

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Mount Cook Airline Limited

AND NZ Airline Pilots Ass. Industrial Union of Workers

REPRESENTATIVES David France counsel for applicant
Richard McCabe counsel for respondent

MEMBER OF AUTHORITY Helen Doyle

INVESTIGATION MEETING Wednesday 26 July 2006

DATE OF DETERMINATION 28 July 2006

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, Mount Cook Airline Limited ("Mt Cook"), operates a domestic commercial airline.

[2] The respondent, New Zealand Air Line Pilots Association Inc, ("ALPA") is a duly incorporated union whose membership includes pilots who fly aircraft for Mt Cook.

[3] Mt Cook and ALPA were party to the NZALPA & Mt Cook Ltd collective employment agreement 2003-2005 ("the collective agreement") which covered all members of the respondent employed as pilots by Mt Cook.

[4] The collective agreement expired on 21 October 2005 and ALPA initiated bargaining for a new collective agreement on 22 August 2005.

[5] Mt Cook has applied to the Authority for reference for facilitation to assist in resolving difficulties in concluding the collective agreement.

[6] It relies in its application on three grounds under section 50C(1) of the Employment Relations Act 2000 as follows:

(b) that...

(i) the bargaining has been unduly protracted; and

(ii) extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement:

(c) that—

(i) in the course of the bargaining there has been 1 or more strikes or lockouts; and

(ii) the strikes or lockouts have been protracted:

(d) that—

(i) in the course of bargaining, a party has proposed a strike or lockout; and

(ii) the strike or lockout, if it were to occur, would be likely to affect the public interest substantially.

[7] Mr McCabe says in his submissions that ALPA does not oppose the application for referral to facilitation in principle but that the grounds for reference do not exist.

Application by ALPA to join Air New Zealand Limited to these proceedings and for an order that that Air New Zealand Limited attend facilitation

[8] I advised the parties at the commencement of the investigation meeting on 26 July 2006 that I did not consider there was a basis for the orders sought by ALPA in terms of the application for reference for facilitation. Air New Zealand Limited is not a party to the bargaining. Facilitation is a separate process. I advised the parties that I would not consider the application.

The Issues

[9] The process of facilitation provides assistance to those who are having serious difficulties in concluding a collective agreement. The Authority must not accept a reference for facilitation unless it is satisfied that one or more of the grounds in section 50 C (1) of the Employment Relations Act 2000 exist.

[10] In terms of the grounds relied on by Mt Cook therefore the issues are:

- Has bargaining between Mt Cook and ALPA been unduly protracted and have extensive efforts by the parties failed to resolve the difficulties?
- Have there been one or more strikes and have they been protracted?
- Has a party proposed a strike in the course of bargaining and if it were to occur would that strike be likely to affect the public interest substantially?

The Submissions

[11] I received very helpful submissions from both counsel which I have carefully considered and taken into account.

The Background to Bargaining

[12] The parties met on 25 and 29 August 2005 to negotiate a bargaining process agreement which was signed off on 29 August 2005.

[13] On 31 August ALPA sent to Mt Cook a log of claims which consisted of 6 general claims.

[14] The parties then met for a full days of bargaining on the following dates in 2005:

15, 16, 21 23 September,
4,13, 14,17,18 October,
2, 9,10,30 November,
1,7,19,20,22 December.

[15] Bargaining on financial aspects commenced around 17 October 2005 and Mt Cook tabled its first offer about pay claim in December 2005. The last day of bargaining in 2005 was 22 December.

[16] Bargaining recommenced on 1 February 2006.

[17] On 8 February 2006 ALPA served strike notices on Mt Cook and since that date have issued in excess of 145 strike notices although 34 have been withdrawn.

[18] The strike notices do not involve a complete refusal to work. They involve the following:

- A refusal to work on any day rostered as a day off in the roster as originally issued under the collective agreement.
- A refusal to work during any period of annual leave.
- A refusal to work other than as rostered except where after the pilot's duty time has commenced, an event makes it impossible or unsafe for the pilot to continue to work as originally rostered.
- A refusal to fly as part of a crew with any pilot who is working on a recall from annual leave, or on days rostered off as specified in the notice.

