

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2025] NZERA 162
3288519

BETWEEN NEW ZEALAND AIR LINE
PILOTS ASSOCIATION

AND JETSTAR AIRWAYS LIMITED

Member of Authority: Eleanor Robinson

Representatives: John Hall, counsel for the Applicant
Michael O'Brien, counsel for the Respondent

Investigation Meeting: 28 and 29 January 2025 in Auckland

Submissions and/or further evidence: 29 January 2025 from the Applicant and from the Respondent

Determination: 17 March 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, the New Zealand Airlines Pilots Association Inc (NZALPA), claims that the Respondent, Jetstar Airways Limited (Jetstar), has breached s 67G of the Employment Relations Act 2000 (the Act) by failing to provide a reasonable period of notice for cancellation of shifts and failing to provide reasonable compensation for cancellation of shifts.

[2] Jetstar denies that it has breached s 67G of the Act.

The Authority's investigation

[3] The Authority received written and, under oath or affirmation, oral evidence from the Applicant witnesses: Danyel Boyle, pilot, Richard Greenslade, pilot and former Administrative Head of NZALPA's Jetstar Plot's Council, and Mark Kenyon, pilot and current Administrative Head of NZALPA's Jetstar Plot's Council.

[4] The Authority received written and, under oath or affirmation, oral evidence from the Respondent witnesses: Leah Everton, Senior Manager Operational Insights and Strategy – Flying Operations with responsibility for New Zealand and Australian operations, and Geoffrey Metcalf, Senior Manager Flying Operations Jetstar.

[5] Oral and written submissions were received from Mr Hall for the Applicant and Mr O'Brien for the Respondent. Whilst I have not referred to all the submissions made by the parties, I have fully considered them.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[7] The issue requiring investigation is whether or not:

- Jetstar has breached s67G of the Act:
 - (i) By failing to provide a reasonable period of notice for cancellation of shifts?
 - (ii) By failing to provide reasonable compensation for cancellation of shifts?

Background

[8] Jetstar Airways Pty Limited (Jetstar Australia) is responsible for all of the Jetstar branded flights within New Zealand and Australia, and flights to the Pacific. The flights are operated using a fleet of Airbus A320 aircraft registered in Australia and owned by Jetstar Australia. Jetstar Australia holds an Australian Airline Operating Certificate with ANZA privileges (AOC) pursuant to s 11B Civil Aviation Act 1990 of New Zealand. The holder of an Australian AOC with ANZA privileges is entitled to conduct air operations in Australia and New Zealand.

[9] Jetstar employs and provides pilots and cabin crew on domestic New Zealand trans-Tasman and Pacific Island flights operated by Jetstar Australia.

[10] NZALPA represents pilots employed by Jetstar. The current collective agreement in place between NZALPA and Jetstar was signed by the parties on 8 January 2025 (the 2024 Collective Agreement). This was pre-dated by collective agreements signed by the parties in 2013, 2017 and 2022 (the Collective Agreements).

[11] Pilots work shifts which are allocated in accordance with a roster of 65 hours which is issued monthly. Pilots are, in accordance with the 2022 and 2024 Collective Agreements, paid

a salary which is not affected by the number of duty periods or shifts they perform in a given roster period (the Base Salary).¹

[12] Jetstar in accordance with clause 8.4.2 of the 2024 Collective Agreement is required to “use every endeavour” to publish the roster 10 days prior to the commencement of each monthly roster period.

[13] A roster will comprise a number of different activities, not just operating aircraft. A roster may comprise the following:

- (a) Flight Duty Periods (FDPs) where a pilot is required to operate an aircraft;
- (b) Positioning duties where a pilot is required to passenger on an aircraft that they are not operating;
- (c) Ground duties, such as simulator assessments and training;
- (d) Standby periods where the pilot is required to be available for work if called upon to perform a FDP (pursuant to clause 8.8.7 of the 2024 Collective Agreement the maximum time for reporting for duty is 120 minutes from being contacted);
- (e) Non-working days e.g. annual leave, alternative public holidays, rostered days off (RDOs); and
- (f) Duty Free Days (DFDs).

[14] Captain Metcalf stated that Jetstar does not have the discretion to unilaterally change a pilot’s RDOs or DFDs once rostered, unless there is a disruption. A disruption is defined in Part 2 of the 2024 Collective Agreement as:

a situation arising due to operational reasons that requires a pilot to change their duty, where that situation occurs prior to commencement of the Duty Period.

[15] A roster may change once published. These changes are tracked to ensure the correct payments are made to the pilots; to communicate to pilots any changes (e.g. if they are allocated a duty when on a stand-by period or reassignable period); and to monitor and ensure compliance with duty period and off-duty period restrictions and regulations.

