IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 301/07
5095092

	BETWEEN	SERVICE AND FOOD WORKERS' UNION NGA RINGA TOTA INC Applicant
	AND	AIR NEW ZEALAND LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Simon Mitchell, Counsel for Applicant Andrew Caisley and Rachel Larmer, Counsel for Respondent
Investigation Meeting:	18 and 20 September 2007
Determination:	1 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The matter that has been investigated by the Authority is a dispute about the interpretation, application or operation of an employment agreement. The dispute is about the need for consent to be given by the applicant Service and Food Workers' Union Nga Ringa Tota Inc (the SFWU) before the respondent employer Air New Zealand Limited (ANZ) makes any change to shift work rosters. The particular rosters at the centre of the dispute are those currently applying to 12 members of the SFWU who are employed by ANZ at Auckland International Airport.

[2] The dispute affects the SFWU members who are employed full time at the airport as ground staff. They are engaged in ground handling services, which includes work in connection with check-in, baggage services, aircraft loading, aircraft cleaning, departure and arrival management, and turn coordination. That work is

within the coverage of a collective employment agreement for ground staff (the CEA) negotiated between ANZ and the SFWU. Two other unions also have collective agreements covering this work.

[3] The dispute has been in the making for over 2 years. Discontent by ANZ with the current shift arrangements was expressly noted in the CEA itself, when the agreement was concluded in April 2005. Schedule C1, a part of the CEA expressly concerned with "ACHIEVEMENT OF COMPETITIVE LABOUR COST TARGETS," contains the declaration that the targets of ANZ have not been achieved in this regard. The CEA, speaking in 2005, also declared that ANZ had given notice of its wish to discontinue the current agreed shift pattern at Auckland International Airport, although no date was given for when that was to happen. There is a statement in the CEA that unless certain corrective steps outlined in the agreement are successful, action by ANZ to discontinue the agreed shift pattern would proceed in accordance with the express requirements of the CEA.

[4] In April this year ANZ gave formal notice to the SFWU that the current shift work roster was to be withdrawn. ANZ proposed a different roster and advised of its wish to consult the union over a 2 month period before any change was made.

[5] The SFWU claims that ANZ is not complying with the CEA in the steps it is taking towards the change. ANZ contends that it is acting in accordance with the CEA.

[6] Although the dispute has been in gestation for several years, a recent company-wide reorganisation of ANZ's airport services has added considerable impetus to the earlier moves by ANZ towards changing the shift arrangements.

In-House Solution

[7] The reorganisation of airport services occurred after ANZ initiated negotiations in mid-2006 with other companies or consortiums interested in contracting to do this work under a long term agreement. When ANZ was close to concluding an outsourcing contract, it had discussions with the three unions representing most of the employees carrying out ground handling work. Those discussions eventually produced an *in-house solution*, as it became known, which was implemented in August this year. As a result, this work has not been contracted outside and will continue to be performed by ANZ employees.

[8] ANZ regards the in-house solution as being able to achieve at least the cost savings and other benefits offered by outsourcing the work. Part of the solution involves new rostering arrangements, new pay scales and a new business structure incorporating different positions and roles. Greater efficiency and economy is hoped to be achieved through implementing the new terms of employment, which are regarded by ANZ as a radical departure from those previously applying to employees performing airport services work.

[9] To maximise the effectiveness of the in-house solution ANZ wants it to apply to all ground handling staff, of which there are about 1800. This objective has not yet been attained because at the conclusion of the discussions with the three unions the SFWU did not agree to the necessary changes to the terms and conditions of its 300 or so members who were engaged in the work. The union representing the majority of ground staff employees, the New Zealand Amalgamated Engineering, Printing and manufacturing Union Inc (EPMU) agreed to the in-house solution and so did the Aviation and Marine Engineers Association (AMEA), a union which represents a smaller number. Those two unions agreed to change their collective agreements, to bring terms and conditions of employment into conformity with the solution.

[10] ANZ hopes it will eventually achieve optimum implementation for the in-house solution, through the bargaining process initiated in May this year by the SFWU for a new collective agreement with the company.

