IN THE COURT OF APPEAL OF NEW ZEALAND

CA125/2014
[2015] NZCA 432

BETWEEN	JETSTAR AIRWAYS LIMITED Appellant
AND	RICHARD GREENSLADE Respondent

Hearing:	22 July 2015
Court:	Ellen France P, Randerson and Winkelmann JJ
Counsel:	D J Goddard QC and M W O'Brien for Appellant R E Harrison QC and R R McCabe for Respondent
Judgment:	11 September 2015 at 3:00 pm

JUDGMENT OF THE COURT

A The Employment Court did not err in finding that the requirement for rest periods under the Australian Civil Aviation Order 48 exemption was not a requirement for a rest break for the purposes of s 69ZH(2) of the Employment Relations Act 2000, having regard to the text of s 69ZH(2) of the Employment Relations Act.

B The Employment Court did err in finding that the requirement to take a rest break under an Australian regulatory instrument (Civil Aviation Order 48 exemption) that was required to be complied with pursuant to a New Zealand enactment (Civil Aviation Act 1990) was not a requirement "under another enactment" for the purposes of s 69ZH(2) of the Employment Relations Act, but this error was not material to the result in view of the conclusion on A.

C The Employment Court did not err in finding that cl 19 of the respondent's Individual Employment Agreement fell within s 69ZG of the Employment Relations Act and was not an unlawful contracting out of s 69ZH(2) of the Employment Relations Act that was precluded by s 238 of the Employment Relations Act.

D The appellant must pay costs to the respondent for a standard appeal on a Band A basis with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Randerson J)

Table of Contents **Para No**

Introduction

[1] This appeal from a decision of the Employment Court is concerned with the issue of rest and meal breaks for airline pilots and cabin crew employed by the appellant to whom we will refer as Jetstar NZ.[1]

[2] The respondent Mr Greenslade is an airline pilot employed by Jetstar NZ to fly airbus A320 aircraft within New Zealand as well as on trans-Tasman and Pacific routes. These flights are categorised as domestic or short-haul services as distinct from long-haul international flights. He and other flight crew employed by Jetstar NZ on these routes contend they are entitled to rest and meal breaks under s 69ZD of the Employment Relations Act 2000 (the ERA).[2]

[3] It is common ground that the breaks required by s 69ZD are not being provided. Jetstar NZ contends that it is not required to provide the breaks specified in that section. It relies on s 69ZH(2) of the ERA in terms of which the requirements of s 69ZD do not apply where an employee is "required" to take rest breaks under "another enactment". Jetstar NZ says that s 69ZH applies because its parent company, Jetstar Airways Pty Ltd (Jetstar Australia) operates air services in New Zealand under an Australian Air Operating Certificate (AOC) recognised by the Civil Aviation Act 1990 (the New Zealand CAA).

[4] In brief, Jetstar Australia operates under an exemption described as the CAO 48 exemption. This is an instrument issued under the Civil Aviation Act 1988 (Cth) (the Australian CAA). Under the CAO 48 exemption there is a separate regime for rest which Jetstar NZ says applies in place of the rest breaks required by s 69ZD of the ERA.

[5] A full bench of the Employment Court found in favour of Mr Greenslade.[3] The Employment Court found there was no "requirement" for a "rest break" under the CAO 48 exemption. Even if there were such a requirement, it was not a requirement made under "another enactment" for the purposes of s 69ZH(2).

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1 *Greenslade v Jetstar Airways Ltd* [2014] NZEmpC 23, [2014] ERNZ 157 [Employment Court judgment].

2 These provisions have since been substantially amended as we later discuss.

3 Chief Judge Colgan, Judge Inglis and Judge Perkins.

[6] A further issue determined by the Employment Court related to Mr Greenslade's individual employment agreement with Jetstar NZ. Under cl 19 of that agreement, Mr Greenslade claims to be entitled to the breaks specified in s 69ZD. In response, Jetstar NZ contends cl 19 should be interpreted as importing s 69ZH(2). If it does not, then Jetstar argues in the alternative that cl 19 constitutes an unlawful contracting out of s 69ZH(2) contrary to s 238 of the ERA. The Employment Court rejected both these arguments and found that Jetstar NZ was in breach of Mr Greenslade's employment agreement by not providing the breaks required by s 69ZD.

The questions of law

[7] On 17 July 2014 this Court granted leave to appeal on the following questions of law:[4]

> Did the Employment Court err in finding that:
>
> (a) the requirement for rest periods under the Australian Civil Aviation Order 48 exemption was not a requirement for a rest break for the purposes of s 69ZH(2) of the Employment Relations Act 2000, having regard to the text of s 69ZH(2) of the Employment Relations Act?
>
> (b) the requirement to take a rest break under an Australian regulatory instrument (Civil Aviation Order 48 exemption) that was required to be complied with pursuant to a New Zealand enactment (Civil Aviation Act 1990) was not a requirement "under another enactment" for the purposes of s 69ZH(2) of the Employment Relations Act?
>
> (c) cl 19 of the respondent's Individual Employment Agreement fell within s 69ZG of the Employment Relations Act and was not an unlawful contracting out of s 69ZH(2) of the Employment Relations Act that was precluded by s 238 of the Employment Relations Act?