[19] There has been agreement to some technical issues. ALPA does not agree with Mt Cook that there are only two issues outstanding; pay claims and Bangkok travel.

[20] Mt Cook requested that the parties attend mediation and there was a half day mediation on 20 February 2006 following which the parties did meet again on 24 February 2006 and ALPA agreed to withdraw the strike notices for the period to 10 March 2006. Further bargaining took place on 26 and 28 February 2006.

[21] The parties met again on 8, 23, 24 and 28 March and endeavoured to reach agreement on the outstanding claims. On 28 March Mt Cook tabled a new offer and ALPA made a verbal offer.

[22] Since 28 March the parties have not met for bargaining but there have been three dates on which mediation took place. One mediation was with a mediator from the Department of Labour and two other mediations took place with a private mediator paid for by Mt Cook on 21 June and 24 July 2006.

[23] As at the date of the investigation meeting there had been 98 days of strike action and approximately 13,700 passengers affected as a result of flight cancellations. As at the date of the investigation meeting there were strike notices covering the period through until 18 August 2006 and there is no foreseeable end to the industrial action.

[24] The general manager of Mt Cook, Peter O'Regan said some days no Mt Cook flights have to be cancelled but on average three flights a day had been cancelled up to June 2006 as a result of the industrial action. From that period onward Mt Cook has been averaging seven or eight cancelled flights a day.

[25] The disruption is to air travel throughout New Zealand on Mt Cook aircraft.

Has bargaining between Mt Cook and ALPA been unduly protracted and have extensive efforts by the parties failed to resolve the difficulties?

[26] I heard evidence from Mr O'Regan and Adam Nicholson who is the advocate for the Mt Cook Airline pilots. Mr Nicholson has had considerable experience in bargaining for the pilots over a period of 18 years.

[27] Mr O'Regan and Mr Nicholson have different views on why there are difficulties in concluding a collective agreement.

[28] Mt Cook says that ALPA has not documented its position with respect to bargaining since 22 December 2005 so it does not know its current bargaining position.

[29] ALPA say that Mt Cook's parent company Air New Zealand Limited is influencing Mt Cook and making decisions with respect to the bargaining between itself and Mt Cook.

[30] Regardless of the reason for the difficulties bargaining has occurred over a period of 11 months without a collective agreement being concluded. The parties have met for the purpose of bargaining on 30 occasions. This includes the four occasions the parties met for mediation. The bargaining has occurred over a period which is longer than previous negotiations between the parties in 2000-2001 and 2003 and the parties have met on more occasions than during the previous two negotiations.

[31] I accept Mr Nicholson's evidence that there have been more protracted periods of bargaining in the aviation industry.

[32] From the evidence I heard I am satisfied, notwithstanding the reason in Mr McCabe's submissions for industry reasons for gaps in negotiation, that the bargaining in this matter has been unduly protracted.

[33] Mr McCabe has submitted that Mt Cook ceased to make extensive efforts to conclude a collective agreement from December 2005. This submission is not supported by the evidence that Mt Cook paid for a private mediator in June and July 2006. Mr O'Regan said that the company did this to try to change the dynamic. In my view this indicates that Mt Cook did continue to make efforts to conclude a collective agreement

[34] I am satisfied that there have been extensive efforts including mediation on four occasions but that the difficulties that have precluded the parties from entering into a collective agreement still exist. The evidence did not establish that there were any other unexplored avenues or other efforts the parties could make.

[35] I conclude that the first ground the applicant relies on set out in section 50C(1)(b) exists as the bargaining between the parties has been unduly protracted and extensive efforts including mediation have failed to resolve the differences between the parties.

Have there been one or more strikes and have they been protracted?

[36] At the date of the investigation meeting there has been 98 days of strike action over the period since 8 February 2006.

[37] The strike actions do not involve a complete withdrawal of labour and some days no flights have to be cancelled.