Notice of change of roster

[11] In these circumstances ANZ wrote to the SFWU on 2 April 2007 advising of its wish to change the shift patterns of SFWU members employed at Auckland International Airport. The need for the change was given as:

> *… to make best use of the flexibilities associated with the 80 hour flexible fortnight that is part of the in-house solution.*

[12] With this letter ANZ gave notice of its withdrawal of the current roster which has been in use for about 12 years. It is based on a 6 days on – 3 days off pattern. The company has proposed changing to a 5 days on - 2 days off roster, which is the general or standard pattern provided in the CEA for SFWU members. The current 6/2 pattern was agreed to in the CEA as an exception to the standard 5/2 pattern.

[13] During a 2 month consultation period following the giving of notice, ANZ had discussions with the SFWU about its proposals to change the rostering patterns. Consultation is required under the CEA so that the parties can explore options for an agreed outcome in relation to any changes proposed. As no agreement was reached, the implementation of the in-house solution in August made it necessary to begin running two rostering arrangements in tandem to accommodate SFWU members who have not agreed to participate in the solution. There are also some employees on individual employment agreements who have not agreed to it. The company wishes to modify SFWU members' terms and conditions in relation to rostering, so that as far as possible it can reduce the differences between the two rostering systems and increase the effectiveness of the in-house solution.

[14] In June 2007 counsel for the SFWU, Mr Mitchell, wrote to ANZ giving the company notice that the union disputed the ability of the employer to make the proposed roster changes. Mr Mitchell advised that although the union would continue to seek resolution of the dispute through consultation, legal proceedings would be taken in the event that the company attempted unilaterally to withdraw from the current roster arrangement and impose a different one.

[15] On 27 July 2007, action was commenced by the SFWU in the Authority to have this dispute resolved. Before the Authority began its investigation the parties undertook mediation. ANZ has agreed to defer taking any action to change the roster, until a determination has been issued by the Authority.

[16] To remedy the employment relationship problem, the SFWU has sought a declaration that ANZ does not have the contractual power to change the roster in the present circumstances. The union contends in particular that the changes proposed by ANZ to the roster cannot be shown to be for the purpose of meeting *the needs of the service*. This phrase is used in the CEA provisions that apply to the withdrawal of rosters by ANZ.

Relevant provisions of the ground staff CEA

[17] The CEA currently in force (known as the 'black book') was signed by the parties in April 2005. There is no issue about the coverage by the black book of the work SFWU members are carrying out for ANZ at Auckland International Airport.

[18] The black book is divided into sections which contain general terms and conditions of employment and, in a series of schedules, specific terms and conditions for various business units of ANZ. A worker covered by the CEA therefore has a mixture of general and specific terms and conditions governing his or her employment. Where there is any inconsistency or conflict between them, specific terms are expressed to prevail over general terms; Schedule A, clause 1.2.2.

[19] Clause 19 is a general term and condition of employment which provides that the ordinary hours of work are to consist of 5 shifts of 8 hours each, to be worked from Monday to Sunday inclusive. This is the arrangement of working hours ANZ has notified SFWU that it wants to revert to. Another general term or condition is clause 22, which provides for roster variation. Under this clause, where practicable, shifts are to rotate but, before changing the roster, ANZ is to consult the employees concerned. Also, shift rosters are to be published 14 days in advance.

[20] As a stated matter of exemption under clause 22.5, its requirements do not need to be met when *the needs of the service* render them impracticable.

[21] Schedule C provides the specific terms and conditions for the Airport Services Business Unit operating at Auckland, and also Wellington and Christchurch.