[4] *Jetstar Airways Ltd v Greenslade* [2014] NZCA 331.

The legislation

The ERA

[8] With effect from 1 April 2009 a new Part 6D was inserted into the ERA.[5] It has since been amended as we later discuss but, at material times, it relevantly provided:

> **Part 6D**
>
> **Rest breaks and meal breaks**
>
> **69ZC Interpretation**
>
> In this Part, unless the context otherwise requires, **work period**—
>
> (a) means the period—
>
> (i) beginning with the time when, in accordance with an employee's terms and conditions of employment, an employee starts work; and
>
> (ii) ending with the time when, in accordance with an employee's terms and conditions of employment, an employee finishes work; and
>
> (b) to avoid doubt, includes all authorised breaks (whether paid or not) provided to an employee or to which an employee is entitled during the period specified in paragraph (a).
>
> **69ZD Entitlement to rest breaks and meal breaks**
>
> (1) An employee is entitled to, and the employer must provide the employee with, rest breaks and meal breaks in accordance with this Part.
>
> (2) If an employee's work period is 2 hours or more but not more than 4 hours, the employee is entitled to one 10-minute paid rest break.
>
> (3) If an employee's work period is more than 4 hours but not more than 6 hours, the employee is entitled to—
>
> (a) one 10-minute paid rest break; and
>
> (b) one 30-minute meal break.
>
> (4) If an employee's work period is more than 6 hours but not more than 8 hours, the employee is entitled to—

[5] By s 6 of the Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008.

(a) two 10-minute paid rest breaks; and

(b) one 30-minute meal break.

(5) If an employee's work period is more than 8 hours, the employee is entitled to—

(a) the same breaks as specified in subsection (4); and

(b) the breaks as specified in subsections (2) and (3) as if the employee's work period had started at the end of the eighth hour.

69ZE When employer to provide rest breaks and meal breaks

(1) Rest breaks and meal breaks are to be observed during an employee's work period—

(a) at the times agreed between the employee and his or her employer; but

(b) in the absence of such an agreement, as specified in subsections (2) to (5).

(2) Where section 69ZD(2) applies, an employer must, so far as is reasonable and practicable, provide the employee with the rest break in the middle of the work period.

(3) Where section 69ZD(3) applies, an employer must, so far as is reasonable and practicable, provide the employee with—

(a) the rest break one-third of the way through the work period; and

(b) the meal break two-thirds of the way through the work period.

(4) Where section 69ZD(4) applies, an employer must, so far as is reasonable and practicable, provide the employee with—

(a) the meal break in the middle of the work period; and

(b) a rest break halfway between—

(i) the start of work and the meal break; and

(ii) the meal break and the finish of work.

(5) Where section 69ZD(5) applies, an employer must, so far as is reasonable and practicable, provide the employee with the rest breaks and meal breaks in accordance with the applicable provision in subsections (2) to (4).

…

69ZG Relationship between Part and employment agreements

(1) This Part does not prevent an employer providing an employee with enhanced or additional entitlements to rest breaks and meal breaks (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.

(2) An employment agreement that excludes, restricts, or reduces an employee's entitlements under section 69ZD—

(a) has no effect to the extent that it does so; but

(b) is not an illegal contract under the Illegal Contracts Act 1970.

69ZH Relationship between Part and other enactments

(1) Where an employee is provided with, or entitled to, rest breaks or meal breaks under another enactment,—

(a) this Part prevails if the breaks provided under this Part are additional or enhanced breaks:

(b) the other enactment prevails if the breaks provided under the other enactment are additional or enhanced breaks.

(2) Despite subsection (1), where an employee is a person who is required to take a rest break by, or under, another enactment, the requirement for a rest break defined by, or under, the other enactment applies instead of the provisions or entitlements for rest breaks or meal breaks provided under this Part.

The civil aviation legislation

[9] With effect from 30 March 2007 the New Zealand CAA was amended to introduce a new Part 1A. In terms of s 11A the purpose of this Part is to implement the ANZA Mutual Recognition Agreements.[6] Section 11B provides that a holder of an Australian AOC with ANZA privileges may conduct its operations to, from or within New Zealand under certain conditions that it is accepted have been met. Jetstar Australia operates in New Zealand under this provision but the pilots and other crew are employed by Jetstar NZ. In order to maintain the right to operate

[6] ANZA means Australia and New Zealand Aviation and the ANZA mutual recognition agreements are agreements or arrangements specified in regulations made under s 100(1)(ed) of the Act: Civil Aviation Act 1990, s 2(1).

under the AOC, the operator must comply with the obligations arising under the Australian civil aviation legislation and the specific requirements of the AOC.[7]

[10] Civil Aviation Rules issued under the authority of the New Zealand CAA make certain provision for rest periods and limitations on flight and duty time.[8] However, it is common ground that these rules do not apply in the case of air operations conducted in New Zealand under an Australian AOC with ANZA privileges.[9]

[11] Under the Australian CAA, the Civil Aviation Safety Authority may issue Civil Aviation Orders.[10] CAO 48 is one such order dealing with rest periods and flight time limitations. It is possible to obtain a Standard Industry Exemption from the flight and duty time limitations set out in CAO 48. Jetstar Australia obtained such an exemption on specified conditions. We discuss these provisions in further detail below.

