Determination Number: CA 121/06
File Number: CEA 278/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	New Zealand Air Line Pilots Association Inc (Applicant)
AND	Mount Cook Airline Limited (Respondent)
REPRESENTATIVES	Richard McCabe, Advocate for Applicant David France, Counsel for Respondent
MEMBER OF AUTHORITY	Paul Montgomery
INVESTIGATION MEETING	6 April 2006
DATE OF DETERMINATION	11 August 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant lodged a dispute with the Authority concerning the interpretation, application and operation of the Collective Employment Agreement (CEA) to which its pilot members and the respondent are parties. The Association alleges a breach of the CEA has occurred and further, that the respondent has breached its obligation to act in good faith in its dealings with the Association and in particular its dealings over the matter of the Bangkok Daily Expense Allowance (DEA).

[2] The applicant seeks the following remedies:

- A determination under s.161(a) of the Act that the CEA does not provide for a Bangkok DEA under clause 6, clause 24.1 or otherwise; and
- A determination that under clause 24.1 of the CEA, the respondent is not entitled to require or to roster pilots to depart for Bangkok until such time as a Bangkok DEA is agreed; and
- A determination under s.161(b) of the Act that the respondent has been, and is, in breach of the CEA in requiring and rostering pilots to depart for Bangkok when there is no agreed Bangkok DEA; and
- A determination under s.161(f) of the Act that the respondent has not complied with its obligations of good faith; and
- An order for compliance under s.137(2) of the Act requiring the respondent to cease requiring and rostering pilots to depart for Bangkok until a Bangkok DEA is agreed in terms of clause 24.1 of the CEA; and

- An order for compliance under s.137(2) of the Act requiring the respondent to apply the agreed process to determine and fix an agreed payment of a Bangkok DEA; and

- A penalty under s.135 of the Act against the respondent for

  a) breach of the CEA; and

  b) breach of good faith obligations imposed under the Act.

[3] The applicant also seeks costs.

[4] The respondent denies it has breached the CEA and further states that it has acted in accordance with its duty of good faith in dealings with the applicant. It rejects each of the applicant's claims.

The facts

[5] The Association and the respondent are parties to a Collective Employment Agreement which expired on 21 October 2005, but which remains in force pending the settlement of a new collective agreement.

[6] At the core of this dispute is whether the DEA for Bangkok has been agreed between the company and the pilots represented by the Association.

[7] The issue involves pilots of ATR-72 aircraft operated by the respondent company. New Zealand Civil Aviation Rules and the respondent's policies and procedures require pilots flying this aircraft to undergo initial type rating training before they are able to fly the aircraft, and regular recurrent training every 180 days on an ongoing basis. Initial type rating is required to be undertaken in a full flight simulator. However, until the end of 2004, recurrent training took place on the aircraft itself rather than a full flight simulator. New Zealand Civil Aviation Authority granted Mount Cook and ten year exemption period from the introduction of this type of aircraft, allowing pilots to undertake recurrent training on the aircraft itself. This exemption expired at the end of 2004 and from 2005 the Civil Aviation Authority required pilots to undertake recurrent training on a full flight simulator.

[8] The respondent does not have, and never has had, its own full flight simulator and the company has sent pilots and their instructors abroad for initial type rating. While initial training was undertaken in Europe and the United States of America, for approximately the last five years those pilots and instructors have been sent to Bangkok to use the full flight simulators available there.

[9] Clause 24.9 states:

> *24.9 Daily expense allowances and meal allowances shall be agreed between the company and the pilots, and their representatives should the pilots so require, prior to any pilot departing where the destination is not one listed in clause 6 of this Agreement.*

[10] Clause 6 is headed *Daily Expense Allowance* and clause 6.1 is headed *Internal Services*; it reads:

> *6.1 A pilot who is engaged on a flight on internal services or in Australia, Western Samoa, Cook Islands, Fiji, Tonga, New Caledonia or Norfolk Island which necessitates an absence from his/her home base overnight shall receive an expense allowance for each night during which he/she is absent, except for that each unexpected night of which the pilot is informed only after leaving his/her residence he/she shall receive a double allowance. The basic allowance is $42.33.*

[11] Clearly, Bangkok is not listed in clause 6.

