

BETWEEN                      NEW ZEALAND AIRLINE PILOTS  
ASSOCIATION INCORPORATED  
Applicant

AND                              AIR NEW ZEALAND LIMITED  
Respondent

Member of Authority:        Leon Robinson

Representatives:            Richard McCabe for Applicant  
Kevin Thompson for Respondent

Determination:                7 March 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant New Zealand Airline Pilots Association Incorporated ("ALPA") asks the Authority to assist the parties in relation to a dispute concerning the interpretation, application and operation of a collective employment agreement. It also has a claim for wage arrears consequent upon a resolution of the contended dispute in its favour.

[2] The parties were unable to resolve the problem between them by the use of mediation.

**The facts**

[3] The parties entered into a collective employment agreement entitled the *NZALPA Air New Zealand Limited Pilot's Collective Employment Agreement 22 August 2002 - 22 August 2004* ("the Collective").

[4] The Collective contains this clause in relation to the calculation of Roster Average Incentive Hours for Pilots:-

The following calculation steps are required to compute the roster average incentive hours for each base fleet rank.

- a) Calculate the number of available pilot days for the base fleet rank. The number of pilots available per base fleet rank to work the planned schedule will not include:
  - (i) Management Pilots;
  - (ii) Any pilot not employed by the company undergoing line training on company services;
  - (iii) Pilots rostered on an on call line duty; inclusive of unassigned days within the on call line;
  - (iv) Leave of any type;
  - (v) Supernumerary Crew;
  - (vi) Pilots undergoing a type rating course, a type rating revision course or is involved in a change of rank, up to and including the day prior to commencing flight duties as a member of a minimum operating crew;
  - (vii) Any pilots performing agreed company-approved duties unrelated to flying duties, e.g. aircraft delivery, award negotiations, attendance at company technical committees.
  
- b) Calculate the total incentive hours for the roster period for the fleet base rank, from scheduled block to block times according to 13.3.1.1, 13.3.1.2 and 13.3.1.3. All known flying for the roster will be included in this calculation, except for
  - (i) Flying rostered to Management Pilots;
  - (ii) Flying where the pilot is supernumerary
  - (iii) Flying where the pilot is undergoing a type rating course, a type rating revision course or is involved in a change of rank, and has yet to commence flying as a member of a minimum operating crew.
  
- c) Calculate the roster average incentive hours for the fleet rank base by dividing the total incentive hours calculated in step (b) by the number of effective pilot days calculated in step (a) and multiply by the number of days in the roster period, normally 28. The roster average incentive hours will then be rounded to the nearest minute.

[5] It is common ground that sub-clause 13.3.4(b) is the numerator of the calculation and that sub-clause 13.3.4(a) is the denominator. Using the numerator and the denominator, a figure representing the "roster average incentive hours for the fleet rank base" results.

[6] By letter dated 30 June 2005, Air New Zealand wrote to ALPA materially stating:-

- b) Pilot days: The Company applies clause 13.3.4(a) as a code in relation to the calculation of the number of available pilot days for the average incentive hours quotient. Items (i) to (vi) are specifically excluded from the "denominator". Item (vii) excludes from the calculation "any pilots performing agreed company-approved duties unrelated to flying duties eg aircraft delivery, award negotiations, attendance at company technical committees." (emphasis added).
  - i) Days attributed to simulator duties are included in the denominator as they are not covered in items (i) to (iv) and for the purposes of item (vii) are not "agreed company-approved duties unrelated to flying duties".

- ii) *Days attributed to admin days rostered for Contract management Group, rostering & Scheduling Committee, Health & Safety Committee and other company required admin duties. These are also included in the denominator as they are not covered in items (i) to (vi) and for the purposes of item (vii) are not "agreed company-approved duties unrelated to flying duties".*
- iii) *Days attributed to fleet refreshers and emergency procedures duties are also included in the denominator as they are not covered in items (i) to (vi) and for the purposes of item (vii) are not "agreed company-approved duties unrelated to flying duties".*
- iv) *Days attributed to non-type rating courses, including command courses, Crew Resource Management courses are also included in the denominator as they are not covered in items (i) to (vi) and for the purposes of item (vii) are not "agreed company-approved" duties unrelated to flying duties".*

*Days attributed to type rating courses are excluded from the denominator as they are covered in item (vi).*

### **The merits**

[7] This case is about Pilots' incentive pay. The Collective contains a description of it which I consider is no help at all in describing what it is although I have no doubt the parties understand it.

This is what it says:-

*13.3.1.1 Incentive pay is related to the productivity generated by the hours of flight time flown by individual pilots as part of an operating crew complement within a four-weekly roster period. In this regard flight time for incentive pay purposes is specified as the scheduled block to block times for normal operations and the actual flight time in the case of diversions or unscheduled technical stops. It also includes deadheading as provided for in 13.3.1.2, but excludes positioning (except as provided for in 13.3.3.14); circuit training, and time spent as supernumerary crew. The four-weekly salary is the appropriate rates of annual salary specified in 13.1 divided by 13.*

[8] The central issue concerns the correct operation of what I shall refer to as sub-clause (vii) from here. It provides:-

*(vii) Any pilots performing agreed company-approved duties unrelated to flying duties, e.g. aircraft delivery, award negotiations, attendance at company technical committees.*

[9] ALPA says that the four categories advised (as above) by Air New Zealand in its advice of 30 June 2005 are "agreed company-approved duties unrelated to flying duties". It further says the four categories are inconsistent with and contrary to the purpose of the incentive pay provisions. Next, ALPA says including the four categories in the denominator has the effect of significantly diminishing the roster average incentive hours. Lastly, it maintains that the improper inclusion of the said four categories results in arrears of wages for affected pilots. It asks the Authority to determine these issues.