[12] We now turn to the specific questions upon which leave to appeal was granted. It is common ground that the answer to these questions depends upon:

(a) What constitutes a "rest break" when that term is used in s 69ZH(2) of the ERA;

(b) Whether in terms of s 69ZH(2) Mr Greenslade was "required" to take "rest breaks" by the CAO 48 exemption; and

(c) Whether any such requirement was "by or under another enactment" in terms of s 69ZH(2).

[13] We will answer the first two of these issues when dealing with the first question and the third issue when determining the second question.

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7 Section 28BD of the Australian Civil Aviation Act 1988 (Cth) provides that the holder of an AOC must comply with all requirements of that Act, any regulations made under it and applicable CAOs.

8 Civil Aviation Rules, pt 121, sub-pt K.

9 Civil Aviation Rules, r 121.15.

10 Civil Aviation Act (Cth), s 98(4A).

Did the Employment Court err in finding that the requirement for rest periods under the Australian Civil Aviation Order 48 exemption was not a requirement for a rest break for the purposes of s 69ZH(2) of the ERA, having regard to the text of s 69ZH(2) of the ERA?

What constitutes a rest break under s 69ZH(2)?

[14] The Employment Court found that a rest break under s 69ZD is a period when an employee is freed from the performance of his or her work duties, during a working day or a work period as defined in s 69ZC.[11] It rejected Jetstar NZ's submission that a rest break could include a period of rest between working days or working periods. The Employment Court also found that a "rest break" as that term is used in s 69ZH(2) had the same meaning.[12]

[15] In this Court, Mr Goddard QC for Jetstar NZ accepted that the expressions "rest breaks" and "meal breaks" in s 69ZD to 69ZG all refer to breaks taken during the "work period" as defined by s 69ZC. Under that provision "work period" is defined as the period between the time the employee starts and finishes work in accordance with the terms and conditions of employment. Section 69ZE(1) makes it clear that the defined rest breaks and meal breaks are to be observed "during an employee's work period". It follows that the requirements of s 69ZD would not be met by providing rest breaks between work periods but not during them.

[16] Mr Goddard also accepted that the reference to "breaks" in s 69ZH(1)(a) and (b) necessarily includes both rest breaks or meal breaks as defined. This must be so because s 69ZH(1) requires a comparison to be made between the breaks required by Part 6D and breaks provided for under another enactment. Section 69ZH(1) means that the employee is entitled to the benefit of whichever enactment provides the more generous entitlement to rest and meal breaks.

[17] Mr Goddard's submission is that the reference to "rest break" on the first two occasions in s 69ZH(2) is to be interpreted more broadly than the meaning of that term when used in the remainder of Part 6D. Mr Goddard submitted "rest breaks" at the end of s 69ZH(2) meant something different from the meaning of that term

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11 Employment Court judgment, above n 1, at [31].
12 At [37].

elsewhere in Part 6D because the early part of s 69ZH(2) referred only to "rest breaks" and not "rest and meal breaks". On this approach, the meaning of the term "rest break" in s 69ZH(2) is not confined to rest and meal breaks as defined in the remainder of Part 6D. He emphasised that a rest break was a paid break whereas a meal break was unpaid.

[18] It was submitted that the broader meaning was confirmed by the legislative history of s 69ZH(2), a provision introduced at a late stage of the legislative process. Mr Goddard submitted that this provision was intended to ensure that specific regulatory regimes for rest breaks in industries such as the transport sector were to apply in place of the Part 6D regime. A broader interpretation was required to achieve Parliament's intention to provide for the rest breaks required by other legislation. In the aviation context, Parliament's intention, consistently with the ANZA mutual recognition agreements, was that the regime for rest breaks applicable to an Australian operator such as Jetstar Australia would apply in place of the provisions of Part 6D of the ERA. On this footing, it did not matter whether the provision for rest breaks was during work periods or between them. Nor did it matter that the alternative regime did not apply to the particular types of flights which the employee was currently required to undertake (for example, short-haul or long-haul).

Approach to interpretation

[19] It is fundamental that the meaning of an enactment must be ascertained from its text and in the light of its purpose.[13] In determining purpose, the Court may have regard to the immediate and general legislative context as well as the social, commercial or other objective of the enactment.[14] In the present case, the legislative context includes the Australian CAA and the recognition given in the New Zealand CAA to the holders of an Australian AOC with ANZA privileges. As well, regard may be had to the purpose of Part 1A of the New Zealand Aviation Act, namely to implement the ANZA mutual recognition agreements.

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13 Interpretation Act 1999, s 5.