[12] In spite of this however, the respondent has paid a Total Daily Allowance (TDA) which is made up of a DEA and meal allowances. At the beginning of 2005 the TDA paid by the respondent to pilots was $112.71 per day. The respondent says this amount was based on historical amounts paid to such pilots and had been adjusted over time. It says that as a result, the TDA of $112.71 had been agreed by custom and practice between the pilots and the airline for the purposes of clause 24.1 of the CEA. However, towards the end of 2004, the respondent received a claim from the Association requesting a revision of the TDA for Bangkok. After a period of discussions with the Association, who was now acting as the pilots' representative, the company agreed with the Association on a process under which the parties would jointly review the basis of calculation of the TDA.

The issues

[13] These are largely defined by the Association's claims. However, the key issues are:

(a) The terms of s.24.1 and s.24.9 of the CEA and the agreeing of a process to establish the Bangkok allowance; and

(b) As a subset of the above, the issue of the Air New Zealand template sought by the respondent to assist in establishing the TDA for Bangkok; and

(c) The issue of good faith over the template as the Association maintained the respondent claims to have had this, but in fact, did not; and

(d) The matter of Mr O'Regan stating that $112.71 was the extent of his mandate; and

(e) The rescinding of a $130 allowance by the airline.

Discussion and analysis

[14] It is clear that clause 24.9 of the CEA imposes an obligation on both parties **to agree** on an TDA where the destination is one other than those cited in clause 6 of the Agreement. The Authority cannot vary terms set out in the CEA. Put simply, the parties must, **between themselves**, agree to an appropriate allowance for Bangkok. Any reasonably incurred expenses above whatever quantum is decided may be applied for by the pilots as a reimbursement. The Authority accepts that each claim will be assessed on its own merits.

[15] It is clear that clause 24.1 sets out that *the parties acknowledge that these issues may need revisiting in the light of actual experience*. The current dispute has arisen over whether there is an actual agreement currently in place between the parties on this issue.

[16] In mid December 2004 the parties addressed the issue of the CEA not providing a daily expense allowance for Bangkok and entered into a temporary agreement covering the period 16 December 2004 until 31 March 2005 setting the Bangkok TDA at $130. Both parties believed this was sufficient time in which they could review the allowance and reach agreement on a permanent basis. The parties have been unable to agree and as a result on 13 May 2005 Mr Webb, on behalf of the company, advised the Association that in line with the agreement reached on 16 December 2004, the Bangkok TDA would return to $112.71. Since that point, the parties have been unable to reach agreement on the issue.

[17] At the time of the December meeting the position was that the company agreed to continue to pay a Bangkok allowance of $112.71 accompanied by an undertaking to provide for affected pilots the difference between $112.71 and the finally agreed allowance in the event that that finally agreed amount was higher than $112.71.

[18] Several efforts have been made by the parties to resolve this issue, but to date, there has been no success.

[19] The agreement as set out in the email of 17 December 2004 includes the following statement:

> *(1) Those parties to review the formula used to determine the DEAs on the B767 "flight crew schedule of allowances and port information" sheet and agreed that the formulae* (sic) *as it stands or as amended is appropriate to determine a figure which will fairly reimburse the average pilot for reasonable costs associating with the simulator duty in BKK.*

[20] This document referred to in the above quotation was referred to by the parties as "*the template"*.

[21] The respondent in seeking a copy of a template it believed was applied by Air New Zealand in such circumstances was, in the Authority's view, a sensible approach to resolving the impasse. The applicant says it was told the respondent had the template, when in fact it emerged at the Authority's investigation that the respondent in fact did not have it, but continued to seek it.

