IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 67/10
5155821

	BETWEEN	NEW ZEALAND AIR LINE PILOTS' ASSOCIATION INC Applicant
	AND	AIR NELSON LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Richard McCabe, Counsel for Applicant David France, Counsel for Respondent
Investigation Meeting:	22 September 2009 at Auckland
Determination:	16 February 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (ALPA) alleges that the employer of some of its members, the respondent (Air Nelson), has breached the collective employment agreement between the parties. That collective employment agreement came into force on 11 December 2008 and makes provision for pilots to receive two days off being a consecutive Saturday and Sunday at least once in every 28 day roster. It is the relationship between that provision and a subsequent provision which makes arrangements for the allocation of alternative holidays where a pilot has worked on a public holiday that is the focus of the dispute between the parties.

[2] ALPA says that the approach Air Nelson takes to this matter has the effect of *killing two birds with one stone* in the sense that, when a pilot makes an alternative holiday request for a Saturday and that is granted, Air Nelson says that, in addition to having satisfied the requirements of the agreement for alternative holiday requests for

that pilot, it has also provided the pilot with a consecutive Saturday and Sunday off for that roster period, thus complying with that provision as well.

[3] A determination is sought that Air Nelson is rostering its pilots in breach of clause 6.1.7.2(g) together with an order requiring Air Nelson to comply with that clause, a penalty and costs.

[4] Air Nelson's position is that its interpretation of the relevant provisions in the applicable collective employment agreement is correct and that a proper construction of the relevant provisions results in the interpretation that Air Nelson has always given them.

The relevant provisions

[5] It is appropriate to set out in full the relevant provisions:

(a) In clause 3.4, the expression *day off* is defined. For our purposes, the important part of the definition is as follows: *where two consecutive days off are rostered the period free of all duties shall be not less than 58 consecutive hours*.

(b) Clause 4 has two relevant provisions as follows:

> *4.2.3.2.1 The roster shall provide a minimum of 8 days off for the employee during each 28 day roster period.*
>
> *4.2.3.2.3 The company shall roster each pilot two days off on a weekend (a consecutive Saturday and Sunday) … at least once in every 28 day roster.*

(c) Clause 6 contains the detailed provision for allocating alternative holidays to a pilot where he or she has worked on a public holiday:

> *6.1.7.2 The following mechanism for allocating alternative holidays shall apply (which shall constitute agreement between the pilot and the company on when an alternative holiday is to be taken):*
>
> *(a) The pilot may request to take up to one alternative holiday per roster. Requests must be in writing and submitted within the timeframe required for roster requests for specific day(s) off. Only written request*

received within the required timeframe will be considered by the company.

(b) Alternative holiday requests shall have priority over and above roster requests.

(c) Requests may not be unreasonably declined by the company. In the event that a request is declined, a pilot shall be provided with a detailed explanation as to the reason(s) why.

(d) In the event that a pilot's alternative holiday request is declined, on the next occasion the pilot makes an alternative holiday request, that request shall have priority ("a priority request").

(e) In the event that more than one pilot requests to take an alternative holiday on the same date, priority requests shall be considered first, in order of seniority. Only after all priority requests have been considered, shall any remaining (non priority) requests be considered, in seniority order. A non priority request shall not be granted ahead of a priority request.

(f) The alternative holiday shall have two consecutive days off rostered after it (i.e. the pilot shall be rostered three days free of duty), except where the pilot requests otherwise.

(g) If a weekend off (a consecutive Saturday and Sunday) is achieved as a result of an alternative holiday request for a Friday, the weekend off requirement under 4.2.3.2.3 is deemed to have been satisfied.

6.1.7.3 The alternative holiday must be taken on a day that would otherwise be a working day for the pilot and must be a whole working day off work for the pilot, regardless of the amount of time the pilot actually works on the public holiday.

Discussion

[6] It is clear from the foregoing provisions that the effect of the collective employment agreement (the agreement) is to provide for two separate kinds of rostered time off, the first a weekend off once every 28 day roster and the second the ability for pilots to access an alternative holiday to replace days worked on a public holiday. It is the relationship between those two provisions intersecting that is the nub of this dispute. Of particular importance is the effect of clause 6.1.7.2(g) which

explicitly provides that where an alternative holiday request is made for a Friday, the weekend off provision is specifically deemed to be satisfied. This is because the way the agreement works is to provide the two succeeding days to the day nominated as the alternative holiday request.

[7] The problem arises when the day nominated as the alternative holiday request is not a Friday but a Saturday. In those circumstances, the two consecutive days thereafter will be the Sunday and the Monday. ALPA draws my attention to the fact that, during the negotiations of the agreement in 2008, Air Nelson floated a proposal (which was not accepted) which would have amended subpara.(g) to relate to an alternative holiday request for a Friday **or a Saturday**. It is suggested that the very fact Air Nelson proposed this amendment is evidence for the view that the company believed, at the very least, there was a lack of clarity about its ability to deal with the matter in the way it wanted with the present wording in subpara.(g).

[8] Conversely, Air Nelson argues that subpara.(g) does not exclude the prospect of other examples of the same principles applying with different days and that, in any event, subpara.(g) *does not exclude an alternative holiday, taken on a Saturday, followed by the required two days off, from meeting the requirements of …* the agreement. ALPA places emphasis on the effect of the Holidays Act and the effect of the agreement itself, both of which require that the alternative holiday must be an otherwise working day. I address these submissions in the following way.

[9] First, I accept the submission of Air Nelson that when a pilot applies for an alternative holiday on a particular day, he or she must be expecting that day to be *otherwise a working day* or else there would be no point whatever in seeking that day as an alternative holiday. Second, it is I think common ground that the industry is effectively a seven day a week, 365 days a year operation and the very fact that the parties have sought to negotiate in good faith with each other to provide adequate time off for pilots is testament to that reality. It seems to me to follow that in principle, in industries such as the airline industry, all days are working days. Thirdly, and finally, it seems to me the logical position is that an alternative holiday request which is granted is, by definition, additional to the minimum entitlement that any pilot has in any roster period. That minimum entitlement period is, of course, eight days pursuant to the provision in clause 4.2.3.2.1.

[10] However, I am not attracted by Air Nelson's argument that the way that the pilot roster is built by Air Nelson somehow confirms the accuracy of Air Nelson's interpretation of the provision. That seems to me to be a self-serving submission, with respect; the fact that Air Nelson builds its roster in a particular way does not demonstrate that its interpretation of the agreement is correct. The boot should be on the other foot and Air Nelson should be required to demonstrate its interpretation is correct before the roster build is undertaken.

Determination

[11] For the foregoing reasons, I am not persuaded that ALPA has made out its case for breach of the agreement. In my opinion, Air Nelson is entitled to interpret the agreement in the way it does and the effect of that interpretation is in accordance with the explicit terms of the agreement.

[12] ALPA's application is accordingly declined.

Costs

[13] Costs are reserved.

James Crichton
Member of the Employment Relations Authority