14 *Commerce Commission v Fonterra Co-operative Group* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

[20] There is a general rule of construction that the drafter is presumed to have used words consistently throughout the legislation.[15] While the presumption may be displaced it is nevertheless a convenient starting point to interpretation, particularly where, as here, the term in question is used frequently within a confined part of a statute addressing a specific topic.[16]

Text of the ERA

[21] We agree with Mr Harrison QC's submission on behalf of Mr Greenslade that Part 6D of the ERA is concerned solely with requirements for rest and meal breaks for employees during work periods as defined. It creates specific entitlements for employees where none existed before under the ERA. It applies to all employees irrespective of who their employers may be or the industries in which they may be employed.

[22] The entitlements to rest and meal breaks prescribed by Part 6D are the minimum required and may not be reduced or excluded by an employment agreement.[17] On the other hand, the minimum entitlements may be enhanced or added to by agreement between the employer and employee.[18] The employee is entitled to the benefit of more generous provisions for rest or meal breaks made under other enactments.[19]

[23] We also agree with Mr Harrison that Part 6D says nothing about any other arrangements or agreements that may be made for rest breaks outside work periods as defined. It does not address, for example, minimum periods between tours of duty by employees engaged in the aviation industry.

[24] Mr Harrison submitted there was nothing in the text of s 69ZH(2) to suggest that the references to "rest breaks" in the early part of s 69ZH(2) were to be

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15 RI Carter *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at [260] citing *New Zealand Breweries Ltd v Auckland City Corp* [1952] NZLR 144 (CA) at 158 and *Elders NZ Ltd v PGG Wrightson* [2008] NZSC 104, [2009] 1 NZLR 577 (SC) at [30]. See also Oliver Jones *Bennion on Statutory Interpretation* (6th ed, LexisNexis, London, 2013) at 1034.

16 See *R v Dunn* [1973] 2 NZLR 481 (CA) at 483.

17 Employment Relations Act 2000, s 69ZG(2).

18 Employment Relations Act, s 69ZG(1).

19 Employment Relations Act, s 69ZH(1).

interpreted any differently from other references to that expression in s 69ZH or, indeed, any differently from the numerous other references to that term throughout the remainder of Part 6D. He made the point that it was not necessary to read "rest break" in the early part of subs (2) any differently from its accepted interpretation elsewhere in order to trigger the application of the rest break or meal break provisions of another enactment. We agree.

[25] It is of particular significance that s 69ZH(2) refers at the end to both rest and meal breaks. It would be surprising if Parliament intended rest breaks when used earlier in the very same subsection to be construed differently.

[26] We conclude there is nothing in the text of s 69ZH(2) or any other provision in Part 6D to suggest that "rest breaks" are to be construed differently or more broadly than the defined meaning which it is agreed those words have. To the contrary, the text of s 69ZH, construed in the context of Part 6D, points clearly to the conclusion that the expression "rest breaks" is to be interpreted consistently throughout Part 6D as those breaks required during work periods as defined by s 69ZC.

Legislative history and purpose

[27] Part 6D of the ERA was introduced along with a new Part 6C by the Employment Relations (Breaks and Infant Feeding) Amendment Bill. The explanatory note accompanying the Bill provides a general policy statement to this effect:[20]

> This Bill implements government policy to make legislative provision for the promotion and protection of infant feeding through breastfeeding and for rest and meal breaks. The Bill amends the Employment Relations Act 2000 (the Employment Relations Act) to require employers to provide facilities and breaks for employees who wish to breastfeed and to provide employees with rest and meal breaks.
>
> The objective of these amendments is to create minimum standards for a modern workforce in respect of the protection and promotion of infant feeding through breastfeeding and the provision of rest and meal breaks. Further, these amendments support government policy concerning the

[20] Employment Relations (Breaks, Infant Feeding and Other Matters) Amendment Bill 2008 (205–1) (explanatory note) at 1.

> choices of employees, particularly regarding their work-life balance and caring responsibilities.

[28] To the extent that the Bill introduced minimum standards for rest and meal breaks, the evident government purpose was to benefit employees by providing for a better work-life balance. The regulatory impact statement accompanying the Bill noted that while almost 93 per cent of active collective agreements provided for rest and meal breaks, there were some problems regarding the organisation of work in specific sectors which meant that the actual provision of rest and meal breaks might be inadequate. The impact statement added that little was known about whether break provisions were included in individual employment agreements which covered a majority of the work force. The service and manufacturing sectors were identified as appearing to be the most prone to providing less than optimal rest and meal breaks.

[29] The only reference in the explanatory note to provisions made in other enactments related to what is now s 69ZG. The explanatory note said:[21]

> These amendments will not apply to employees who are already covered by other legislative provisions or regulations for rest and meal breaks, where those other provisions are enhanced or additional to the entitlements in the proposed Bill.

[30] The Bill as introduced contained no provision equivalent to s 69ZH(2) as enacted. Although some amendments to the Bill were recommended in the Select Committee's report, no change was recommended to the proposed s 69ZH.

[31] Mr Goddard drew our attention to some statements made by individual members of the House during Parliamentary debates on the Bill. It was suggested that concerns had been raised by submitters from the transport industry as to whether specific provisions for work breaks and hours of work in transport-related legislation should prevail. There was also a suggestion that similar concerns may have been raised about maritime legislation.