[22] In the introductory provisions of Schedule C, at C1 a number of matters are set out under the heading "ACHIEVEMENT OF COMPETITIVE LABOUR COST TARGETS." In this regard it is expressed that ANZ and the SFWU have agreed to work towards the achievement of the company's competitive labour cost targets at the various airports including Auckland International. The provisions of C1 are as below:

> *3. Passenger Services – Auckland International and Auckland Domestic Airports:*
>
> *The achievement of the competitive labour cost targets at these locations has yet to be achieved.*
>
> *The company has given notice that it wishes to discontinue the current agreed six on three off shift pattern at these locations.*
>
> *To ensure the achievement of the competitive labour cost targets the parties have agreed to:*
>
> - *immediately institute the Roster Review process to develop and implement solutions around the current shift pattern, under the principles outlined above.*

> - *these solutions to be implemented within two months from the date of settlement of this collective employment agreement.*
>
> *Subsequent to the outcomes of this Roster Review process and in the event that progress towards achieving the Competitive Labour cost targets are not satisfactory the company will discontinue the current agreed shift pattern under the terms of Schedule C3, of this Collective Agreement.*

[23] As stated at the end of clause 3 of C1 above, any discontinuance of the current agreed shift pattern must occur under the terms of C3 of the CEA. C3 sets out the following provisions:

> ***Withdrawal From Roster***
>
> *In the event the Company wishes to discontinue the current agreed shift pattern in any of the above areas, the Company will give not less than two months notice in writing to the Union or the employees' authorised bargaining agent of its intention to do so.*
>
> *In such circumstances, the Company will immediately consult with the Union or the employees' authorised bargaining agent for the purpose of negotiating an agreed shift pattern, to meet the needs of the service.*
>
> …
>
> *It is understood that in the event an agreement has not been reached on the expiry of the two months period, and subject to the above conditions having been applied, the Company may revert to the standard shift provisions contained in this agreement which shall become the agreed shift pattern and the provisions of Clause 19 shift work shall apply.*
>
> *In the event of no agreement being reached at the conclusion of the two month notice period the new roster shall be published 14 days in advance of its introduction.*

[24] Staying within the covers of the black book and reading only the words of its provisions, the extent of ANZ's ability to change the 6/3 rosters currently in place is clear to the Authority.

[25] The 6/3 rosters were incorporated into the CEA at Schedule C3, expressly as a specific exception to the 5/2 rosters that apply generally. In anticipation of change the parties also recorded in the CEA in April 2005, the desire of ANZ to discontinue the 6/3 shift pattern at Auckland International Airport. ANZ and the SFWU agreed and

recorded that in the event of its doing so, ANZ would comply with the terms of Schedule C3.

[26] C3 requires ANZ to give not less than two months notice in writing to the SFWU of its intention to discontinue the current agreed shift pattern. It has given that notice by letter dated 2 April 2007, sent by Mr Bruce Parton, the General Manager Domestic Airline of ANZ to Ms Jill Ovens, the Northern Regional Secretary of the SFWU.

[27] Having given that notice, ANZ was required to immediately consult with the SFWU for the purpose of negotiating an agreed shift pattern to meet the needs of the service. ANZ endeavoured to consult and the parties met a number of time for discussions.

[28] The last paragraph of C3 provides for the possibility that agreement is not able to be reached before the expiry of the two month notice/consultation period. In that event C3 provides that ANZ may revert to the standard shift provisions contained in the CEA. Those provisions at clause 19 require no more than five shifts of 8 hours per week to be worked.

[29] I find from the plain words used in this part of C3 that a reversion by ANZ to the standard shift provisions is not subject to any express or implied qualification that the "needs of the service" are to be met as the objective of change.

[30] Meeting the "needs of the service" was, I find, a qualification or proviso applying to consultation during the 2 month period of notice, in which the parties were to try and reach agreement about a different shift pattern.

[31] The determination of the Authority is that once ANZ has consulted with the SFWU over the 2 month notice period and has during that time endeavoured in good faith to negotiate an agreed shift pattern, if agreement is not reached ANZ can revert to the standard shift provisions of the agreement by the action of publishing a new roster. This must be done not less than 14 days in advance of the roster's introduction.

"Needs of the service"

[32] In my finding it is not necessary for the Authority to consider what the expression *needs of the service* means in the context of the roster variation provisions of the Collective Agreement. This is because the "needs of the service" is no longer an operative factor when there has been a failure to reach agreement during the two month consultation period. The phrase "needs of the service" does not migrate from where it is written in an earlier part of C3 to the final part, which allows ANZ to revert to standard shift provisions.

