

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 100
5416557

BETWEEN NEW ZEALAND AIRLINE
 PILOTS' ASSOCIATION
 INCORPORATED
 Applicant

AND MOUNT COOK AIRLINES
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Richard McCabe, Counsel for Applicant
 David France, Counsel for Respondent

Investigation Meeting: 14 May 2013 at Christchurch

Submissions received: At the investigation meeting

Determination: 5 June 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application for an interim injunction restraining Mount Cook Airlines Limited (Mt Cook) from implementing a new rostering system as the applicant, New Zealand Airline Pilots Association Incorporated (NZALPA), anticipates it will breach the parties' collective employment agreement (CEA).

[2] Mt Cook contends the proposed system is compliant with the CEA.

Background

[3] Mt Cook and NZALPA are parties to a CEA that came into force on 11 October 2012.

[4] The CEA contains a provision that provides:

The company shall be entitled to require its pilots to report for duty and to perform flying and other duties in connection with the operation of the company aircraft at any time and from time to time, whether by day or night, and whether before 8am or after 5pm on any day, without payment of any monies in respect of overtime, shift work, penal rates and so forth other than those prescribed in this agreement

...

[5] There are then various clauses which temper the above right. One of those is a clause imported from previous documents and which has remained unchanged for some time. It reads:

4.2 Requests for a specified day or days free of duty shall be granted wherever possible. Each such request granted forfeits the pilot's right to a duty free period for that roster being given in two consecutive days as provided in sub-clause 4.1. Where such requests are granted the pilot may nominate up to two of the days so granted as inviolable and, where rostering permits, they shall be shown on the roster as such.

[6] For some years Mt Cook has operated one aircraft type from one base (Christchurch). This is changing with the introduction of a second aircraft type and another crew base.

[7] The current rostering system sees rosters developed by a computer programme known as Geneva. One of the components which populates the roster once it is developed by the computerised product is a manual system which allows pilots to ask for specific days off in a request book. Pilots can similarly request specific overnight duties, early or late starts etc., and requests are often facilitated by direct discussion between rosterers and pilots.

[8] The Geneva version used by Mt Cook is an old one that will no longer receive provider support. This decision left Mt Cook with two options. The first was to transition to a newer version of Geneva at considerable cost. The second was to use the system its parent company, Air New Zealand, uses for jet pilots within the group at little cost. Mount Cook chose the latter.

[9] The new system sees roster requests addressed through a points based electronic process. Pilots are given 100 points per roster to bid for days off, overnights and specific duties, and success is determined by an algorithm which considers the size of the bid and previous satisfaction levels.

[10] It is NZALPA's contention the new system will result in pilots being unable to achieve the current level of request satisfaction. That implies Mt Cook will no longer be granting requests *wherever possible* and means it will be in breach of the collective. This contention is based on the anecdotal evidence of flight attendants who have been using the new system for approximately a year.

[11] Mt Cook contends the proposed system is completely compliant with the collective.

Determination

[12] As both parties said, the law is well settled in respect of applications such as this. The Authority is required to determine:

- (a) Is there an arguable case;
- (b) Does the balance of convenience favours the granting of the orders sought;
- (c) Whether there are other adequate remedies; and
- (d) What does the overall justice require?

[13] It is, in my view, easy to conclude there is an arguable case. Essentially the argument is the algorithm will no longer grant requests that would previously have been facilitated. However the claim is supported with anecdotal evidence from flight attendants and is, to some extent, speculative. To determine whether or not it has validity will require an examination of how the algorithm works. That will, in turn, determine whether or not Mt Cook will continue to grant requests *wherever possible*.

[14] While there was a brief summary of how the algorithm works, the evidence was superficial and lacked the detail required for a conclusion. That comment should not, however, be treated as a criticism – it is simply the nature of an interim application. There is also evidence other factors may impinge on Mt Cook's ability to grant requests such as the effect of a doubling in the number of both aircraft type and bases with further issues arising from changes in patronage both recent and forecast. Again the evidence alludes to these being issues but given the nature of an interim application questions remain. Finally there are questions about other contractual obligations and, in particular, whether or not there has been sufficient consultation

and discussion about the introduction of the new system. These questions can only be answered through a substantive investigation where the evidence can be fully tested.

[15] Whilst out of turn, I next address the question of whether or not there are adequate alternate remedies. Alternate recourse normally lies with damages but both parties have convincingly argued this is not an option. For the pilots it is a question of work / life balance and, assuming their claim has validity, it is difficult to place a monetary value on that they contend they will lose. Similarly Mt Cook gave evidence of deficiencies in their current system which would preclude it being able to quantify any loss that may result from an initial grant of this application should it not be sustained after a substantive investigation. Both parties have convinced me there is a lack of alternate remedies.

[16] That leads to the balance of convenience. This, I conclude, heavily favours Mt Cook.

[17] It is the pilots' contention there will be a diminution in their ability to influence which days are rostered off but that does not mean they will not continue to receive an appropriate number of days off. There is also a large question over the extent of inconvenience should the claim be substantiated and the fact that while the case is arguable, it falls short of proven. I then note NZALPS's concession it could have pursued the matter earlier and finally the fact the substantive hearing has already been scheduled and is not that distant. In other words, and assuming the claim has validity, any inconvenience the pilots may suffer is both temporary and may be relatively minor.

[18] On the other hand Mt Cook has already commenced implementing the new system. This has been accepted by the pilots to the extent they had, by the date of hearing, made requests for the first roster under the new system. Mt Cook has also disbanded the capability required to operate the previous system. It would be placed in an invidious position should it have to reconstruct that which no longer exists and for which required external support is no longer available. Add to that the fact that while the pilots will at least continue to receive the required days off, Mt Cook would be placed in a position that should it ultimately be proved right, it could suffer a loss for which there is no recourse.

[19] When I balance the above, and especially the conclusions in respect of the balance of convenience, I decline NZALPS's request for interim relief. This is a matter best addressed comprehensively and that can occur in the not too distant future.

[20] Costs are reserved.

Mike Loftus

Member of the Employment Relations Authority