[22] The applicant says that it possessed just such a template and then produced a document which the Authority considers could be a template. However, the document is dated 15 August 1978. The relevance of the document over 25 years old has exercised the Authority's mind considerably. I asked myself why, if the applicant had such a document it considered relevant to establishing agreement between the parties, the applicant never volunteered it in the spirit of good faith and good will to assist a resolution.

[23] The Authority heard that the respondent's CEO, Mr O'Regan, stated clearly t the applicant that he was not mandated to offer more than $112.71 as the allowance for Bangkok. The applicant insists this is due to the severe strictures placed on Mr O'Regan by Air New Zealand management. In this context it has to be clearly stated that Mr O'Regan reports to the Board of Mount Cook Airline Limited. He does not report to, nor properly is he able to take directions from, either the Board or management of Air New Zealand. While the Authority accepts that the respondent is a wholly owned subsidiary of Air New Zealand, it takes the view that the integrity of directors of Mount Cook Airline Limited govern that entity in the best interests of the respondent.

[24] Turning to the issue of the rescinding of the earlier paid allowance of $130 for Bangkok, I have considered two issues. Firstly, the claim that the respondent made that this sum was calculated on flawed information, cannot be laid at the feet of the applicant. It paid what it now claims is an

inflated allowance. Maybe so, but it was the respondent who agreed to this quantum, and later sought to reduce it.

[25] The second consideration for the Authority was the reduction of the allowance originally scheduled for 31 March 2005 to $112.71, but which, due to a number of circumstances, was paid out until May 2005.

[26] The correspondence between the parties makes it quite clear that both were confident that the matter could be resolved before 31 March 2005. That confidence was, in fact, misplaced. However, the respondent continued to pay the $130 allowance in order to provide a further time period in which the parties could agree on the issue. It goes to credit that the respondent continued to maintain the higher rate for a longer period than envisaged while the parties sought agreement as required under clause 24.9 of the CEA. The email from John Davies to Mr O'Regan on 28 December 2004 states:

> *7. Any thoughts on what happens if not settled by 31 March 2005? I don't think we ever discussed this.*

[27] Having considered this issue at some length also, I am of the view that the failure of the applicant to discuss this specific issue prior to agreeing to the proposal put in the email from Mr O'Regan on 17 December 2004, the dispute between the parties may never have arisen.

The investigation meeting

[28] At the investigation meeting the Authority was assisted by senior representatives from both parties. I wish to record the Authority's appreciation of the evidence they provided. I should also like to thank counsel for their assistance on the day and also for their detailed, professional submissions.

Determination

[29] Addressing the issues set out above in this determination, the Authority makes the following findings:

- I find that the parties are obliged under clause 24.9 of the CEA to agree to a quantum in respect to the Bangkok allowances. They are directed to do so.

- I find the respondent may have misrepresented its position on its having an Air New Zealand template which was to have formed part of the basis for agreeing a quantum for the Bangkok allowance, but given the applicant's possession of a document it says is relevant to the issue, I find the scales are evenly balanced.

- I find that the CEA does not provide for a Bangkok allowance.

- I find the respondent is entitled to continue to require its pilots to depart for and train in Bangkok.

- I find the respondent is not in breach of the CEA in requiring and rostering pilots to depart for Bangkok. An agreement is in place and given that no further agreement has been reached, the 16 December 2004 agreement remains in force.

- The application for an order for compliance in respect of having the respondent cease requiring and rostering pilots to depart for Bangkok until a Bangkok allowance is agreed is declined.

- The application for an order for compliance requiring the respondent to apply the agreed process to determine and fix an agreed permanent Bangkok allowance is declined. As noted above, both parties are directed to resolve the quantum of that allowance.

- The application for a penalty for breach of the CEA is declined.

- The application for a penalty for the respondent's breach of good faith obligations is declined.

Costs

[30] Costs are reserved.

Paul Montgomery
Member of Employment Relations Authority