[32] Little can legitimately be drawn from the references by individual members of Parliament in endeavouring to ascertain the true meaning of s 69ZH(2) in the form

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[21] At 10.

in which it was finally enacted.[22] All that can be said is that the amendment to the Bill to introduce what is now s 69ZH(2) occurred at a late stage of the legislative process. There is nothing in the Parliamentary materials to suggest that any specific attention was given to the distinction between rest breaks and meal breaks during the work period as defined and provisions for such breaks outside the work period.

Other statutory schemes for rest breaks

[33] Mr Goddard referred us to s 30ZC of the Land Transport Act 1998 and the Land Transport Rule: Work Time and Logbooks 2007 (Land Transport Rules) made thereunder.[23] He submitted that the regime under this legislation did not necessarily require rest breaks or "rest time" within a work period in the way described by s 69ZD. Similarly, for mandatory rest requirements under Part 31A of the Maritime Rules made under the Maritime Transport Act 1994.[24] He submitted these provisions suggested that "rest breaks" under s 69ZH(2) should be construed to allow for exceptions from the requirements of the ERA where there were statutory regimes for rest breaks in specific employment situations such as the road transport and maritime industries.

[34] Mr Harrison's submission in response was that it was not necessary to construe "rest break" in s 69ZH(2) more broadly. Rather, the two regimes could exist side by side. The ERA applied to the minimum rest breaks and meal breaks required during the work period. Where other legislation required employees to take rest breaks or meal breaks within the work period which were of the same or similar character to those required by s 69ZD, then the other enactment was to prevail. However, there was no reason why the requirements of other enactments outside the work periods should not apply in addition to those within the work periods. In that sense, Mr Harrison submitted there was no incompatibility with other legislation which might require "rest breaks" in s 69ZH(2) to be interpreted more broadly. We agree with this submission.

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22 See *W v Attorney-General* [1993] 1 NZLR 1 (CA) at 5 per Cooke P.

23 Land Transport Act 1998, s 30ZC and the Land Transport Rule: Work Time and Logbooks 2007: rr 2.1–2.3.

24 In particular, Maritime Rules, r 31A.24.

Conclusions on what constitutes a rest break under s 69ZH(2)

[35] We accept that it may not always be a straightforward exercise to rationalise different statutory regimes addressing the same or similar topics. But we must construe s 69ZH(2) in the form enacted by Parliament and in the light of the statutory purpose as best it can be discerned. Approached on that basis, we are satisfied Parliament's intention was to provide for the wellbeing of employees by requiring them to take specified rest and meal breaks during the work period as defined by s 69ZC of the ERA.

[36] To the extent that employees are required by other enactments to take rest and meal breaks of the same or similar character during the work period, the provisions of the other enactments are to apply. We do not view "rest breaks" in the first part of s 69ZH(2) as extending to any regime which makes provision designed to ensure that employees are adequately rested. For example, we do not consider that s 69ZH(2) was intended to apply to regimes providing for the duties of airline pilots to be rostered so there is adequate time off before they are next required for duty.

[37] We also take into account that the purpose of legislation such as the ERA may be contrasted with that of aviation legislation. The former is concerned specifically with the wellbeing of employees while the latter will necessarily be focused on ensuring the safety of the travelling public as a paramount consideration. This distinction is of particular significance in the present case where Jetstar Australia is the operator under the AOC but has chosen to employ Mr Greenslade and other flight crew by its subsidiary Jetstar NZ, which is subject to the obligations imposed by the ERA.

[38] Although we consider the ANZA mutual recognition agreements recognised and implemented by the New Zealand CAA are relevant to the second question of law we do not view them as bearing upon or assisting the first question. Their focus is on provisions applicable to the aviation sector and do not have a goal of mutuality in employment matters.

[39] We note for completeness that Part 6D of the ERA has been amended with effect from 6 March 2015.[25] The amending legislation was introduced by the Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill and is designed to address a concern that the provisions of Part 6D were unduly prescriptive.[26] Greater flexibility is introduced including a requirement that employers provide compensatory measures if rest or meal breaks in accordance with s 69ZD are not, or cannot, be provided. Section 69ZH(1) has been deleted but s 69ZH(2) has been substantially re-enacted, although it now refers to both rest breaks and meal breaks.

[40] No reference is made in the explanatory statement nor in any other Parliamentary materials or debates about the changes to s 69ZH. That is so despite, it appears, Members of Parliament being aware of the Jetstar employment case.[27] On one view, the fact that s 69ZH now refers to both rest and meal breaks tends to support the conclusion that the present version of this section is consistent with Parliament's original intention. If there had been an intention to change the meaning of the provision, one would have expected some reference to this in the Parliamentary materials.

Does the CAO 48 exemption "require rest breaks" in terms of s 69ZH(2)?

