

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 462/09
5158942

BETWEEN NEW ZEALAND AIR LINE
 PILOTS' ASSOCIATION INC
 Applicant

AND MOUNT COOK AIRLINE
 LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Simon Dench, counsel for Applicant
 Kevin Thompson, counsel for Respondent

Investigation Meeting: 8 December 2009

Determination: 18 December 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant New Zealand Air Line Pilots' Association Inc (NZALPA) has asked the Authority to investigate and determine a claim that the respondent Mount Cook Airline Limited (Mt Cook) has breached the Holidays Act 2003. The union's claim arises from payment the airline employer is making or has made of salary or wages due to its pilots for work performed on public holidays.

[2] Before embarking on its investigation the Authority was satisfied that because of the nature of the parties' dispute the use of mediation was unlikely to contribute constructively to their resolving this employment relationship problem. Accordingly

the parties were not directed to undertake mediation, although it is acknowledged that Mt Cook had been willing to engage in that process.

[3] To apply the Supreme Court decision in *NZALPA v. Air New Zealand Limited* [2007] 1 ERNZ 884, Mt Cook commenced paying pilots at the rate of time and a half for all work performed by them on public holidays, as the Court had held was a requirement of s 50 of the Holidays Act. As part of the exercise arrears were calculated for payment to those pilots who had worked on any public holiday after the Holidays Act had come into force on 1 April 2004.

[4] The arrears were intended to be paid on the basis that pilots affected by the Court's decision would receive an extra half day's pay for their work on a public holiday, regardless of how many hours had actually been worked on that holiday.

[5] To calculate the arrears the quantum of "*relevant daily pay*" (RDP) as defined by s 9(1) of the Holidays Act had also to be determined. Section 9(1) of the Holidays Act provides:

a. Meaning of relevant daily pay

(1) *In this Act, unless the context otherwise requires, **relevant daily pay**, for the purposes of calculating payment for a public holiday, alternative holiday, sick leave, or bereavement leave, -*

(a) *means the amount of pay that the employee would have received had the employee worked on the day concerned;...*

[6] Mt Cook has calculated the pay for a whole day by applying a divisor of 365 to a pilot's annual salary specified in the employment agreement. The quotient has then been halved to give the value of a half day's pay.

[7] NZALPA disputes that 365 is the correct divisor for calculating RDP under the Holidays Act and contends it is 206.

[8] To avoid confusion I refer in this determination to the competing divisors only as 365 and 206, although I am aware that the airline's calculations begin by using 364 before a correction is made to achieve a quotient based on 365 days in a year. I am further aware that 235 is contended by the union to be a correct divisor as an alternative to 206 and that there is a reasoned basis for that default substitute, for the event the latter divisor is not held to be correct.

[9] NZALPA seeks a determination that Mt Cook's use of 365 to calculate one day's pay for the purpose of establishing RDP is incorrect and constitutes a breach of s 9 of the Holidays Act. The union seeks a determination that the correct divisor is 206.

[10] The union seeks an order requiring Mt Cook to apply 206 as the divisor and to pay pilots affected by the Supreme Court's decision accordingly. An order is sought requiring Mt Cook to pay arrears in the correct amount to all pilots for all public holidays on which they have worked since 1 April 2004, and interest is sought on the arrears.

Mt Cook's case

[11] Mr Paul Crooke the airline's HR Manager gave the employer's evidence. He referred the Authority to the collective agreement which Mt Cook and NZALPA were parties to. It had come into effect in late 2006 and was expressed to expire on 11 October 2008. Since that date, by operation of s 53 of the Employment Relations Act 2000, the collective agreement has continued to bind the parties and pilots who were members of NZALPA.

[12] Mr Crooke's evidence was that Mt Cook operates its business as a domestic airline on 365 days of the year and under the collective agreement and associated rostering arrangements it is possible for pilots to be rostered to perform work on any day of the week, month or year. Mr Crooke said that although in practice pilots are not asked to and would not be able to work on every day of the year, the provisions of the employment agreement in relation to paid leave were negotiated as a *quid pro quo* for pilots making themselves available to work on any day of the year, if required.

