IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 84
ARC 22/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND AIRLINE PILOTS' ASSOCIATION INC Plaintiff
AND	AIR NELSON LIMITED Defendant

Hearing: By submissions dated from the plaintiff on 17 and 24 January 2011

Judgment: 11 July 2011

SUPPLEMENTARY JUDGMENT OF JUDGE B S TRAVIS

---

[1] In my judgment in these proceedings dated 30 September 2010[1] I found in favour of the plaintiff's (NZALPA) interpretation of a collective agreement. This prevented the defendant (Air Nelson) satisfying the requirement in the collective agreement for it to provide its pilots with two days off on a weekend in every 28 day roster. Air Nelson had attempted to satisfy that requirement by using a Saturday, when a pilot had requested that day as an alternative day for the purposes of the Holidays Act 2003, plus the Sunday of the following additional two days off, which it was also required to provide by the collective agreement.

[2] At the conclusion of the judgment I observed that the parties had not addressed remedies. Being of the view that they would be able, by agreement, to implement the Court's decision, I granted leave to the parties to refer the matter back to the Court should there be any difficulty.

[1] [2010] NZEmpC 130.

[3] The parties attended mediation but were unable to agree as to the nature of the remedy available to those pilots affected by the judgment. In the event it was agreed that the parties would each file submissions and the Court would determine remedies based on those submissions.

[4] Mr McCabe for NZALPA relied on my substantive finding that Air Nelson was not entitled to treat the same days off for the two purposes of alternative holidays and weekends off and submitted that the pilots, to whom Air Nelson had applied those two purposes, had either not received a weekend off or not received an alternative holiday. Mr McCabe submitted that the plain words of the collective agreement could only be interpreted on the basis that the weekend off requirement in cl 4.2.3.2.1(a) was a mandatory provision because it contained the word "shall" and there was no exception to a weekend off, consisting of a Saturday and Sunday, being granted to a pilot every 28 days. He submitted that, by contrast, the alternative holiday clause, cl 6.1.7.2, was permissive insofar as Air Nelson was entitled to reasonably decline alternative holiday requests and machinery was provided in the clause to cover that event. He submitted that, in attempting to apply the dual purpose, Air Nelson could only have intended to provide pilots with a mandatory weekend off under cl 4.2.3.2.1(a) of the collective agreement and therefore could not have given the pilots a permissive alternative holiday under cl 6.1.7.2. NZALPA therefore sought as a remedy an order from the Court that Air Nelson reinstate those alternative public holidays wrongly deemed by Air Nelson to have satisfied the dual purpose of a weekend off and alternative holidays, and costs in the sum of $300.

[5] In support of those submissions Mr McCabe cited the following paragraphs from my earlier judgment, underling the parts of those paragraphs on which he relied:

> [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.
>
> …

> [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 to satisfy the weekend off requirement, then it would be a day off and not otherwise a working day. …
>
> [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.
>
> [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. …

[6] Mr France for Air Nelson, submitted that the issue that arises in determining remedies is whether the affected pilots receive a weekend off and therefore, as NZALPA submits, are entitled to an alternative day, presumably followed by two rostered days off, or whether they received an alternative holiday on the Saturday, as Air Nelson submits occurred, and have not received a weekend off.

[7] Mr France submitted that I had found that affected pilots who had an alternative holiday granted on a Saturday, followed by two rostered days off on the Sunday and Monday, did not, at the same time, receive a weekend off pursuant to cl 4.2.3.2.3. He therefore submitted that the remedy for the affected pilots was that they receive the weekend off which the Court had determined they had not received when they had the alternative holiday on a Saturday. Mr France also relied on paragraphs 20 and 22 of my judgment and also para [21] where I stated:

> 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.