[41] Mr Goddard submitted that if the Employment Court's interpretation of s 69ZH(2) was correct, the CAO 48 exemption contained a requirement for rest breaks that sufficiently complied with that interpretation. It is therefore necessary to examine the terms of the exemption in more detail. The CAO 48 exemption issued by the Australian Civil Aviation Safety Authority is expressed to be effective from 20 September 2012 to 30 September 2015 unless earlier revoked or suspended.[28] It is issued to Jetstar Australia as the operator:

> … on condition that, until the exemption ceases to be in force, the Operator and flight crew members engaged in operations conducted by the Operator are subject, at all times, to the flight and duty limits set out in the document attached as Schedule 1 …

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25 Employment Relations Amendment Act 2014, ss 49–52.
26 Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill 2009 (91–1).
27 (30 October 2014) 701 NZPD 440.
28 Instrument No SR224/12.

[42] Schedule 1 of the CAO 48 exemption contains provisions for flight crew rest periods, rostering limitations and related issues. The provisions relied upon by Jetstar NZ are primarily contained in ss 1 to 3 and in Part III of the Schedule. Mr Goddard accepted that none of the conditions provides for any specified rest breaks of the type required by s 69ZD of the ERA. However, he pointed to various provisions which he contended constituted rest breaks. The first is s 3.1:

> **3.1 Adequate Well Being Before Flight**
>
> 3.1.1 A flight crew member shall not knowingly operate an aircraft and an operator shall not knowingly require or knowingly permit a flight crew members to operate an aircraft unless at the start of any duty period:
>
> (a) the operator has provided opportunity for and the flight crew members has taken adequate rest;
>
> (b) the operator has provided opportunity for and the flight crew member has taken adequate sustenance; and
>
> (c) the flight crew members is free of any fatigue, illness, injury, medication or drug which could impair the safe exercise of his or her licence privileges.

[43] This provision requires the operator to ensure that flight crew members have taken adequate rest and sustenance before the commencement of a "duty period" which is defined as:

> A period which starts when a flight crew member is required by an operator to report for a duty, until the flight crew member is free of all duties.

[44] Section 3.1 does not impose any requirement for a rest break during the work period nor does it require any specific period of rest to be taken. There is no direct requirement on a flight crew member to take adequate rest and sustenance. Rather, it provides that a flight crew member shall not knowingly operate an aircraft unless the operator has provided the flight crew member with adequate opportunity for rest and sustenance.

[45] Mr Goddard also drew our attention to s 3.2.1 of Sch 1:

> 3.2.1 An operator shall provide opportunity for and a flight crew member shall ensure that adequate rest is taken during the period prior to commencing or recommencing duty.

[46] The term "duty" is defined broadly as including any task that a flight crewmember is required to carry out associated with the business of an operator. This section is also focused on the taking of adequate (unspecified) rest prior to a flight crew member commencing duty. Mr Goddard submitted that the reference to adequate rest before recommencing duty could include rest taken during a work period. This may be so but could not be regarded as a rest break of the type envisaged by s 69ZH(2) as we have interpreted it.

[47] Finally, Mr Goddard referred us to certain provisions under Part III of the Schedule.[29] Part III is concerned with roster limits for domestic (high capacity) operations. It provides limits on the maximum hours in any flight duty period and also restricts the number of duty periods for which a flight crew member may be rostered over a given period of time. Paragraph 3.2.2 enables the general roster limits to be increased where a flight duty period contains a rest period of at least four consecutive hours at "suitable resting accommodation".[30] Paragraphs 3.3.1 and 3.3.2 specify the maximum rostered flight duty periods for "augmented" flight crew where a comfortable seat is provided. Again, none of these provisions imposes any requirement on an employee to take a rest break.[31]

[48] We are satisfied that none of these provisions requires an employee to take a rest break falling within s 69ZH(2) as we have interpreted it. In summary, our reasons for this conclusion are:

(a) In the main, the obligations are cast on the operator not on the employee.

(b) With one possible exception, there is no requirement for an employee to take a rest break during a work period.

(c) The single rule that might arguably be regarded as imposing a requirement on an employee to take a rest break during a work period

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29 Paragraphs 3.2.2, 3.3.1 and 3.3.2.

30 This is defined as a comfortable resting area which is environmentally conducive to rest, which contains a comfortable chair and at which the flight crew member has access to sustenance at times appropriate to the flight duty requirements.

31 Similar provisions apply to International Operations under Part II of the Schedule. Mr Greenslade is not currently flying international operations and we do not consider it is relevant that he might in future be required to do so.

only requires the employee to take "adequate rest" without specifying any particular period or the intervals at which rest is to be taken.[32] This provision leaves the assessment of what is "adequate rest" in the discretion of the employee.

(d) Placing restrictions on maximum periods of duty or managing rosters so that an employee is allowed time off between duties does not fall within s 69ZH(2).

(e) A scheme with the general objective of providing opportunities for employees to be adequately rested is not contemplated by s 69ZH(2).

[49] We do not view the CAO 48 exemption as being similar to the Land Transport regime discussed at [33] and [34] above. In particular, s 30ZC imposes specific rest time requirements on drivers that may, but need not, be taken during work periods. There is no such requirement under the CAO 48 exemption.

