

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 158  
5380308

BETWEEN            NEW ZEALAND AIRLINE  
                         PILOTS ASSOCIATION  
                         INCORPORATED  
                         Applicant

AND                   AIRWAYS CORPORATION OF  
                         NEW ZEALAND LIMITED  
                         Respondent

Member of Authority:    Michele Ryan

Representatives:        Richard McCabe, Counsel for the Applicant  
                              Susan Hornsby-Geluk, Counsel for the Respondent

Investigation Meeting:    18 June 2013 at Wellington

Submissions Received:    On the day of the investigation meeting

Determination:            10 December 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] From 1998 onwards provisions regarding 'Rest Periods' for air traffic controllers on rostered shifts have been replicated in various collective agreements between the New Zealand Airline Pilots Association Incorporated (ALPA) and Airways Corporation of New Zealand Limited (Airways).

[2] ALPA disputes the way Airway interprets and applies clause 29.8.3 - one of a group of provisions that concern the management of Rest Periods for airway traffic controllers engaged in rostered shifts. ALPA claims that Airways has and continues to breach clause 29.8.3.

[3] Clause 29.8 provides for Rest Periods in the context of shift work. It sets out an entitlement to Rest Periods of no less than 10 minutes. It provides, amongst other things, three methods as to how Rest Periods may be achieved, as follows:

- formal rostering of a rest period in the roster as dictated by the availability of relief staff.
- combining two independently operating positions into one position for the duration of the rest period (known as consolidation).
- leaving a position unstaffed for the duration of the rest period (de-manning).

[4] The provision at issue, clause 29.8.3 sets out how Rest Periods should be managed in a specific set of circumstances. It states the following:

*During that part of the day when the function of each operating position at Auckland, Wellington and Christchurch is essential to the integrity of the unit and work cannot be reasonably off-loaded, provision shall be made and the roster covered for relief employee(s) to be available.*

[5] ALPA says that Airways refuses to provide relief staff to cover air traffic controllers' Rest Periods in accordance with clause 29.8.3.

[6] By way of illustration, on behalf of ALPA, Mr Jeremy Thompson pointed to specific times in the morning and afternoon at Airways' Wellington Terminal and says the functioning of the air traffic controllers are essential to the integrity of the unit at these busy times. He has concerns that in circumstances where an air traffic controller is unable to continue operating, remaining air traffic controllers within the unit are required to perform the work without rest periods.

[7] Mr Thompson also refers also to a "solo" night shift at the Wellington Terminal/unit and says in the absence of an available relief employee there are no suitably licensed air traffic controllers in which an incumbent air traffic controller can reasonably off-load his or her work, and is therefore prevented from taking a Rest Period.

[8] ALPA asks the Authority to find that Airways is in breach of the collective agreement and requests the Authority to order Airways to comply with its obligations as set out at clause 29.8.3.

[9] Airways denies that it is in breach of clause 29.8.3. It says that its obligation to provide relief staff in the context of providing Rest Periods is contingent on the presence of both of two conditions expressed in 29.8.3 as follows:

- that when the function of each operating position at Auckland, Wellington and Christchurch is essential to the integrity of the unit; and
- work cannot be reasonably off-loaded.

[10] Mr Paul Fallows, Head of Service Delivery for Airways Corporation, strongly refutes any inference that the genesis of ALPA's claim rests in safety concerns. He says the dispute between the parties is about service levels.

[11] Mr Fallows reports that Airways is unaware of any circumstances where air traffic controllers have not been able to take Rest Periods<sup>1</sup>. He refers to the examples furnished by ALPA to support its claim and says the situations described are satisfactorily managed by mechanisms available under the collective agreement and are not relevant to the operation of clause 29.8.3.

[12] Mr Thompson says Airways will not advise when "*the function of each operating position is essential to the integrity of the unit*". In contrast Mr Fallows says ALPA will not state which rosters it considers controllers are not able to take Rest Periods.

[13] I understand the dispute has been a matter of sporadic discussion between the parties since 2010 but they have been unable to agreement on the meaning and operation of the provision.

[14] Despite their differences, the parties advised that they have recently concluded bargaining for a new collective agreement. Clause 29.8.3 has remained unchanged in that agreement.

