IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 499
3122373

	BETWEEN	AIRWAYS CORPORATION OF NEW ZEALAND LIMITED Applicant
	AND	NEW ZEALAND AIR LINE PILOTS ASSOCIATION INDUSTRIAL UNION OF WORKERS INCORPORATED Respondent
Member of Authority:	Philip Cheyne	
Representatives:	Kylie Dunn, counsel for the Applicant Richard McCabe, counsel for the Respondent	
Investigation Meeting:	13 August 2021 at Auckland	
Date of Determination:	10 November 2021	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Airways Corporation of New Zealand Limited (Airways) is a state owned enterprise. It provides air navigation and air traffic management services in New Zealand and elsewhere. Airways employs Air Traffic Controllers (ATC). ATCs belong to New Zealand Airline Pilots Association Industrial Union of Workers Incorporated (ALPA). ALPA is a registered Union. Airways and ALPA are party to a collective agreement. The agreement continues in force because bargaining was initiated for the purpose of replacing it before its expiry date. Bargaining has not yet resulted in a replacement collective agreement.

[2] In October 2020. Airways lodged a statement of problem. It says that it and ALPA have different interpretations of the effect of clauses 52 and 53 of the collective agreement on the ability of Airways, under s 19 of the Holidays Act 2003 (HA), to give ATCs notice of requirement to take annual holidays. Airways seeks a declaration that it is permitted to direct employees covered by the collective agreement to take annual leave, subject to several provisos.

[3] ALPA says that there is no live issue for the Authority to resolve; alternatively, it says that Airways and ALPA have agreed how annual holidays are to be taken for the 2020/2021 leave cycle in accordance s 18(3) of the HA, rendering void Airways' wish to require ATCs to take holidays; or alternatively, as Airways and ATCs have agreed as to how to take annual holidays for the 2020/2021 leave cycle, Airways is estopped from requiring ATCs to take annual holidays under s 19(1) of the HA.

[4] The matter was not resolved, despite mediation.

[5] The following issues arise:

(a) Is there a live issue for the Authority to determine?

(b) Have the parties agreed under the collective agreement when annual holidays are to be taken, so that Airways cannot now rely on s 19(1)(a) of the HA?

(c) Is Airways estopped from requiring ATCs to take annual holidays?

Is there a live issue for the Authority to determine?

[6] I am referred to *Auckland City Council v Drought*[1] where the Employment Court explained that an abuse of process will arise in proceedings where it is inevitable that a remedy will be refused, even if a ground is made out. There, the Court struck out a challenge to an Authority determination. The challenge was only to one ground, but the Authority's determination had relied on two grounds. Even if the challenge had succeeded, it could not have affected the orders made by the Authority. That point does not arise here.

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[1] *Auckland City Council v Drought* [2019] NZEmpC 63.

[7] The issue currently is that Courts have struck out proceedings as an abuse of process if they are moot, so that they have no practical effect on the rights of the parties to the litigation. The Employment Court's strike-out power in *Duncan*, was based on the High Court Rules 2016 and the Employment Court Regulations 2000. The Authority's statutory power to dismiss frivolous or vexatious proceedings is found elsewhere.[2] I make the assumption that moot proceedings may be dismissed in reliance on that power. However, the present proceedings are not moot.

[8] "Dispute" means a dispute about the interpretation, application, or operation of an employment agreement. Mike Bishop is ALPA's ATC Industrial Director Council Member, an elected representative position. Sally Williams is Airways Employment Relations Manager. Mr Bishop sent Ms Williams an email and attachment on 7 April 2020. The attachment was ALPA's proposal for a "Joint Comms on Leave and DIL's". It included "…an employer can require an employee to take leave in certain circumstances, up to one year's leave allocation". Ms Williams in reply expressed the view that "providing it is reasonable, an employer can put a plan in place to compel an employee to use their entitled leave regardless of the amount".

[9] Later, Ms Williams sent Mr Bishop a draft email intended for staff that included "… Airways may roster your entitled leave as per the Holidays Act and within the parameters of the CA (i.e. 28 days' notice)". Adam Nicholson is ALPA's legal officer. In reply, Mr Nicholson set out ALPA's view that the collective agreement entitled the employee to choose whether to take annual leave of less than a shift cycle or more than 12 days in duration. The collective agreement also meant that Airways could only exercise a right to direct when annual leave must be taken during the compilation of each year's leave schedule. ALPA circulated advice to members about its view, for reference if being required (against their agreement) to take annual leave.