Did the Employment Court err in finding that the requirement to take a rest break under an Australian regulatory instrument (CAO 48 exemption) that was required to be complied with pursuant to a New Zealand enactment (Civil Aviation Act 1990) was not a requirement "under another enactment" for the purposes of s 69ZH(2) of the ERA?

[50] The Employment Court found that the CAO 48 exemption was not "another enactment" for the purposes of s 69ZH(2).[33] It considered that the reference to an enactment, consistently with the definition of that term in the Interpretation Act 1999, must be read as a reference to a New Zealand enactment. The Employment Court also took the view that the CAO 48 exemption was not made by or under a New Zealand enactment.

[51] There was some dispute in the Employment Court about whether the CAO 48 exemption was a legislative instrument under Australian legislation. The Employment Court accepted the evidence of an expert witness called by Jetstar NZ to the effect that the exemption was not a legislative instrument under Australian legislation.

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[32] Section 3.2.1 — referring to the "recommencement" of duties.
[33] Employment Court judgment, above n 1, at [65].

[52] Whether the CAO 48 exemption did so qualify is not relevant to Jetstar NZ's argument in this Court. Mr Goddard's argument was that the relevant enactment for the purposes of s 69ZH(2) was the New Zealand CAA. We have concluded the Employment Court was wrong to decide that the CAO 48 exemption did not constitute "another enactment". Rather, we accept Jetstar NZ's argument that if the CAO 48 exemption does, contrary to our view, require Mr Greenslade to take rest breaks, then that requirement derives "by, or under, another enactment" for the purposes of s 69ZH(2).

[53] Section 29 of the Interpretation Act defines "enactment" as being the whole or portion of an Act or regulation. "Act" means an Act of the Parliament of New Zealand or of the general assembly. The term "regulations" means, inter alia, regulations, rules or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown. It follows that the New Zealand CAA is an enactment and that the Civil Aviation Rules made thereunder are regulations since they are made by a Minister of the Crown.

[54] Mr Goddard advanced an argument based on the requirements of Part 121 of the Civil Aviation Rules which contains provision in subpart K for rest breaks or rest periods applicable to air operators under a New Zealand AOC. However, we agree with Mr Harrison that the fact that these rules do not apply to the holder of an Australian AOC with ANZA privileges means that reference to Part 121 of the Civil Aviation Rules does not advance Jetstar NZ's argument. We consider there is a more direct route.

[55] As already noted, s 11B of the New Zealand CAA authorises the holder of an Australian AOC with ANZA privileges to conduct air operations to, from, or within New Zealand. Absent s 11B of the New Zealand CAA, Jetstar Australia would not be authorised to operate air services in New Zealand. It follows that if Jetstar NZ had been able to establish that the CAO 48 exemption required Mr Greenslade to take rest breaks in terms of s 69ZH(2) then that requirement would have arisen by or under an enactment, namely the New Zealand CAA.

[56] We accept Mr Goddard's submission that the statutory recognition of the Australian AOC with ANZA privileges stems from the recognition given to the ANZA mutual recognition agreements implemented by Part 1A of the New Zealand CAA.

[57] The Employment Court considered that Jetstar NZ's argument would potentially undermine the minimum standards for employment relationships imposed by New Zealand legislation by applying variable standards adopted elsewhere. We take a different view. If the CAO 48 exemption had otherwise fallen within s 69ZH(2), then the requirements of the exemption would apply instead of the rest break requirements of Part 6D.

[58] Mr Harrison supported the Employment Court's reasoning that the expression "by or under" a New Zealand enactment required a direct statutory link.[34] The Employment Court gave the example of regulations or rules made pursuant to the empowering provisions of an Act as fulfilling the "by or under an enactment" provision. The Employment Court reasoned that since the CAO 48 exemption was an instrument made under the Australian CAA it did not meet the requirement of having a direct link with the New Zealand CAA. Mr Harrison accepted that the expression "by or under" contemplates that the source of legal obligation need not be expressly stated in the relevant enactment. Nevertheless, he submitted the connection between the New Zealand enactment relied upon and the actual source of the requirement in terms of s 69ZH(2) must be directly derived from the enactment in question or must itself be one which arises as a matter of New Zealand law.

[59] We do not accept this submission. We are satisfied that the expression "by or under" is sufficiently wide to include the terms of any Australian AOC with ANZA privileges authorised by s 11B of the New Zealand CAA. While it cannot be disputed that the Australian AOC held by Jetstar Australia and the conditions in Sch 1 of the CAO 48 exemption ultimately derive from the Australian CAA, the authority for Jetstar Australia to operate in New Zealand is conferred directly by s 11B of the New Zealand CAA. As earlier noted, Jetstar Australia must comply with

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[34] Employment Court judgment, above n 1, at [55].

the terms of the Australian AOC in order to maintain its validity.[35] While Mr Greenslade is employed by Jetstar NZ, he would nevertheless be required in practice to comply with any applicable obligations imposed by Jetstar Australia as operator.

