

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2010] NZEMPC 130  
ARC 22/10**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

BETWEEN NEW ZEALAND AIR LINE PILOTS'  
ASSOCIATION INC  
Plaintiff

AND AIR NELSON LIMITED  
Defendant

Hearing: 30 August 2010  
(Heard at Auckland)

Appearances: Richard McCabe, counsel for plaintiff  
David France, counsel for defendant

Judgment: 30 September 2010

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**JUDGMENT OF JUDGE B S TRAVIS**

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[1] The plaintiff (NZALPA) has challenged a determination of the Employment Relations Authority which rejected its claim that the defendant (Air Nelson) had breached the collective agreement in force between the parties. The issue arose out of how Air Nelson treated rostered days off when they occurred on Saturdays and Sundays, where pilots who had worked on a public holiday were being allocated the Saturday as an alternative holiday for the purposes of the Holidays Act 2003 (the Act).

[2] The parties filed briefs of evidence which dealt with the negotiations for the collective agreement. Both cited *Vector Gas Ltd v Bay of Plenty Energy Ltd*<sup>1</sup> as

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<sup>1</sup> [2010] NZSC 5, [2010] 2 NZLR 444.

authority for the proposition that pre-contractual materials could be an aid to the interpretation of the collective agreement. I was not assisted by that evidence except to the extent that it provided a context for the interpretation of the agreement.

### **Factual background**

[3] Air Nelson operates 365 days a year. Throughout the year pilots are rostered on a series of 28 day rosters. The relevant collective agreement (the “Agreement”) came into force on 11 December 2008 and continues in force until 10 December 2011. The clauses in issue dealing with the provision of alternative holidays under the Act were negotiated in light of the Supreme Court’s decision in *NZ Airline Pilots Assn IUOW Inc v Air New Zealand Ltd.*<sup>2</sup> They expressly deal with how alternative holidays are to be allocated when pilots have worked on a public holiday. Counsel accepted that these clauses are to be construed in the context of other relevant clauses in the Agreement as follows:

#### 4.2.3 Days off

...

4.2.3.2 Except where otherwise agreed between the pilot and the Company:

4.2.3.2.1 The roster shall provide a minimum of eight days off for the employee during each 28 day roster period; and

4.2.3.2.2 Four of these days shall appear in the first 14 days of the roster, and the remainder in the second 14 days and, in respect of each of these groups of 4 days, at least two of these days shall be consecutive.

4.2.3.2.3 (a) The Company shall roster each pilot two days off on a weekend (a consecutive Saturday and Sunday) comprising a minimum of 60 consecutive hours free of duty, at least once in every 28 day roster.

...

[4] Part 6 of the agreement deals with leave and part 6.1, public holidays. Clause 6.1.7.2 provides a mechanism for allocating alternative holidays and creates a system of priorities for dealing with the requests of pilots who may seek to take up to one alternative holiday per roster. The clauses in issue are as follows:

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<sup>2</sup> [2007] 1 ERNZ 884.

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):

...

(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 worked on the public holiday.

6.1.7.4 The roster shall distinguish between annual leave days and alternative holidays.

(Emphasis added)

[5] During the course of the negotiations for the Agreement Air Nelson sought to add into cl 6.1.7.2(g) (subcl (g)), after the word "Friday", the words "or Saturday", but NZALPA would not agree and the clause that appeared in the Agreement is that set out above.

[6] There is no issue between the parties that when a pilot successfully requests a Friday as an alternative holiday and receives the Saturday and Sunday as the two consecutive days off, that satisfies the weekend off requirement under cl 4.2.3.2.3. That is the clear and unambiguous meaning of subcl (g).

[7] Where the issue has arisen in the present case is when a pilot successfully requests a Saturday as the alternative holiday and the following Sunday and Monday are rostered as the two consecutive days off. The issue is whether that is also deemed to satisfy the weekend off requirement under cl 4.2.3.2.3. Clearly if subcl (g) had included the words "or Saturday", cl 4.2.3.2.3 would have been deemed to have been satisfied in such circumstances. Air Nelson claims to be entitled to regard the weekend off obligation as having been met where the alternative holiday is the Saturday and the pilot has been given the consecutive Sunday and Monday off.