### **The issues**

[15] In determining whether Airways is in breach of its obligations at clause 29.8.3, I consider it is necessary to also identify what the dispute is not about.

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<sup>1</sup> Counsel for ALPA disputes this aspect of Mr Fallows' evidence and advised the issue had been raised previously by an employee. I understand all matters concerning that employee were resolved during mediation and are subject to a confidential settlement agreement. I was unable to make inquiry into the matter.

[16] Mr Thompson's oral evidence referred to a range of events where an air traffic controller may be unexpectedly incapacitated or an emergency might arise, as examples of situations where rostered relief staff should be available.

[17] Arrangements for staff coverage in circumstances where unexpected illness or emergencies occur is provided elsewhere in the collective agreement and those events are separate to how coverage is managed so as to provide for Rest Periods. Evidence about an air traffic controller's inability to perform the role or return from a rest period is not relevant to the dispute about the provision of relief staff to allow for Rest Periods and I have not given weight to these portions of Mr Thompson's evidence.

[18] I note also that the contractual provisions regarding Meal and Refreshment Breaks for air traffic controllers are distinct from the provisions concerning Rest Periods. Meal and Refreshment breaks are covered at clause 30 of the collective agreement and are identified within the roster and scheduled over the course of any given shift. I understood from the evidence that issues pertaining to coverage for Meal and Refreshment do not form part of the dispute before the Authority.

[19] Airways says that the provision of Rest Periods is in a practical sense primarily to allow air traffic controllers to take toilet breaks although I note the provision does not make reference to that purpose.

[20] ALPA does not accept Airways' characterisation of Rest Periods as confined solely to toileting.

[21] The parties agreed during the Authority's investigation that the Rest Period provisions relate to breaks that do not generally feature within a roster formation.

[22] The Authority is required to determine whether clause 29.8.3 has been breached. To do so I need to examine:

- the construct of the material provision;
- what is meant by the phrase "*essential to the integrity of the unit*"?
- are rostered air traffic controller functions essential such that their work cannot be reasonably off-loaded?

- is there evidence to establish that air traffic controllers are not able to reasonably off load work and cannot take rest periods?

### **Discussion and analysis**

[23] The starting point in an inquiry as to whether Airways is in breach of clause 29.8.3 is to assess what has been agreed by the parties by reference to the wording contained in the material provision.

[24] The principles set out by the Supreme Court in *Vector Gas v Bay of Plenty Energy Ltd*<sup>2</sup> were confirmed by the Court of Appeal in *Silver Fern Farms Ltd v New Zealand Meat Workers an related Trade Unions Inc*<sup>3</sup> as appropriate to the interpretation of employment agreements.

[25] The key principles are as follows:

- the ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear;
- the words used should be given their ordinary meaning in the context of the contract;
- the ordinary or plain meaning of the words and text used should be the primary focus for interpretation; however, extrinsic material may be relevant in objectively demonstrating what the parties intended even if the words are not ambiguous;
- the full context in which a contract is made is an important consideration and should be interpreted in accordance with commercial/business common sense.
- evidence of negotiations may help to establish the circumstances in which the contract was made.

[26] Having reviewed the material provision I accept the submissions of both parties that clause 29.8.3 cannot be read in isolation and I consider it is necessary to cross check the broader contractual provisions against clause 29.8.3. I have set these out below.

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<sup>2</sup> [2010] NZLR 444

<sup>3</sup> [2010] NZCA 317; NZELR 650

[27] During the Authority's investigation the parties each also referred to differing sections of Airways' Manual of Air Traffic Services (MATS); which informs how Airways operationally complies with its obligations to the CAA. It is apparent from the content of MATS that this document provides context to how Rest Periods are managed and I consider this information, although extrinsic, is helpful.