[16] A pilot who is rostered an annual leave day, alternative public holiday, RDO or DFD is not required to perform duties on those days, but he or she is free to agree to do so. The only exception is when this arises due to unplanned operational reasons outside of Jetstar’s control such as a weather event or mechanical malfunction, and the duty is required to be extended into the non-working day. This event is covered in clause 8.14.2 of the 2024 Collective Agreement.

¹ Clause 11.2. in the 2022 and 2024 Collective Agreements

[17] The Collective Agreements contain clauses which relate to roster and rostering. In the 2024 Collective Agreement these are covered in clause 8.14 “Delays, Extension to Duty, Disruption and Displacement.

[18] In addition to their salary a pilot may also be entitled to allowances. These include overnight accommodation, meal and travel allowances, and Extra Flying Allowance (EFA).

[19] The EFA is referred to in clause 11.5 of the 2024 Collective Agreement. This clause has remained in the same form in the Collective Agreements from the 2013 Collective Agreement (apart from rate changes and slight wording adjustments). Clause 11.5 of the 2024 Collective Agreement states:

11.5 FLIGHT ALLOWANCES

11.5.1 A pilot shall be paid an Extra Flying Allowance at the rate specified in the table below per credited hour for all credited hours in excess of 65 hours in a roster period. This allowance will be calculated in one tenth of an hour (6 minute) blocks.

...

11.5.2 When calculating the credited hours for the Extra Flying Allowance payment the Company shall:

- a) use the scheduled flight duty (block) times recorded in the rostering system for the sectors flown as the basis for the Pilot’s entitlement where flight hours will be calculated to the nearest one tenth of an hour.
- b) apply 3.6 credit hours for each Day on which ground duties are performed during the roster period.
- c) Apply 5.5 credit hours for each duty in a roster period where the Pilot attends either a simulator duty ...or recurrent Emergency Procedures or Security Training which is in excess of the hours already credited (22 and 5.5 credit hours respectively) and forming part of the base annual pay as outlined in clause 11.2.3 above.

11.5.3 Pilots shall be credited at the rate of 50% per scheduled block hour for each block spent Positioning in aircraft at the Company’s direction.

11.5.4 The extra Flying Allowance rates specified in clause 11.5.1 incorporate and include a 3% increase that take effect from the first full pay periods on or after 1 October 2024, 1 October 2025 and 1 October 2026.

[20] Ms Everton said that the reference to “scheduled flight duty (block) times recorded in the rostering system for the sectors flown” refers to the flight time that is recorded in the rostering system for how long that particular flight sector is planned to take. The scheduled block times are inputted into the rostering and payroll system by the Networks and Scheduling department which monitors seasonal flight departure and arrival times to ensure there is accuracy in detailing the scheduled flight time.

[21] A pilot is able to be rostered four standbys per roster period, with approximately 50 percent of rostered standbys being utilised. At the time the roster is published it is not known

if the pilot will undertake flying duties on a standby day or the duration of those duties. In addition, pilots can agree to work on their rostered day off (RDO) with those hours also not known at the date the roster is published.

[22] Ms Everton said that the EFA provides compensation for pilots over and above their base salary for credited hours in excess of 65 hours in a roster period.

[23] Mr Metcalfe said that whether or not a pilot is entitled to EFA is calculated at the conclusion of the roster period based on the amount of credited hours a pilot has achieved in excess of 65 credited hours in that roster period. Credited hours are a combination of flying hours flown, hours spent positioning as well as credits that are applied to other activities performed such as completing ground training.

[24] This has the result that a pilot may perform more or less credited hours than they were originally rostered at the time the roster was published. If the pilot flies additional hours to those rostered, they are used to calculate the EFA at the conclusion of the rostered period.

[25] It is also the case that a pilot may fly less rostered hours in a given month, because a flight may be cancelled due to bad weather, or a pilot may be absent due to sickness and unable to work the shift.

[26] Ms Everton said that if EFA was based upon what was originally rostered, block hours performed on a standby or RDO would not be recognised for the purpose of a pilot being paid EFA.

[27] EFA is therefore paid retrospectively. This is reflected in the wording of clause 11.5 which refers to retrospective actions:

- “for the sectors flown” cl 11.5.2 (a)
- “ground duties are performed” cl 11.5.2 (b)
- “where a Pilot attends” cl 11.5.2 (c)

[28] Captain Greenslade confirmed his agreement to the wording being retrospective in cross-examination.