[8] Mr France submitted that where a pilot had an alternative holiday granted on a Saturday with the following two days rostered off, the pilot clearly did not receive the weekend off entitlement as Air Nelson had previously argued they had. In order to put those affected pilots back in the position they would have been in if Air Nelson had interpreted and applied the collective agreement pursuant to the Court's judgment, he submitted that Air Nelson would need to provide those affected pilots with a weekend off, pursuant to cl 4.2.3.2.3. He therefore submitted that the remedies for those affected pilots was that they receive the weekend off that they were entitled to in a 28 day roster period but had never received.

[9] Mr France submitted that this remedy was entirely consistent with NZALPA's pleadings and its submissions to the Employment Court at the earlier hearing. He referred to NZALPA's statement of claim at para 1.2 where it is stated:

> 1.2 Notwithstanding the provisions of the CEA, when a pilot makes an Alternative Holiday Request for a Saturday and that is granted, Air Nelson contends a pilot has had his/her weekend off for that roster and consequently refuses to roster the pilot 2 days off on a consecutive Saturday and Sunday for that roster period. Consequently, the pilot has not been rostered a weekend off in that roster.

[10] Mr France also pointed to NZALPA's written synopsis of submissions where it was submitted that Air Nelson cannot treat the alternative holiday on a Saturday as part of a weekend off as satisfying the weekend requirement under cl 4.2.3.2.3. He submitted that NZALPA's case until the present had been that, while affected pilots received an alternative holiday, they never received a weekend off as required pursuant to cl 4.2.3.2.3. He submitted that it is clear that what affected pilots received was an alternative holiday as opposed to a weekend off. The affected pilots had nominated a Saturday as an alternative holiday, which had to be rostered on an "otherwise working day" and then had to be followed by the two rostered days off. After Air Nelson had so rostered the pilot in accordance with the pilot's request for the alternative day on the Saturday, it then purported to apply the weekend off provisions of the collective agreement.

[11] Mr France observed that a weekend off is defined in cl 4.2.3.2.3 as 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. He submitted that

this was not what the affected pilot who had had the request for an alternative holiday granted on a Saturday, actually received.

[12] Mr France therefore submitted that the remedy that Air Nelson was obliged to provide to affected pilots was reinstatement of the weekends off they never received when they took their alternative holiday on a Saturday.

Conclusion

[13] I accept Mr France's submissions. They not only accord with the way the case was argued by NZALPA and the relief it sought in its statement of claim but also accord with the reasoning in my earlier judgment. The rosters were constructed on the basis of the request by the pilot for the Saturday to be an alternative holiday for the purposes of the Holidays Act. The consequence was that the pilot then received the following Sunday and Monday off. If the rosters had been constructed to show that period purely as a weekend off there would have been no entitlement to take the Monday off. As the opening words of the judgment indicate, the issue arose out of how Air Nelson treated rostered days off when they occurred on Saturdays and Sundays where pilots who worked on public holidays were being allocated the Saturday at their request as an alternative holiday for the purposes of the Act. That is what triggered the dispute.

[14] I accept Mr France's submission that Air Nelson has satisfied its obligations under the Holidays Act by providing the requested alternative day. It was the attempted use of that alternative day falling on a Saturday and being followed by two additional rostered days off that led to its claim that that also satisfied the weekend off requirement. It is not now possible to retrospectively reject the request for the Saturdays as alternative days, with the attendant bonus of two additional rostered days off.

[15] As I concluded in my judgment, the weekend off requirement has not be satisfied. The remedy is to ensure that affected pilots who did not receive a rostered weekend off as required, now receive that in addition to their other rostered weekend off in any 28 day roster period.

[16] NZALPA sought costs, as has Air Nelson. I reserved costs in respect of the substantive matter as well but provided a time limit for filing and serving memoranda in relation to costs. That timeframe has not been complied with and so no order for costs is made in relation to the substantive proceeding.

[17] My preliminary view is that in relation to this issue of remedies, costs should lie where they fall. This dispute was determined in the interests of both parties. If either side does not accept that view then a memorandum as to costs should be filed and served with 30 days, with the other party having 14 days in which to reply.

B S Travis
Judge

Judgment signed at 4.45pm on 11 July 2011