## The submissions

[8] Mr McCabe on behalf of NZALPA submitted that whereas the Agreement specifically addresses the issue of a Friday being taken as an alternative day and deems the following consecutive Saturday and Sunday to have satisfied the weekend off requirement, it does not provide that a Saturday and Sunday taken off when the pilot takes a Saturday as an alternative holiday can be treated as a weekend off. Mr McCabe submitted that the Agreement specifically requires that an alternative holiday must be taken on a day that would “otherwise be a working day” (cl 6.1.7.3) and the Act also requires that an alternative day must be taken on a day that would “otherwise be a working day” (ss 56(1)(a) and 57(1)(b)). Mr McCabe submitted that to allow the alternative holiday taken on a Saturday to be used as part of the weekend requirement would mean that the Saturday is not and cannot “otherwise be a working day”. Rather it would be a day off.

[9] Mr France submitted that Air Nelson’s position was simply that the Agreement requires in each 28-day roster for the pilot to have two days off on a weekend, namely a Saturday and a Sunday. If a pilot has a Saturday and Sunday off, as a result of a request to have an alternative holiday on a Saturday, then cl 4.2.3.2.3(a) has been complied with. This comes from what he submits was the natural and ordinary meaning of the words in that clause and the specific defined expression of “day off” as meaning a period “rostered free of all duty obligations”. Air Nelson contends that an alternative holiday meets this requirement. The definitions relied on are:

- 3.3 “Day” means the period from midnight until the next following midnight.
- 3.4 “Day Off” means a period at the pilot’s base, unless another location is agreed between the pilot and the Company, rostered free of all duty obligations. ...
- 3.7 “Duty Time” means any continuous period through which a pilot is required by the Company to be available for duty, whether on the ground or in the air. ...

[10] Mr France submitted that the words in cl 6.1.7.2(f), that the pilot should be rostered three days free of duty, virtually replicates the definition of “day off” and when two of those three rostered days off fall in the weekend, cl 4.2.3.2.3 is

complied with. He submitted that where a pilot requests an alternative holiday on a particular day that pilot must be expecting the day to have otherwise been a working day or else an alternative holiday could not have been granted. Once the alternative holiday is granted, an otherwise working day becomes a rostered day off for the pilot free of all duty obligations and can be used for satisfying the weekend off provisions.

[11] Mr France rejected the submission of NZALPA that where an alternative holiday is granted on a Saturday this meant that the alternative holiday was not being taken on a day that would otherwise have been a working day for a pilot. He submitted that this was based on an erroneous premise. An alternative holiday request which is granted on a Saturday, or any other day, does not fall on one of the other eight rostered days off required each month, but is in addition to this minimum entitlement and is therefore being observed by a pilot on what would otherwise have been a working day for that pilot. The provisions of the Act are therefore complied with, with the added effect that when the alternative day is a Saturday, the pilot also gets the weekend off.

[12] Mr France submitted that the provisions in subcl (g) that the weekend off following the alternative holiday on a Friday complies with cl 4.2.3.2.3, reinforces the relationship between alternative holiday days off and the eight rostered days off, as constituting, together, rostered days off for the purposes of the collective. He submitted that subcl (g) provides clarification but does not otherwise alter the weekend off roster requirement which is simply two rostered days off comprising a minimum of 60 consecutive hours free of duty on a Saturday and Sunday. He submitted that subcl (g) does not exclude an alternative holiday taken on the Saturday, followed by the required two days off, from meeting the requirements of cl 4.2.3.2.3(a).

## **Discussion**

[13] Addressing, first, the principles of interpretation, I accept that it is no longer essential to find an ambiguity before proceeding to look at the background to a

contract to assist in interpreting the language which has been used.<sup>3</sup> The ultimate objective in a contractual interpretation dispute is to establish the meaning the parties intended their words to bear and extrinsic evidence may be relevant to that question to enable the Court to be more properly informed.<sup>4</sup>

[14] I also accept Mr France's submissions that the document must be considered as a whole to give effect to the intention to the parties and that ordinary words should be given their proper ordinary meaning unless they are clearly used in a narrow or technical sense. Ambiguity may be circumvented also by interpreting the document in the light of practicalities and by reference to the surrounding circumstances.

