard by the provision of reasonably adequate training and sufficient time, issuing such a requirement under these conditions is well within the rights of an employer. Ordinarily, the acquisition of the new or different skills would lead to some compensatory recognition but that is not an essential pre-requisite where, of the employees range of skills, some are being acquired in the place of others that are no longer to be used or used as much.

[25] The Court in *McCulloch* (above) also referred to the distinction between the same position but with a change of “focus/emphasis” within it, and a different position. These views expressed by the Court’s Chief Judge were repeated by him in *Wilkinson v Wairarapa CHE* [1999] 2 ERNZ 133.

[26] The Unions contend that the positions of ISD and FSM are the same job and that the implementation of the restructuring will change only the focus or emphasis in that job. As FARSA put it in a letter of 14 April 2005 to Air NZ;

.....what the proposal amounts to is a re-titling of an existing role along with a re-emphasising or re-aligning of existing expectations that, for whatever reason, have not been maintained following their implementation by the airline management.

The Unions contend that Air NZ should simply advise ISDs of the changes required of them - the new focus and emphasis - and then implement those changes. They acknowledge that Air NZ can bring change in that way and to that extent as part of its rights as an employer to manage.

Need for change

[27] The primary task of the Authority in resolving this dispute has been to compare the positions of ISD and FSM. As confirmed by the case law, the extent if any to which the positions are different is a question of fact. It is to be determined from the information and evidence provided by the parties or obtained by the Authority during the investigation.

[28] In approaching its task the Authority has accepted from the evidence of Air NZ that the intended change from ISD to FSM positions is not an isolated instance of reorganisation within the airline but is part of wholesale change being made across the board and at all levels of Air NZ, from CEO downwards.

[29] It is also accepted by the Authority that Air NZ has committed itself to spending \$1.8 billion on new B777 aircraft and on refurbishing B747 aircraft, to provide improved in-flight facilities and accommodation for passengers flying long haul routes. The FSM role clearly is intended to both complement and enhance the new long haul operations in terms of customer service during and after flight and effective crew management and development.

[30] There will be no cost saving to Air NZ from the change, at least not immediately or directly. It will not reduce the number of employees and FSMs are going to be paid appreciably more than ISDs. There is some difference between the parties as to how great the overall increase in pay will be, but whether \$5000 pa or \$10,000 pa, there will as a consequence of the change be a higher payroll cost to the airline. An anticipated reduction in the B747 cabin crew level from 14 to 13 will be a saving to the airline but seems not to be a direct result of having FSMs instead of ISDs, but of changes in the way food is to be prepared pre-flight before being served by cabin crew.

[31] The issue in this dispute is therefore not Air NZ's ability to restructure if it wishes. Nor is the issue the necessity for such change as Air NZ may decide to make, always assuming however that the airline has not been motivated by any desire, as it has been put in one case,“to be rid of employees who, in the view of management, have overstayed their welcome.” see; *Toll NZ Consolidated Ltd v NZ Seafarers Union Inc. and another*, Employment Court, unreported, 16 July 2004, WC 10/04, at paragraph 52.

[32] In this dispute the issue for the Authority is the consequence for existing ISD positions of the change Air NZ has decided to make on 19 December 2005. The resolution of that issue requires a comparison to be made between the ISD and FSM positions to determine the degree or extent of the change. The comparison must look at the ISD position not so much from the way Air NZ historically has required that job to be performed but from the way contractually the employer could, if it had wished, have required it to be performed without doing more than changing the focus or emphasis within the job.

Position evaluations

[33] Air NZ asked three private consultants to evaluate the ISD and FSM positions. After applying their firm's own particular job evaluation methodology, all three consultants reported to Air NZ their conclusion that the positions were “substantially,” “significantly” or “clearly” different in terms of the relative size and importance of the two roles within the airline. The FSM position was ranked or graded higher than the ISD position to an extent that one or more consultants considered would justify a higher salary of \$10,000 to \$15,000.

[34] While more of an art than a science, job evaluation of the kind carried out by the consultants has long been recognised and used by employers and others as a valuable tool for placing positions correctly within the job hierarchy of an organisation and for setting pay according to relativities.

[35] However, the evidence of the pay consultants has left the Authority with some concerns. Two of the consultants in their evidence, to begin with at least, maintained that they had carried out the evaluation using only the information about each position that was to be found in the formal Position Description for ISDs and FSMs. One witness said it was not unusual to work only from position descriptions. If it had been true that only position descriptions were used, I would have

some concern about the evaluation because, as was noted by the consultants, there was a marked imbalance between the content of the two job descriptions supplied to them by Air NZ. The ISD Position Description was noticeably lacking in the kind of detail provided by the description for the FSM. I consider that a consultant could not have evaluated effectively or meaningfully the positions on that information alone, as two of the consultants initially told the Authority they had done.