[38] There is no indication as to when or if ALPA will cease issuing strike notices. It continues to issue strike notices every 14 days. As at mid July 262 flights have had to be cancelled as a result of the strike action.

[39] A significant number of passengers have had flights disrupted even if just for a short period until they can be accommodated on another flight. As the industrial action continues more passengers are being disrupted on multiple occasions. Complaints have tripled and check-in-staff are dealing with more irate passengers.

[40] Mr McCabe submits that 13,700 passengers is a small percentage of the approximately 560,000 passengers Mt Cook carried over the five month period. Notwithstanding that, and the difficult weather conditions in winter which may have resulted in cancelled flights in any event, I still view rescheduling 13,700 passengers on other flights over that period as a significant effect of the strike.

[41] Given the nature of the strikes it is not possible for Mt Cook to predict what services will be affected as the flights are spread out randomly. Sometimes advance notice can not be given to passengers before they arrive to check in for their flights.

[42] In all the circumstances I am satisfied that the strikes have been protracted.

[43] I conclude that the second ground the applicant relies on set out in section 50C(1)(c) exists as there have been strikes and they have been protracted.

Has a party proposed a strike in the course of bargaining and if it were to occur would that strike be likely to affect the public interest substantially?

[44] This ground has to be considered in terms of section 50(C)(2) of the Employment Relations Act 2000 which provides that a strike or lockout is likely to affect the public interest substantially if ...

(a) the strike or lockout is likely to endanger the life, safety, or health of persons; or

(b) the strike or lockout is likely to disrupt social, environmental, or economic interests and the effects of the disruption are likely to be widespread, long-term, or irreversible.

[45] Mt Cook says in terms of this ground that the strike is likely to endanger the safety and health of ground staff who have been under considerable stress from dissatisfied and angry passengers.

[46] Mr O'Regan also said in his evidence about the potential for damage to the pilot and cabin-crew relationship in the long term. He said barriers to communication could arise because of frustration at the pilots' continued industrial action. Cabin crew suffer a loss of allowances when flights are cancelled and no doubt their plans get disrupted as well when a flight is cancelled at short notice.

[47] Mr O'Regan explained to me that overseas studies of air accidents have shown that in a number of cases the accidents could have been prevented if there had been better communication between cabin crew and pilots about issues of concern.

[48] He described this as something that has the potential to create a serious safety issue.

[49] That potential needs to be considered in terms of air travel.

[50] I am of the view that the potential for a communication barrier between cabin crew and pilots to create a serious safety issue may well have been sufficient for me to conclude that the ground under section 50C(d) exists. Mt Cook also rely on the likelihood for disruption for passengers in their travel at short notice both for social and business reasons.

[51] Both counsel recognised in their submissions that there would need to be likelihood of significant disruption. In *Stagecoach NZ Limited v NZ Tramways Union (Auckland Branch)* 21/4/05 J Wilson AA 146/05 there was an observation that *the Act clearly envisages a high level of disruption*. Mr McCabe referred to the Court of Appeal case of *Port Nelson Limited v Commerce Commission* [1996] 3 NZLR 554, 562 – 3 as to the meaning in law of *likely*.

[52] In terms of reaching a finding on this ground however I would have wanted to consider some more information about the international studies and hear some evidence from cabin crew and pilots.

[53] I do not wish to delay the release of this determination. There are two grounds that exist on which the Authority can accept the application for facilitation.

Determination

[54] I find that the grounds set out under section 50 C 1 (b) and (c) of the Employment Relations Act 2000 exist.

[55] Mt Cook Airline Limited and New Zealand Airlines Pilots Association Inc are referred under section 50B of the Employment Relations Act 2000 for facilitation to assist them in resolving difficulties in concluding the collective agreement they have been bargaining for.

[56] A member of the Employment Relations Authority will want to talk to the parties early next week to discuss facilitation arrangements and a support officer will arrange a telephone conference with counsel.

Costs

[57] I reserve the issue of costs.

Helen Doyle
Member of Employment Relations Authority