[15] I accept that when a pilot requests an alternative holiday, which must be on a working day, to satisfy the provisions of both the Act and the Agreement, with a blank roster potentially all the days are working days. One exception is where an alternative holiday was taken at the end of the previous 28-day roster and the consecutive days would have to be taken at the beginning of the next 28-day roster period. Such days will therefore not otherwise have been working days because they were required by the Agreement to be rostered as days off.

[16] The difficulty with Air Nelson's argument is that it is using the alternative holiday for two purposes. One is to satisfy the requirements under the Holidays Act and, the other, if it is requested on a Saturday, to satisfy its contractual obligation under the Agreement to provide a weekend off in the 28 day rostered period. This means that when the Saturday is the alternative day, it is being taken on a day which, for rostering purposes, is to be regarded as a day off. Is it also to be regarded as part of the weekend off? On one view, as submitted by Mr McCabe, this means the alternative holiday is being taken on a day which would not otherwise be a working day for the particular employee. This is because it is being used to provide the weekend off.

[17] In constructing the roster the Saturday, if not granted as an alternative holiday would, as Mr France submitted, be regarded as otherwise a working day. If it is used

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<sup>3</sup> *Vector Gas*, per Blanchard J at [4].

<sup>4</sup> *Vector Gas*, per Tipping J para [19].

to satisfy the weekend off requirement, then it would be a day off and not otherwise a working day. The same difficulties do not arise in the example contained in subcl (g) where the alternative holiday is taken on a Friday with the Saturday and Sunday as the two consecutive days off. The alternative holiday is not required to bear two characters, one satisfying the Holidays Act and the other satisfying the Agreement. Instead it is the two consecutive days, the Saturday and Sunday which are deemed by subcl (g) to satisfy the requirement of providing a weekend off.

[18] When examining the Agreement as a whole, that position becomes even clearer. If Air Nelson's interpretation of cl 4.2.3.2.3(a) is accepted it would render subcl (g) superfluous. If, as argued by Air Nelson, a weekend off is achieved under that clause as a result of an alternative holiday request being granted on a Saturday, together with the consecutive Sunday, there would be no need for subcl (g). Where the alternative holiday was on a Friday and the consecutive days off were the Saturday and Sunday, equally that would satisfy the provisions of cl 4.2.3.2.3(a) without the need for subcl (g) if Air Nelson's argument is correct.

[19] It is more likely that the express deeming provisions in subcl (g) were intended to implicitly exclude the Saturday from being taken both as an alternative holiday and in satisfaction of the weekend off provision. The approach is embodied in the canon of construction *expressio unius exclusio alterius*, "the mention of one is the exclusion of another".<sup>5</sup>

[20] Clause 4.2.3.2.3 requires Air Nelson to roster each pilot two days off on a weekend at least once every 28 days. That is for the purpose of rostering days off.

[21] Clause 6.1.7.2 is dealing with an entirely different matter. As it states in opening it is a "mechanism for allocating alternative holidays". It is only when the alternative holiday is on a Friday with the two consecutive days being Saturday and Sunday that, by virtue of the express provision in subcl (g) that this is deemed to satisfy the weekend off requirement in cl 4.2.3.2.3. In any other circumstance there is nothing in the Agreement which states that subcl (g) is deemed to be satisfied.

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<sup>5</sup> *Tutty v A C Blackmore Ltd* [1999] 1 ERNZ 587 at 612.

## **Conclusion**

[22] For these reasons I conclude that Air Nelson cannot use an alternative holiday granted on a Saturday followed by Sunday and Monday, as satisfying cl 4.2.3.2.3. As a consequence the challenge succeeds and the Authority's determination is replaced by this ruling.

[23] The parties did not address remedies, being of the view that they would be able by agreement to implement the Court's decision. I reserve leave to the parties to refer the matter back to the Court should there be any difficulty with implementation.

[24] Both counsel sought to have costs reserved and so they are. If they cannot be agreed between the parties they may be addressed by an exchange of memoranda, the first of which is to be filed and served within 30 days from the date of this judgment with a reply within a subsequent 21 days.

B S Travis  
Judge

Judgment signed at 1pm on 30 September 2010