[10] Lawyers instructed by Airways wrote to Mr Nicholson. Airways would "compromise" on ALPA's point that employees could not be required to take leave less than a shift cycle or more than 12 days. However, Airways did not agree that the collective agreement limited when it could exercise its rights under section 19 of HA to give notice to

[2] Employment Relations Act 2000, Schedule 2, clause 12A.

employees requiring them to take annual leave. Mr Nicholson in reply described the parties as "in dispute". ALPA also circulated to members a template personal grievance letter to use if they wished to challenge a requirement from Airways to use annual leave.

[11] The exchanges resulted in Airways' application to the Authority, seeking a declaration regarding the interpretation of the HA and the collective agreement, confirming its right to direct annual leave.

[12] ALPA relies on information and its view about circumstances that it says have resulted in Airways employing insufficient ATCs to meet establishment numbers, so that ATCs are unable to take all annual holidays entitlements as they fall due. Many ATCs have accumulated substantial leave balances. ALPA says that Airways would not require ATC's to take leave, even if it could do so lawfully. ALPA's view, based on information from its members, is that leave requests are declined or cut short because of staff shortages and the need to meet service requirements. It is not necessary to canvass the details or resolve any disputed aspects. I proceed on the basis that these factors are likely to be a significant constraint on Airways, assuming it has the legal right to direct ATCs to take annual holidays.

[13] The interactions between Airways and ALPA demonstrate that the issue about the application of s 19 of the HA given the terms of the collective agreement remains a live issue. Mr Nicholson correctly characterised it as a dispute. The collective agreement remains in force. The parties are entitled to an answer to the issue raised by Airways in its application.

Have the parties agreed under the collective agreement when annual holidays are to be taken, so that Airways cannot now rely on s 19(1)(a) of the HA?

[14] The meaning of ss 18 and 19 of the HA is not in dispute. The resolution of the dispute depends on the meaning of the collective agreement. I did not understand there to be a difference between the parties about the relevant principles, although they referred to different Supreme Court cases. I need only mention the most recent: *Bathhurst Resources Ltd v L & M Coal Holdings Ltd*.[3] As submitted by Airways' counsel, the Supreme Court confirmed that contractual interpretation remains an objective exercise. It is necessary to

[3] *Bathhurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85.

determine the meaning the contract would convey to a reasonable person having the background knowledge reasonably available to the parties at the time of their agreement. Negotiations or later conduct may help to establish context, but evidence is not admissible to the extent it only proves a subjective intention or belief.

[15] It is sufficient to paraphrase clause 52.1 of the agreement. It creates an entitlement to 23 days annual leave for ATCs after each year's service.[4] Additional entitlements apply for the fifth and subsequent years and the tenth and subsequent years. Counsel submits that the clause sets bounds on the amount of leave that can be taken at one time, except with the employee's agreement. Counsel also submits that these bounds limit but do not remove Airways' right under s 19 of the HA to direct an employee to take annual holidays, in the absence of agreement as to when leave will be taken. I agree that the second sentence in clause 52.1 means that annual leave "shall not be" outside those bounds, unless otherwise agreed by the employee concerned.

[16] ATCs are based at "units" throughout the country. A general commitment to working co-operatively is expressed at several points in the collective agreement. While clause 29.3 vests responsibility for validating and managing rosters in the senior manager at each unit, clause 29.3.1 makes unit rostering committees responsible for drawing up rosters in compliance with the agreement and other criteria. Committees comprise a unit manager and a staff representative for the appropriate roster. Clause 53 is headed "ROSTERING OF ANNUAL LEAVE". As well as ordinary rosters, the "unit rostering committee" is tasked with compiling a schedule or roster "for each year for all rostered staff" so that as far as practicable "all leave commitments are planned to be met".

[17] Airways says that clause 53 is not the only way by which the parties intended that annual leave could be taken. That must be correct, insofar as it applies to employees. Section 18(4) of the HA provides that an employer must not unreasonably withhold consent to an employee's request to take annual holidays to which they have an entitlement. To the extent that clause 53 purported to limit an ATC to a single opportunity through the "unit rostering committee" each year to request the taking of their holidays, it would appear to exclude, restrict or reduce the employee's entitlements under the HA. In any event, as drafted,

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[4] Extra leave applies for shift work also.

clause 53 does not prevent an ATC from requesting annual leave, outside the unit rostering committee process. In practice, ATCs have not been limited to the clause 53 unit rostering committee process as their only opportunity to apply for and take annual holidays. I accept that, as drafted, Clause 53 does not limit employees to a sole opportunity to apply for leave. It is a mechanism to facilitate planning for leave.