[13] Mr Crooke explained that under the collective agreement pilots are paid an annual salary, and he said:

The annual salary amount is currently paid regardless of the number of days which are worked by a pilot in any particular fortnight, or in any given year.

[14] And:

For the normal work cycle, pilots are paid the same amount for each and every day, regardless of whether the day is worked or not and regardless of how many days in the fortnightly roster are worked.

[15] Mr Crooke explained that the collective agreement limited the amount of work that can be rostered for a pilot to a maximum of nine days in each fortnight, although by agreement a pilot may work additional days. Further he said the roster is unpredictable and he explained that a pilot will not normally know in advance of the publication of the roster what duties he or she will be performing, or which days will be worked or not worked, or how many days will be worked.

[16] Further Mr Crooke explained that the payment of the same amount for each and every day regardless of whether the day is worked or not, and regardless of how many days in the fortnightly roster are to be worked, overcomes the inherent difficulty in not knowing, in advance, whether a particular day or days would be worked by a pilot and avoids the consequences of pilots' pay being a variable according the number of days actually worked.

[17] Pilots, Mr Crooke said, for many years had been paid and had accepted payment in this way without to his knowledge comment or complaint.

[18] His evidence (and submission) was also:

Therefore, to answer the inquiry under s.9(1) [Holidays Act], the amount the pilot would have received had the pilot worked on the day concerned is his/her annual salary amount divided by 365, although it is paid over 364 days (there is no dispute about the adjustment that is made for this difference of 1 day).

[19] And:

In other words, the pilot is paid the same amount of pay for a day when the pilot works as for a day when the pilot does not work but could have been rostered to work. That amount is predictable.

[20] Mr Crooke summarised by saying:

... the point of all of this is that, as a matter of fact, the pay for pilots is calculated and paid for each day of the year, irrespective of whether the day is worked or not worked.

[21] And he concluded with the following:

To come back to the inquiry in this case as to RDP for a public holiday, the amount of pay that a pilot would have received had the

pilot worked on the day concerned is the same amount that the pilot would have received had the pilot not worked on the day concerned.

NZALPA's case

[22] NZALPA had little ability to present evidence relevant to the dispute, as the union has not been the party responsible for making payroll decisions involving RDP. The employer has had that responsibility.

[23] The evidence given by Mr Rick Mirkin, Executive Director of NZALPA, was therefore limited to matters more of submission. After explaining his many years experience of payroll administration in large '24/7' operations Mr Mirkin said in evidence:

Mt Cook says that 1/364 is the correct divisor (fraction) for calculating a day's pay for a pilot's annual salary for the purposes of relevant daily pay because pilots are paid an annual salary covering every day of the year. In my experience, this is an extraordinary and unprecedented proposition. The value of a day's pay is invariably calculated (for numerous purposes) in terms of the standard number of days worked by an employee as opposed to notional total calendar days which include days that are seldom if ever worked.

Determination

[24] The thorough and extensive submissions of counsel for NZALPA, Mr Dench, were not able to persuade me that Mt Cook's approach to determining RDP leads to the Holidays Act being breached by the employer.

[25] NZALPA attempted to portray Mt Cook's approach as being that "*as pilots are paid an annual salary, they are therefore paid for working every day of the year*" (para.7 of union's submissions). NZALPA submitted that pilots are not paid for working every day of the year but for working "*206 days work in a year*" (para.8 of union's submissions).

[26] At para.16 of NZALPA's submissions the same was repeated:

NZALPA's fundamental position, therefore, is that pilots' salaries are not in fact paid for working 365 days of the year. They are paid for working 206 days.

[27] This view of the employer's approach is wrong I find. It has not been contended by Mt Cook that pilots are paid, even notionally, for working every day of the year.

[28] Mr Crooke's evidence from the passages reproduced above is quite clear in this regard. He said that as a matter of fact the pay for pilots is calculated and paid for each day of the year, irrespective of whether the day is worked or not worked. It is a misstatement of the employer's position to say that pilots are paid for working every day of the year, or are paid as if they work 365 days in a year. The union seems to have advanced that argument to expose a perceived contradiction with a requirement that pilots may only work 206 days of the year, not 365. Off the springboard created by the union its argument then proceeds that 206 must be the divisor for calculating RDP, because under the employment agreement 206 is an element of an equation used for valuing a day's work.