***The contractual arrangements***

[28] Clause 29 of the collective agreement concerns rosters for shift workers. Establishment numbers are set according to criteria set out at clause 29.2 and include amongst others objectives, the following:

*“the faculty workload and workforce resources should be managed so as to ensure that an adequate level of relief staff is available (except solo watch duty) having regard to the nature of the duties and the requirements for relief breaks as specified in clause 29.8.”<sup>4</sup>*

[29] Clause 29.8 sets out the entitlement to Rest Periods as follows:

***Rest Periods***

*Rest periods of no less than 10 minutes duration shall be achieved either by formally rostering a break at a specified time in the roster, at variable times in the roster dictated by the availability of relief staff, or by combining two positions for the duration of the break, or by leaving a position unstaffed. Such rest breaks shall be treated as continuous duty for the calculation of duty times.*

*In positions, shift patterns and locations other than those specified in clause 29.8.1 and clause 29.8.2 it may not be possible to provide a rest break eg solo shifts. It is intended, however, that such breaks will be provided to the maximum extent possible and at the time of the breaks, where they are practicable, will be staggered around the mid-point of the particular half of the shift...*

*Nothing in this provision precludes an employee from being temporarily relieved from duty at any time either if relief staff is available, if so requested by the employee on duty, and/or if considered necessary or expedient by the supervisor.*

*29.8.1 For ATC employees at Auckland, Wellington and Christchurch International Towers provision shall be made for a rest break after three hours of controller duty.*

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[30] As regards the provision of breaks during a solo shift clause 29.10 states:

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<sup>4</sup> Clause 29(2)(d)

*Airways will publish procedures for the leaving of a position unstaffed to enable employees on solo duty to be absent from their positions for ablutions and any other purpose specified in the published procedures. Employees will endeavour to time breaks between aircraft movements and Airways accepts that this may not always be possible.*

[31] MATS ASM 7 'Solo Watch Breaks' sets out procedures for breaks depending on the tower/unit environment. The procedure relevant for Auckland, Wellington and Christchurch units is as follows:

*For an operating position/sector which is normally a multi-person position/sector but is being operated as a solo watch, breaks may be taken when there is no traffic...or traffic requires radar monitoring only provided that arrangements are made with another position/sector to provide listening watch on the appropriate frequency(ies) and to monitor telephones.*

[32] As noted, entitlements to Meal and Refreshment breaks are set out in the collective agreement at clause 30.

***The construction and interpretation of clause 29.8.3***

[33] ALPA challenges the construction and interpretation of clause 29.8.3 in two ways.

[34] First, it says the provision obliges Airways to provide at all times rostered relief employees to cover Rest Periods.

[35] I do not accept ALPA's position. Clause 29.8.3 does not impose a general requirement for Airways to provide rostered relief staff. The provision plainly states that the obligation to do so is only required when:

- a. the function of each operating position at Auckland, Wellington and Christchurch is essential to the integrity of the unit; and
- b. work cannot be reasonably offloaded.

[36] I am further persuaded in my view when I consider the other provisions concerning Rest Periods and the purpose of the clause 29.8.3. Clause 29.8.3 sits within a group of provisions that specifically set out mechanisms to off load work so that Rest Periods can be taken. I regard these provisions as indicating an acceptance by the parties that functioning positions are not static and can be consolidated or demanned for brief periods of time. I consider clause 29.8.3 incorporates this understanding. The provision clearly anticipates that controllers should use various

mechanisms to off load work prior to the use of relief staff because it is only where work cannot be reasonably off-loaded that the collective agreement requires rostered relief staff to be provided.

[37] Secondly, ALPA asserts, in the context of Airways obligation to provide a 24 hour service, that the provision of air traffic controller functions are essential to the integrity of [each] unit at every part of the day. The effect of this argument if accepted is that the mechanisms to off-load work set out at clause 29.8 (consolidation and de-manning) are not applicable to clause 29.8.3 as these methods interrupt the integrity of the unit.

[38] ALPA says the phrase “*essential to the integrity of the unit*” means that positions in the unit remain fully staffed. Airways says what is “*essential to the integrity of the unit*” varies and is assessed according to the level of service Airways considers acceptable to its customers.

[39] I am not satisfied with either of the parties’ subjective interpretation. The Authority must take an objective, common sense approach and look to find the meaning which the agreement would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of entering the agreement.

[40] Standing back and assessing the provision from the point of an objective observer, it seems clear that its purpose of 29.8.3 is to ensure that air traffic controllers remain able to take Rest Periods at times when the workload is such that it cannot be deferred or redirected. In these circumstances a relief employee is required to be available.