[29] Captain Kenyon said that a pilot who fulfilled his or her rostered shifts would earn EFA and described this as “a substantial portion of our income”. Once a roster was received he explained that it was usual for a pilot to calculate what he or she might earn in that roster period taking into account not just their base salary but the potential to earn EFA.

[30] Captain Boyle accepted under cross-examination that a pilot does not receive EFA for working a particular day, instead it was “locked in over a month period”.

[31] NZAPLA’s claim is that the EFA forms part of a pilot’s remuneration and cancelling a rostered shift means that while the pilot would still receive the Base Salary, he or she would lose the potential EFA that could have been earned had the shift been worked.

[32] It is submitted for NZALPA that the 2024 Collective Agreement does not comply with s 67G of the Act because (i) it does not provide a specific reasonable period of notice or (ii) reasonable compensation when it cancels a shift.

[33] Mr O’Brien submitted that Parliament’s intent in enacting the shift cancellation provisions was in the context of the ‘zero hours contract’ which was prominent in New Zealand at that time. He submits that it was Parliament’s intention that, by enacting what would become s 67G of the Act, that workers would be provided with some stability, and be able to place reasonable reliance on an employer’s scheduling of a shifts in terms of receiving, at the least, ‘reasonable compensation if that shift were cancelled.

[34] Mr Hall submits that 67G provides no exceptions to its provisions for shift workers who are paid a salary because it applies to all employees who are “required under the employer’s employment agreement to undertake shift work”.

[35] Section 67G of the Act sets out in s 67G(1) that it applies to employees who are required to undertake shift work. Shifts are defined in s 67G(9):

In this section, shift means a period of work performed in a system of work in which periods of work-

- (a) Are continuous or effectively continuous; and
- (b) May occur at different times on different days of the week.

[36] Pilots are required to work to rosters of 65 hours comprising periods of work which occur at different times on different days of the week. I find pilots are required to undertake shift work.

Has Jetstar breached section 67G of the Act by failing to provide a reasonable period of notice for a shift cancellation?

[37] Section 67G (1) (2) and (3) Act state:

67G Cancellation of shifts

- (1) This section applies in relation to an employee who is required under the employee’s employment agreement to undertake shift work.

- (2) The employer must not cancel a shift of the employee unless the employee's employment agreement specifies-
 - (a) A reasonable period of notice that must be given before the cancellation of a shift; and
 - (b) Reasonable compensation that must be paid to the employee if the employer cancels a shift of the employee without giving the specified notice.
- (3) In cancelling a shift of an employee, the employer must-
 - (a) give the employee the notice specified in the employee's employment agreement under subsection (2)(a); or
 - (b) If that notice is not given, pay to the employee the compensation specified in the employee's employment agreement under subsection (2)(b).

Cancellation of a Shift

[38] Section 67G (2) of the Act states that the employer must not cancel a shift unless certain conditions are met. I find that this section of the Act is focused on employers who cancel shifts. Accordingly I find that if it is the employee who cannot work a shift (i.e. due to sickness or some other personal reason), it is not the employee who has cancelled the shift and s 67G of the Act is not relevant to that situation.

[39] I note that if a pilot is displaced from a duty which is delayed, the duty may commence at a delayed Sign-on Time (within an agreed limited time window). The Pilot may also be assigned to varied duties for that tour of duty (clause 8.14.3 of the 2024 Collective Agreement).

[40] These situations have been accounted for extensively by clauses in all of the Collective Agreements to date. Specifically in clauses 8.6 to clause 8.13 and in particular clause 8.14 of the 2024 Collective Agreement. I find in those situations, the rostered shift has been varied not cancelled.

Reasonable Notice

[41] If the employer cancels the shift, the employer will be in breach of s 67G unless the employee's employment agreement specifies a "reasonable period of notice" and that notice is given as stated in s 67G (3):

- (3) In cancelling a shift of an employee, the employer must-
 - (a) Give the employee the notice specified in the employee's employment agreement under subsection (2)(a); or
 - (b) If that notice is not given, pay to the employee the compensation specified in the employee's employment agreement under subsection (2)(b).

[42] The proviso in s 67G 2(a) is that notice is to be reasonable. The Act does not specify any period of time. The Oxford English dictionary defines reasonable as 'fair' and 'equitable'.²

² Oxford English Dictionary online <https://www.ord.com>

[43] In subsection 67G(4) the “reasonable period of notice” must be determined by having regard to all relevant factors, including s 67G(4):

- (a) The nature of the employer’s business, including the employer’s ability to control or foresee the circumstances that have given rise to the proposed cancellation; and
- (b) The nature of the employee’s work, including the likely effect of this cancellation on the employee; and
- (c) The nature of the employee’s employment arrangements, including whether there are agreed hours of work in the employee’s employment agreement and, if so, the number of guaranteed hours of work (if any) including among those agreed hours.