[29] That is so, but expressly for particular purposes which do not include calculating RDP. The agreement provides that 206 is to be used as the divisor of a pilot's salary for the purpose of calculating payment for an extra day's work. And, 206 is also to be used in this way for calculating a daily allowance payable when pilots operate an aircraft in a higher equipment category than normally flown.

[30] I do not agree with the union's submission at para.9(e) that because of the two particular instances where the employment agreement requires a divisor of 206 to be applied;

..... the parties have had contractual agreement that the value of a day's work was 1/206th of a pilot's salary.

[31] I find that 1/206th is intended for purposes clearly defined in the employment agreement and is not expressed or is even necessarily or reasonably implied to be for the purposes of calculating RDP.

[32] Those purposes – payment for an extra day's work and operating a higher equipment category – were defined in the employment agreement several years before the concept of RDP was even part of the law under the Holidays Act. Since the introduction of RDP in 2003 subsequent collective agreements negotiated between the parties can be taken to have been settled with knowledge of the statutory concept of

RDP and the requirements for it to be applied, yet the use of 206 remains confined to the purposes expressed.

[33] As Mr Dench pointed out in his submissions, the focus of this case is pilots who work on a public holiday. He submitted that under s 50 of the Holidays Act, Mt Cook must pay the pilots one and a half times their “*relevant daily pay*” for the time worked on a public holiday. That is correct. Mr Dench also acknowledged that it is s 50 in its application that creates the problem in this case.

[34] He made reference (at para.38(c)) to “*the suggestion that pilots are paid for working every day of the year*” and submitted that this suggestion was belied by the fact that pilots cannot work 365 days in a year and must be paid for any additional day’s work above 206 at the rate of 1/206th of their annual salaries.

[35] I am unable to find that Mt Cook has ever stated that its approach is to pay pilots for working every day of the year. Neither has Mt Cook in my view relied on “*a fiction*” that pilots work every day. If there is such a fiction it is not one that Mt Cook has invoked to calculate RDP. The airline’s approach has been to pay the same amount for each day of the year. That is not the same as paying them for working 365 days, or the same as paying them as if they were working 365 days. It is relevant that under s 9(1) RDP is defined in terms of pay that would have been “*received*” not pay that would have been earned or worked for.

[36] NZALPA’s views as given by Mr Mirkin that Mt Cook’s use of 365 as a divisor was extraordinary and unprecedented, and that invariably a day’s pay is calculated from the standard number of days worked by an employee, do not take account of two in particular situations Mr Mirkin was apparently unaware of. First, it can be inferred from the Court’s judgment in *Wignall v Air NZ* [1998] 3 ERNZ 152 and the terms and conditions of the collective agreement under consideration in that case, that a divisor of 365 was applied (by agreement of the parties) to annual salary to obtain a “*daily rate*” of pay for an airline pilot.

[37] Second, in the NZALPA – Air New Zealand Limited Collective Employment Agreement of 2008 the union agreed, at clause 16.4.2.2 that a divisor of 365 (actually 364) was appropriate for determining “*a daily salary amount*” when calculating time and a half for work on a public holiday.

[38] Even if the use of 365 (or 364) as a divisor could be regarded as unusual or exceptional in 24/7 operations, that of itself does not mean the methodology is contrary to the Holidays Act. Such use is clearly not unprecedented as Mr Mirkin claimed was the case.

[39] I find that Mt Cook has a clear rationale for the way it calculates daily pay for its pilots, based on their availability or readiness to work on any day of the year and not based on the days actually worked. The rationale behind the Airline's method is a fact and this case should be about identifying that method rather than an exercise in testing the logic of it.

Determination

[40] I am in agreement with the submissions made by Mr Thompson, counsel for Mt Cook, and find that the airline is paying pilots at least the minimum amount required by s 50 of the Holidays Act when a pilot has worked on a public holiday.

[41] I find that the approach taken by Mt Cook in calculating RDP by looking at a day's pay as being 1/365th of the pilot's salary is permitted under the Holidays Act and does not lead to any breach of that legislation.

Costs

[42] Costs are reserved. Any application by Mt Cook may be made in writing before 25 January 2010. Any reply from NZALPA may be made before 8 February 2010.