[41] I am not persuaded as Airways contends that the acceptability of services to Airways’ customers was/is an agreed component of the contractual conditions set out a clause 29.8.3. There is no evidence to support Airways’ proposition. In this respect I agree with Mr Thompson’s view that whatever service arrangements Airways has with its customers, clause 29.8.3 is an agreement between the parties as to how rest breaks for air traffic controllers will be managed.

[42] Nor do I accept ALPA’s submission that the phrase means all positions in the unit must be fully staffed. I note ALPA does not dispute Airways’ authority to determine staff coverage. I consider Airways is entitled to determine what

coverage/functions it will roster at any given time, and it is in this context that the provision must be interpreted.

[43] I find that clause 29.8.3 provides that Airways, having determined the staffing coverage that is required, is obliged to provide relief staff in circumstances where there are times of the day when functions of rostered air traffic controllers are essential to the integrity of the unit and work cannot be reasonably offloaded.

***Is there evidence to establish “work cannot be reasonably off-loaded”?***

[44] The onus rests with ALPA to establish that the agreement between the parties at clause 29.8.3 has been breached.

[45] ALPA did not furnish evidence of alleged breaches to clause 29.8.3 at either the Auckland and/or Christchurch units other than Mr Thompson’s view that he was aware of some instances where air traffic controllers could not take Rest Periods. Airways contested this evidence.

[46] In the absence of tangible evidence to establish air traffic controller are unable to take Rest Periods in Auckland and/or Christchurch units I am unable to find that Airways is in breach of the collective agreement in these locations.

[47] Mr Thompson’s evidence focussed on busy periods during the day at the Wellington unit and the night time solo shift watch also at Wellington as illustrative of times where air traffic controllers’ work cannot be reasonably off-loaded.

*Day time shifts*

[48] With respect to the examples as to busy day time periods, Mr Thompson gave evidence about his concerns as regards staff coverage in circumstances of unexpected illness or emergencies. As noted events of the nature described are provided for elsewhere in the collective agreement and evidence in regards to these matters are not relevant to this determination.

[49] As regards day shift at the Wellington unit Mr Thompson was unable to detail any specific instances where he or another air traffic controller were not able to reasonably off-load work and a Rest Period was not able to be taken.

*Solo Duties*

[50] It is clear from the employment agreement that the parties each accept that solo watches are an operative reality as regards the management of coverage and associated rosters<sup>5</sup>.

[51] Clause 29.10 expressly notifies staff on solo duties of procedures to allow a controller to leave a position unstaffed to attend to ablutions.

[52] It is accepted by both parties that the Wellington Tower is under curfew between 00.30am and 6am and no flight traffic is scheduled between these times. Airways says that there is virtually no traffic and the solo shift role is essentially a gate keeper position. In contrast Mr Thompson says that the unit is still required to be manned. He says unexpected flights can and do arrive at Wellington and management of ground traffic on the tarmac persists despite the curfew.

[53] Mr Thompson set out three separate concerns about the night solo shift at Wellington Terminal and says that in each instance work cannot be reasonably offloaded and therefore air traffic controllers are prevented from taking Rest Periods.

1. *CAA requirements*

[54] ALPA submits that an air traffic controller working a solo watch in position at Wellington is essential to keeping the unit open and de-manning and work to a controller in another location (so as to take a Rest Period) results in the Wellington unit closing. ALPA appears to say any closure of the unit contravenes Airways' service agreement with the CAA and effectively precludes air traffic controllers from utilising their entitlement to Rest Periods.

[55] I consider this aspect of ALPA's claim mirrors ALPA's previous general assertion that air traffic controller functions are essential to the integrity of each unit at every part of the day albeit this specific concern is in the context of a solo watch. I consider Airways' obligation to provide rest breaks for air traffic controllers in accordance with clause 29.8.3 is a separate matter to Airways' compliance or otherwise with CAA requirements. I do not accept that ALPA can rely on Airways' external agreement with the CAA to support its claim. I note also that ALPA's view

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<sup>5</sup> Clause 29.2(d)

is not supported by MATS *ADM*, section 3.5. which expressly states that the CAA does not prescribe the number of operating positions Airways has to provide.