[18] Under clause 53, staff must be consulted and their preferences taken into consideration. However, the staff preference can operate as a veto over short or long periods of leave. The bounds set at clause 52.1 restricting shorter and longer periods of annual leave (except with the employee's consent), make better sense if Airways retains power under s 19 of the HA to direct when annual leave is taken. Clauses 52 and 53 can be sensibly read alongside ss 18 and 19 of the HA. ATC annual leave entitlement balances, not used through the clause 53 leave schedule process or separately by agreement under s 18(3), may be used by notice given by Airways under s 19(2), but only within the bounds of clause 52.1.

[19] I accept the submission for Airways that clause 53 is not the only mechanism for Airways and ATCs to reach agreement about when annual holidays are to be taken. That is apparent from the words "as far as practicable" that qualify the unit rostering committee's task of ensuring all leave commitments are planned to be met. If the unit rostering committee process does not completely meet the purpose[5] of enabling Airways to manage its business, taking into account its employees' annual holidays, the statutory right[6] for the employer to require an employee to take annual holidays must remain.

[20] There is a submission for ALPA that when a unit rostering committee fixes the leave roster, that amounts to agreement for the purposes of s 18(3) of the HA. Section 19(2) does not apply, as the employer and employee have reached agreement. It will be apparent from the foregoing explanation that I do not agree with that submission. Clause 53 facilitates the process of agreement for annual leave, but does not limit the application of the Holidays Act 2003.

[21] The effect of clauses 29, 52 and 53 explained above is apparent from the language used. It is consistent with other provisions in the collective agreement and it is reinforced by

[5] Holidays Act 2003, s 15(d).
[6] Holidays Act 2003, s 19.

reference to the context or background knowledge that would have been available at the time of the agreement.

[22] ATC work is highly regulated. Airways operates every day of the year. ATCs are shift workers. It is an "essential industry, governed by the need for safety, the exigencies of airline schedules, movements of aircraft, and the weather".[7] Balance between work and other aspects of employees' lives is promoted by comprehensive arrangements under clauses 29 and 53 to compile leave schedules, other opportunities for leave to be agreed and a residual statutory right for Airways to require an employee to take leave in the absence of agreement. Consultation and co-operation on an equal basis between Airways and ALPA to achieve the objectives of the State Owned Enterprises Act 1986 is supported by that approach.

Is Airways estopped from requiring ATCs to take annual holidays?

[23] ALPA makes the following points. The application was made in 2020. It "addressed" the 2020/2021 leave year. Airways did not seek a variation of the collective agreement, despite that being provided for in the agreement. At the time of the investigation meeting, some unit rostering committees had fixed 2021/2022 leave rosters. These were validated and none were referred to head office. This process amounts to agreement for the purposes of s 18(3) of the HA. In current bargaining, Airways has not sought any variation to relevant provisions.

[24] These circumstances are said to give rise to an estoppel.

[25] I was not referred to any decided cases in support of the submission. It is correct that the dispute between Airways and ALPA arose during 2020, given events at the time. However, the dispute is not limited to the 2020/2021 leave year and it remains an issue between the parties. I do not accept that the unit rostering committee process excludes the potential operation of s 19 of the HA. Airways' position is that the current collective agreement supports its position, so it would not claim any variation or amendment to the current or proposed collective agreement. I see no basis on which Airways could be estopped from exercising rights under the Act.

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[7] Collective Agreement, clause 1.3.

Conclusion

[26] I determine the dispute as follows:

(a) Clause 53 of the collective agreement does not prevent Airways Corporation of New Zealand from giving to an employee covered by that agreement, not less than 14 days' notice of the requirement to take annual holidays, provided that:

i. The requirements of section 19 of the Holidays Act 2003 are met, in that it has attempted to reach agreement with the relevant employee in the first instance; and

ii. The requirements of clause 52 of the collective agreement are met, in that it is requiring a period of between one week and twelve days of annual leave be taken, unless the relevant employee agrees otherwise.

[27] I am mindful that the form of the determination differs slightly from the wording proposed by Airways. Leave is reserved if either party seeks to vary the wording.

[28] Airways did not seek costs in its application or by way of submissions. ALPA did seek costs, but it has not succeeded. In any event, it may be the type of problem where an order of costs would not be appropriate. There may not be any issue about costs, but I will reserve costs, just in case. An application for costs should be made by submission within 28 days. The other party may lodge and serve submissions in reply. Costs will then be determined.

Philip Cheyne
Member of the Employment Relations Authority