[36] It quickly emerged in evidence that the consultants had indeed found the job descriptions to be inadequate for their exercise and, contrary to the initial evidence of two of them, had obtained additional information about the positions. Part of that additional information gives rise to a second concern. Two of the consultants made a point of saying that they were not told why Air NZ wanted their evaluation, or what result the airline hoped for out of the exercise. However having received from Air NZ a copy of the employers own detailed comparisons of the positions, the consultants could not have failed to realise that Air NZ viewed the FSM position as a substantially different position to that of ISD. The approximate percentage change is given in the three page comparisons document as 51.6%. It could reasonably be inferred from the Air NZ comparisons and other information, that Air NZ hoped the consultant's evaluations would confirm, not contradict, the employers own assessment.

[37] Two of the consultants I find were not as aloof from their client's interests as they tried to make themselves out to be in their evidence. They presented written statements to the Authority which they swore or affirmed to me were correct and which they did not wish to change at all. On a highly material point their evidence was clear and emphatic, but quite untrue, as was soon revealed. I do not consider that the witnesses set out deliberately to give false evidence, as they made no attempt to conceal the three page comparisons document Air NZ had given them about the ISD and FSM positions for the purposes of measuring those positions. However when the full extent of that information emerged it left those two consultant witnesses looking distinctly partisan towards their client Air NZ and undermined in their credibility.

[38] The third consultant, Mr Douglas Reid of Hay Group Ltd, impressed as having better maintained his independence in conducting the measurement exercise and in giving acceptable and reliable evidence about that.

[39] I note that in letters dated 13 and 24 June 2005, Air NZ advised the President of FARSA that the evaluations had been done on the basis of copies of the Position Descriptions and verbal information. This advice was incorrect, as the three page 'comparisons' document had also been given to the consultants.

[40] For reasons other than these evidential glitches however, I consider that the Authority should attach little if any importance to the job evaluations carried out by all three of the consultants. Although Air NZ was entitled to obtain the evaluations and to consider that information as relevant and important to its decision making, it is for the Authority to carry out a comparative exercise of its own. In doing so it must form its own conclusion about the two positions. That conclusion must be based on what the Authority has been told about the positions, rather than what the consultants were told.

Individual characteristics of current ISDs

[41] It is clearly not feasible for the Authority to interview as many as 130 employees, some of whom may not be members of either of the applicant unions and in that event are not to be taken as addressed by this determination. Also, this case is brought to the Authority not as a personal grievance but as a dispute, the particular crux of which leaves less room for the personal

circumstances of the affected employees to have a bearing on the outcome.

[42] I can at least assume that some, or perhaps many, of the affected employees have been ISDs for all or for much of the 15 years since that position was established. Employees who have become moulded over a long time by a particular position and the way the employer has required it to be performed may well experience any change as significant, and this a factor that favours the claim of Air NZ that the FSM position should be seen as different to that of ISD. It is not a particularly strong factor however.

Unlocking FSMs from service tasks

[43] Air NZ has pointed to several distinct requirements of the FSM position which it contends will amount to a change from the ISD position. One significant aspect heavily emphasised by Air NZ is the change to the amount of time FSMs will be required to spend working in the aisle on the trolleys, serving food and drink to passengers. A complete change is planned, as trolley work will not be any part of the job of FSMs except in emergencies. I accept, and there is no dispute, that ISDs by comparison normally spend 50% to 60% of a flight performing this work. I have however found no regulatory or contractual provision which would prevent Air NZ from simply instructing ISDs to reduce the time spent working on the trolley, or even to not work on the trolley at all.

[44] While I accept that a 'team' ethos is promoted by the way cabin crew members and their ISD are currently deployed in and around the passenger cabin in-flight, I do not consider that would necessarily be detracted from simply because the team leader was not working immediately alongside of other team members on exactly the same kind of work.

[45] The definition of an ISD common to the Unions' two collective employment agreements leaves the employer plenty of room to decide where any ISD is to be located in the cabin and for how long, and to decide how any ISD will discharge the responsibility for service delivery. If this was the only or the major difference between the FSM and ISD positions I would consider it to reflect merely a difference of focus or emphasis and not to be an indication of any substantial change between the positions.

[46] Neither do I consider that an intended requirement for FSMs to be located in an office on the ground for 2 days during every 18 day working cycle will put that work outside the scope of the ISD position. The definition of an ISD at best merely implies that the ISD will for every flight be present on the aircraft when directing in-flight service and discharging responsibilities for other cabin crew.

[47] These are not the only significant changes Air NZ points to. What is important is not how, for the FSM position, 50% to 60% of flight time will be freed of trolley work or how 2 days will be freed of flying duties, but what work will be required, in-flight and on the ground, in this freed up time. If it is intended that for 50% or more of a flight the FSM will be required to perform duties that are not within the contemplation of the ISD position as currently defined and described, then a substantial difference between those positions is present. The same applies to duties performed on the ground.