[10] Air New Zealand says that the said categories are not and have never been, agreed company-approved duties unrelated to flying duties and as such, are correctly included in the denominator.

[11] I determine the more meritorious position by applying certain legal principles which the Courts have adopted as instructive. The law courts have applied principles referred to in some judgments as *Boat Park* principles, which are themselves adopted from another English judgment. These principles have been applied routinely in all New Zealand Courts including the Employment Court.

[12] These are helpful statements of the principles:-

*Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*

And:-

*The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.*

[13] I have heard much evidence from both the pilots and Air New Zealand about the complicated detail of pilots' work routines. The detail can become overwhelming. Although that detail evidences the significance of the issues to the parties, I resolve by relying on basic rules of interpretation. I do not enquire into matters of subjective intention, negotiations, and draft contracts believing the same to be unprincipled and inappropriate.

[14] The starting point for calculating the denominator is not expressly stated. 13.3.4(a) simply provides what is not to be included in the "*number of available pilot days*" instead of defining what is to be included. Air New Zealand says that everything is included unless it is excluded. That is a logic I support. There are specific exclusions numbered (i) through (vii). The dispute here is that the parties cannot agree about what is to be included to be excluded by operation of sub-clause (vii).

[15] I have reached the view that there are three operative aspects of the sub-clause (vii), "*duties unrelated to flying duties*", "*company approved*" and "*agreed*". These are all cumulative requirements. The duties sought to be included for exclusion must be *unrelated to flying duties*.

Next, the duty must be approved by the Company and finally, it must be agreed by the parties to be included for exclusion (put another way, agreed as coming within the ambit of sub-clause (vii)).

[16] The most contentious issue between the parties is the question of what precisely are "*duties unrelated to flying duties*". Examples of these are expressly stated in the Collective to be aircraft delivery, award negotiations, and attendance at company technical committees. Those examples are not exhaustive, but rather, are illustrative as specific instances of a general class.

[17] The Collective, despite having a definition section, does not define what "*flying duties*" are or what "*duties unrelated to flying duties*" are. The only distinction made in terms of pilot duties are those "*in the air*" and those "*on the ground*" as set out in Section 2 under the heading *Area and Incidence of Duty*:-

*The Company shall employ its pilots and the pilot shall serve the Company in the capacity of pilot whether in New Zealand or any other part of the world where the Company may from time to time be operating, or to or from which the Company's aircraft may require to be flown, and shall perform such other duties in the air and on the ground relating to his employment as a pilot as the Company may reasonably require.*

[18] As I understand the parties, it is not disputed that not all ground duties will necessarily be "*duties unrelated to flying duties*" and so "*duties unrelated to flying duties*" are not synonymous with ground duties.

[19] The dispute about classification of particular duties occupied much of the investigation meeting time. But I have decided I do not need to resolve this question, because I have concluded that ALPA does not satisfy the other cumulative requirements.

[20] The first requirement is that the particular duty must be company-approved. The qualification for "*duties unrelated to flying duties*" is that the company must approve such a classification in respect of a specific duty. There can be no uncertainty about the words, and it is clear on any interpretation, that "*company-approved*" means as decided by Air New Zealand. This is Air New Zealand's sole prerogative and it alone is the sole arbiter of that assessment. This I find is the meaning and effect of the use of the words "*company-approved*". The words were chosen by the parties and agreed by them.

[21] The second cumulative requirement is that a particular duty must be "*agreed*". There is no difficulty in interpreting what that word means. I conclude that both parties must agree between

them that a particular duty which is approved by the company as a "*duty unrelated to flying duties*" is to be included for the purposes of sub-clause (vii). Both parties must agree to include what is to be excluded. Once again the word "agreed" as with the others, was chosen by the parties and agreed by them.

[22] On this analysis, I record that my investigation has not provided evidence of any agreements or approvals. On the contrary, Air New Zealand's advice of 30 June 2006 makes it clear, there is no approval or agreement.

### **Determination**

[23] For the above reasons, **I now determine that there is no case for the declarations sought by ALPA and I decline to make any formal orders. So too is there no basis to conduct further investigation in any wage arrears claim and there will no orders accordingly.**

### **Recommendations**

[24] In so far as sub-clause (vii) or any identical provision continues to apply, what should now be clear is the practical operation of how the provision should operate. There are procedural mechanisms implied in the clause, which apparently, were not appreciated by the parties. I recommend the parties now take steps to formulate appropriate procedural mechanisms to facilitate the correct operation of sub-clause (vii) in relation to its various inherent cumulative requirements. They should now agree appropriate protocols.

[25] I am concerned about the degree of transparency surrounding the calculation of Roster Average Incentive Hours for Pilots. As with other employees, these Pilot employees are entitled to know how their remuneration has been calculated. There is no doubt that the calculation is sophisticated and complex. However, the process by which the incentive payments are calculated ought to be known to the Pilots and made available for them to access in real time. The calculation of their remuneration ought to be disclosed to them and be available to them for scrutiny. I recommend that Air New Zealand implement steps aimed at making available to Pilots the relevant calculations. I suggest that such steps will likely reduce the prospect of historical claims emerging or disputes arising in the future.

**Costs**

[26] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Thompson is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr McCabe is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson  
**Member of Employment Relations Authority**