Nature of the Business: s 67G (4)(a)

[44] Jetstar operates in the airline industry which means that factors beyond its control such as weather events may result in a scheduled flight being delayed or cancelled. However flight cancellations are not the sole reason for a shift cancellation. As recognised in the Collective Agreement, a pilot might be displaced from a rostered TOD for operational reasons:

... including but not limited to flight cancellations, schedule disruptions, Flight and Duty Time limitations, training requirements, short notice sick leave, misconnections and interviews/meetings.³

[45] Sometimes these events may be known some little time in advance, but sometimes change may occur just prior to a pilot’s sign-on time. It is also not unknown for a duty to be cancelled after a pilot has started on the preliminary stages of a shift, both Captains Kenyon and Metcalfe gave evidence that may occur on occasion.

[46] I find that the nature of last minute disruption for factors beyond the airlines control is a feature of the airline industry, and recognised by the pilots.

Nature of the employee’s work: s 67G(4)(b)

[47] The applicants are pilots and as such their work is affected by any postponements or cancellations.

[48] In regard to the “likely effect of the cancellation on the employee”, Captain Kenyon gave evidence that a pilot would carry out substantial planning in respect of preparation for work and/or personal financial planning.

[49] When questioned Captain Kenyon said the preparation for work might involve ironing a shirt, preparing a meal to take to work, or checking the weather. I do not find these preparations to be substantial, rather they are not out of the ordinary for a person intending to

³ Clause 8.14.7 of the 2024 Collective agreement)

attend for work that day. Moreover none of these preparations appear to be wasted actions in the sense of being of no utility in the changed circumstances.

[50] Captain Kenyon also stated that pilots carry out personal financial planning. He explained this involved checking the potential for stand-by flights and the corresponding impact of the potential to achieve credited hours for EFA. Again I do not find these preparations to be 'substantial' in nature.

Nature of the employment arrangements: s 67G (4)(c)

[51] This subsection of s 67G involves looking at whether or not there are agreed hours of work in the employee's employment agreement, and if there are, if these include guaranteed hours of work.

[52] Pilots work in accordance with a roster of 65 hours each roster period. The Base Salary is guaranteed and does not vary based upon the number of duty periods or shifts they perform in a given roster period. Importantly if the pilot is displaced from a shift or a duty for any reason, this will not reduce their Base Salary which is set out in the relevant collective agreement (clause 11.2.4 in the 2024 Collective Agreement).

[53] Pilots work in accordance with a roster. Once a roster is published the pilot agrees to work the rostered hours. At that point the pilot is able to calculate the potential for earning credited hours in excess of 65, and the corresponding potential for earning EFA.

Has Jetstar breached s 67G of the Act by failing to provide reasonable compensation for the cancellation of flights?

[54] EFA is not aligned to a specific day, it is a retrospective payment calculated on the actual credited hours. EFA is not a guaranteed payment, as accepted by Captain Kenyon in his evidence.

[55] NZALPA states that the main effect on the pilot if a flight is cancelled is the loss of the potential to enhance their base salary by the addition of EFA payments.

[56] I observe that EFA payments provide a joint recognition by the parties that pilots make themselves available to work hours which may exceed those rostered. The EFA payments provide a reward and an incentive to pilots for their availability.

[57] I accept that in the event that the rostered hours are worked, there is a known potential for a pilot to enhance their base pay. Consequently a pilot who is ready and willing to work and has a shift cancelled by the employer without being reassigned to another duty has been deprived of the potential to earn the EFA.

[58] In that situation I find that the cancellation of the rostered shift may result in a reduction in the EFA payment to the pilot. If that situation eventuates and the pilot, although ready and willing to work the shift is deprived of the opportunity to do so and there is no opportunity to substitute another shift for the one cancelled, there is a loss of the expected EFA for which no compensation is provided. I find that to be a breach of s 67G of the Act.

[59] I determine that Jetstar has breached s 67G of the Act by failing to provide reasonable compensation for the cancellation of a flight.

Recommendation

[60] Given the number of variables given the dynamic nature of the rostered shifts, and the fact that one cancelled shift may not result in a shortfall in the EFA when all the pilot's worked hours are taken into consideration when calculating the EFA, I recommend that the parties discuss the issue of reasonable compensation with the assistance of a Mediator from the Ministry of Business, Innovation and Employment.

Costs

[61] As this is a dispute about the application, interpretation or operation of a collective agreement; there is no order for costs.

Eleanor Robinson
Member of the Employment Relations Authority