[48] I consider that in some respects the difference in positions arises more from the way accountability or responsibility is to be measured, than from the introduction of accountability where previously this was limited or non-existent. I do not accept that the accountability of ISDs for the performance of their work as required by their employer, has been as limited as the airline says. Rather it is a case of the employer choosing not to hold ISDs to account in respect of some aspects of their work. Possibly that is because it is difficult and time consuming to investigate with

whom in a team the responsibility really had lain for a problem that arose.

Continuous management of selected team of cabin crew

[49] Currently the responsibility and accountability ISDs have for the management or supervision of cabin crew members is of a discontinuous or intermittent nature. This is so in two respects; the role of ISD is normally performed coextensively with a particular flight, and it is performed with the particular crew members rostered for that flight. The title 'Inflight' Service Director and the definition of the position in the collective agreements and the Position Description, emphasise this qualification on performance of the job, or the flight-centric nature of it.

[50] On stopovers ISDs are expected between flights to have some responsibility and accountability for the management of crew when unexpected situations or emergencies arise, from medical problems and off-duty misconduct. These however are not regular occurrences.

[51] After a flight or tour of duty the composition of the cabin crew will usually change, to follow roster requirements. As a consequence there is no supervision or leadership of an on-going nature provided by ISDs for particular individuals over any long period of time, and it may be weeks or months before an ISD has the same person again in his or her crew.

[52] It is intended by Air NZ that FSMs will have on-going responsibility and accountability for a team or POD of between 8 and 10 cabin crew. This will not be dependant on the FSMs crewing flights together with any of their charges, although the position may develop in that way. I accept that the responsibility of the FSM for the team members will also be wider or greater. In the 50% to 60% in-flight time freed up from trolley work, and during the on-ground time of two days in every 18 day working cycle, and also during the rest of their time on duty, it is intended that FSMs will work towards meeting their accountability in key areas. These are specified in the FSM Position Description as being leadership, customer satisfaction, performance management, financial management and operational/regulatory/policy.

[53] These key accountabilities must be regarded as being interrelated, so that 'leadership' will be an important factor if the expected outputs/results are to be achieved in relation to 'customer satisfaction' and 'performance management.' In combination, these three key areas have been assessed by Air NZ as comprising 80% of the FSM position.

[54] With regard to 'operational/regulatory/policy' (10% of total role) there is no change of responsibility in the area of safety. By themselves the requirements of financial management' (also 10%) seem more a matter of change of focus or emphasis from the requirements of ISDs.

[55] I do not accept that currently ISDs have little or no accountability at all for 'customer satisfaction' or financial expenditure. The evidence of ISDs Ms Helen Masfen and Mr Peter Bentley demonstrates the contrary. It does however seem to me that through new or higher requirements for leadership and performance management, the position of FSM is designed to provide greater efficiency and consistency in achieving the airlines standards and objectives through the teamwork of cabin crew. The position is also designed to devolve some of this accountability and responsibility down from FSMs to the cabin crew members they have charge of.

[56] I find that the on-going requirement of FSMs in respect of a designated team of cabin crew or POD, to set performance goals and levels, to coach and develop individuals in meeting those and to monitor and report on their attainment, takes the FSM position beyond the scope of the ISD position as defined and described. It is the same with regard to another a significant new responsibility, currently residing with the ISDs' supervisors, for managing and conducting disciplinary processes,

when necessary. From the detail given in evidence about these aspects in particular of the FSM position, I consider it is a substantially different position to that of ISD. On a feature by feature basis there are similarities and dissimilarities, but when looked at overall or in the round, I find that at their core the positions are significantly different.

[57] That difference I find is great enough to break, in respect of the ISD position, the “essential continuity of employment” referred to in the test approved by the Court in the *Wallis* case (above).

Determination

[58] For the above reasons the determination of the Authority is that the degree of change that will result from the implementation and performance of the FSM position will be substantial and will result in the performance of a different position to that of ISD. I find that the degree of change will in the circumstances require a permanent reduction in the number of ISDs from the date of implementation of the change. The situation that will result from the introduction of FSM positions will be one to which the redundancy provisions under clause 19 of the collective agreements will apply.

[59] The Authority therefore declines to give the declarations sought by the Unions.

Costs

[60] Costs are reserved to allow the parties an opportunity to resolve that question by agreement. Any application to the Authority for an award of costs is to be in writing. In deciding whether an application should be made, counsel for the parties will I expect take into account the usual practice of the Authority to require parties to bear their own costs where the employment relationship problem has been a dispute. This is because of the declaratory nature of the resolution given to that type of problem.