## 2. *Validation*

[56] ALPA says that an air traffic controller on night solo watch at Wellington is required to off-load work to an adjacent sector controller who is not located at the Wellington unit and who may not be appropriately qualified (validated) to perform the work stemming from the Wellington unit.

[57] In support of its proposition ALPA refers to MATS Ratings and Validation Requirements<sup>6</sup>, and says that the air traffic controller assuming responsibility for the work must have appropriate validation to assume a position. ALPA submits that it cannot be reasonable for an air traffic controller to off load work to an air traffic controller who is not suitably qualified to perform it.

[58] Airways says there is no requirement that an external air traffic controller engaged in providing a listening watch is required to be specifically validated in the location of the sector/unit.

[59] Airways further counters ALPA's submissions and refers to procedures in MATS *ADM* 7, section 3.6; '*Solo Watch Breaks*' which specifically provide for the management of breaks on solo watch for a unit such as Wellington.

[60] There appears to be some dispute as to which sections in MATS predominate. I prefer the approach taken by Airways. ALPA's reference to a requirement for section/location validation appears to rely on a general section within MATS<sup>7</sup> that does not address solo duties. In contrast MATS *ADM* 7, section 3.6; is specific about the management of rest breaks in the context of a solo watches. The tenet that the specific overrides the general is a principle predominately exercised in statutory interpretation but I consider that principle is relevant in the current matter and am persuaded that the procedure set out in the Solo Watch Breaks section prevails.

[61] The argument advanced by ALPA essentially focusses on questioning the suitability of the recipient external air traffic controller assigned to manage or watch the work that is off-loaded. I regard the issue of suitability (or otherwise) of an

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<sup>6</sup> MATS; *PEL Section 9.1*

<sup>7</sup> *Ibid*

external air traffic controller providing a listening watch, whether as a consequence of de-manning or off-loading, is a matter for Airways and is separate to the contractual dispute as to whether or not “*work cannot be reasonably off loaded*”.

[62] I do not accept ALPA’s concern with respect to whether an external air traffic controller has appropriate validation as illustrating circumstances where a solo watch controller who wishes to take a rest period is prevented from de-manning or off-loading to an adjacent sector/unit.

### 3. *The work*

[63] Mr Thompson’s evidence is that the ‘listening watch’ mechanism referred to in MATS does not allow for the work of the controller to be reasonably off-loaded. He says the controller who provides the ‘listening watch’ does not perform the work but simply maintains the status quo.

[64] Mr Fallows gave unchallenged evidence that controllers have a high degree of autonomy as to how work is managed. He says that that controllers are able to delay, disrupt and hold traffic according to an individual’s personal capacity and that controllers dictate delivery rates from adjacent sectors and can require aircraft to remain on the ground and/or remain in or vacate airspace.

[65] The inference I understand Airways wishes the Authority to take from this evidence is that a controller’s work load is able to be managed in such a way so as to incorporate Rest Periods when needed. I accept Mr Fallows’ evidence.

[66] I do not consider Mr Thompon’s portrayal of a night time solo watch shift entirely reflects the working environment. In cross examination Mr Thompson accepted that during curfew he was able to rest between limited work demands and able to take Rest Periods. He conceded that an air traffic controller is likely to receive advance notice of an unscheduled aircraft’s arrival.

[67] Although there may be an argument that an air traffic controller on a night time solo watch is unable to fully discharge the work to a listening watch, I consider this approach is unduly technical and I have no evidence that an air traffic controller has been unable to take a Rest Period as a consequence.

[68] Mr Thompson was unable to point to a time when he required a Rest Period but could not do so because work could not be off-loaded. He says he is aware that

controllers in Auckland and Christchurch have been unable to take Rest Periods during a night solo shift but was not able to furnish any other detail as to the circumstances in which these instances purportedly occurred and I am unable to give weight to this aspect of his evidence.

[69] I have no tangible evidence that air traffic controllers are prevented from off-loading work or are unable to reasonably off load work and cannot take Rest Periods during a night time solo shift.

### **Determination**

[70] On balance I am not satisfied that ALPA has established that Airways is in breach of its obligations pursuant to clause 29.8.3 and in these circumstances I am unwilling to make an order for compliance.

### **Costs**

[71] Costs are reserved.

Michele Ryan  
Member of the Employment Relations Authority