[33] If however contrary to my determination the "needs of the service" is a matter to be taken account of, I consider that *service* should be read as a reference, amongst other things, to the overall commercial operation of ANZ as a business enterprise.

[34] Mr Graham Buchanan, who has been employed by ANZ for many years and who works in a position under coverage of the CEA at Auckland International Airport, gave an example of changes to flight schedules or customer contracts giving rise to roster reviews to meet the needs of the service.

[35] The phrase *needs of the service* is used frequently throughout the various provisions of the Collective Agreement and in many places in context it may seem that *service* is a reference to a particular flight or operation, so that variations to rosters can be made to accommodate changes to the timing of these whenever they occur for one reason or another.

[36] It may be that the expression has been intended to have a different meaning in some provisions, although in principle a construction is to be sought that avoids that result. This case however is about the application or operation of Schedule C in particular and the construction of its provisions.

[37] Schedule C1 refers to the current agreed 6/3 shift pattern expressly in connection with the achievement of competitive labour cost targets at Auckland International Airport. In my view therefore the achievement of those commercial objectives is an aspect of the *service* and its needs. The "needs of the service" is wider than the requirement to meet airline flight timetables, at least in C3.

[38] The requirement for notice to be for a period as long as two months also suggests that the variations are not necessarily to be made only to meet the exigencies

of flight operations and flight scheduling, but are also able to take account of the wider need for ANZ to meet its commercial objectives so far as possible.

[39] The introductory words of Schedule C3 under which the change may be made, are;

> *The intention of the parties is to meet the special requirements of the Company and its shift employees in …..… Airport services Business Unit at Auckland Airport.*

[40] From the above provision it can clearly be seen that the requirements of the company may extend beyond retaining flexibility in changing shifts to meet operational requirements and schedule changes. It is also clear from the criteria at C4 that the needs of the employees themselves in maintaining a reasonable work/life balance are relevant in considering the needs of the service.

[41] In final submissions Mr Mitchell for the SFWU raised an issue about the adequacy of consultation by ANZ in the roster withdrawal process. This was not expressed to be part of the employment relationship problem in the amended application lodged by the union with the Authority. Ms Ovens in her statement of evidence referred to a number of meetings that have taken place with ANZ over the roster issue, but she did not complain that the consultation has been inadequate or in bad faith for some reason. The Authority has no evidence of that.

[42] Ms Oven has complained that the move by ANZ to change the rosters is a form of punishment for members of the union because they did not vote in favour of the in-house solution and have decided not to participate in it. She also claims ANZ has not suffered any financial crisis that might justify the changes sought and ANZ is acting without a good reason.

[43] ANZ presented its reasons to affected SFWU members in a power point display on 16 May 2007. The reasons expressed were generally that the change would help achieve conformity with the in-house solution and thereby generate cost savings. The company considers it will benefit in those and other ways from the change. I consider ANZ has not acted capriciously but has genuine reasons for wanting the change. From an employer's point of view, those are natural and compelling reasons which spring from the decision not to outsource ground handling services.

[44] The law is clear that an employer does not need to be in a state of financial crisis before it makes change of the sort ANZ seeks. As was stated by the Court of Appeal in *G N Hale & Sons Ltd v. Wellington etc Caretakers etc IUOW* [1990] 2 NZILR 1079 at 1084, whether or not the business is going to the wall, an employer is entitled to make it's business more efficient by re-organisation or other cost saving steps.

Determination

[45] The determination of the Authority is therefore that ANZ does have the contractual power to change the roster in the circumstances presented by ANZ and the SFWU. It can do so in the absence of agreement by the union, provided it has consulted in the 2 month period following the giving of notice of the change required.

[46] The remedies sought on behalf of the SFWU are therefore declined.

Costs

[47] Generally parties bringing a dispute may be expected to bear their own costs, but as the investigation extended to 2 other matters which are to be determined separately the question of costs will be reserved in this case. If the parties are unable to reach agreement, application can be made to the Authority by memorandum in the usual way.

A Dumbleton
Member of the Employment Relations Authority