Summary in respect of the second question

[60] We conclude that the Employment Court was correct to find that the CAO 48 exemption did not require rest breaks in terms of s 69ZH(2). However, if we had concluded otherwise, we would have found that the requirement arose by or under another enactment for the purposes of s 69ZH(2) of the ERA.

Did the Employment Court err in finding that cl 19 of the respondent's Individual Employment Agreement fell within s 69ZG of the ERA and was not an unlawful contracting out of s 69ZH(2) of the ERA that was precluded by s 238 of the ERA?

[61] Strictly speaking, the third question of law need not be answered since we have found in favour of Mr Greenslade on the first two questions. However, in case this matter goes further, we will deal with it. It relates to a term of Mr Greenslade's individual employment agreement which was in force for the period 14 October 2010 to 25 March 2013 when it was replaced by a collective agreement which is not in issue.

[62] Clause 19 of the employment agreement provided:

> **Breaks**
>
> The parties agree that breaks will be provided in accordance with the statutory requirements set out in section 69ZD of the Employment Relations Act 2000, or any amending or substituting Acts. The parties agree that the Company may direct the most appropriate time for these breaks to be taken in accordance with operational requirements.

[63] In the Employment Court, Mr Greenslade submitted that the wording of cl 19 was clear. Jetstar NZ agreed that he would be provided with the rest and meal breaks specified in s 69ZD of the ERA. As well, the parties agreed that Jetstar NZ could

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[35] Civil Aviation Act (Cth), s 28BD.

direct the most appropriate time when those breaks would be taken in accordance with operational requirements.

[64] The argument to the contrary by Jetstar NZ was that what was agreed between the parties in terms of cl 19 must have regard to the whole of Part 6D of the ERA including s 69ZH(2). Since Jetstar NZ contended that s 69ZD did not apply by virtue of s 69ZH(2), there was no breach of cl 19 by Jetstar NZ failing or refusing to provide any meal or rest breaks. Effectively, the regime under the CAO 48 exemption overrode the rest and meal break requirements of s 69ZD. Jetstar NZ supported its submission by referring to s 69ZD(1) which refers to the required rest and meal breaks being "in accordance with this Part".

[65] The Employment Court rejected this argument.[36] Its reasons were: the clause referred specifically to s 69ZD and did not mention s 69ZH; the reference in s 69ZD(1) to rest and meal breaks in accordance with this Part logically referred to the rest and meal breaks defined by ss 69ZD and 69ZE; and, if s 69ZH(2) were intended to apply, then the ability of Jetstar NZ to direct when the breaks would be taken would be otiose.

[66] The Employment Court also rejected an alternative argument advanced by Jetstar NZ that Mr Greenslade's interpretation of cl 19 would constitute an unlawful contracting out of the Act under s 238 of the ERA. It was submitted that s 238 prohibited the parties from entering into an employment contract which included some elements of the legislation but excluded others (in this case s 69ZH(2)). This argument was also rejected by the Employment Court.[37]

[67] Mr Goddard accepted that the third question upon which leave was granted was awkwardly expressed in referring to s 69ZG. He submitted that s 69ZG related only to rest breaks or meal breaks which enhanced or added to the employee's entitlements under s 69ZD. Since cl 19 did not provide entitlements beyond those mandated by s 69ZD, it followed that s 69ZG is not engaged. We agree.

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[36] Employment Court judgment, above n 1, at [76]–[78].
[37] Employment Court judgment, above n 1, at [82]–[91].

[68] However, in our view the reference in cl 19 of the employment agreement to s 69ZD does not import the whole of Part 6D for the reasons the Employment Court gave. This conclusion is reinforced by the reference in cl 19 to "or any amending or substituting Acts". Plainly the parties intended that breaks would be required as specified by s 69ZD or by any later versions of the ERA.

[69] In any event, we are satisfied this question raises an issue of construction of an individual employment agreement which in terms of s 214(1) of the ERA we have no jurisdiction to consider. We reject Mr Goddard's argument that the third question raised a point of interpretation of Part 6D rather than the employment agreement.

[70] We are able to deal shortly with the argument under s 238. That section provides:

> **238 No contracting out**
>
> The provisions of this Act have effect despite any provision to the contrary in any contract or agreement.

[71] We are satisfied cl 19 does not offend against s 238. It does not purport to contract out of the provision of the ERA. Rather, it positively applies the provisions of the ERA by specifying that Mr Greenslade is entitled to the rest and meal breaks the Act requires.

[72] Before leaving this issue, we record that there was an argument in the Employment Court about whether cl 19 was overridden by another provision of Mr Greenslade's employment agreement. No argument was advanced on this point before us, the parties no doubt recognising the prohibition on such arguments by virtue of s 214 of the ERA.

Result

[73] For the reasons given, the formal order of the Court is:

(a) The Employment Court did not err in finding that the requirement for rest periods under the Australian Civil Aviation Order 48 exemption was not a requirement for a rest break for the purposes of s 69ZH(2) of the Employment Relations Act 2000,

having regard to the text of s 69ZH(2) of the Employment Relations Act.

(b) The Employment Court did err in finding that the requirement to take a rest break under an Australian regulatory instrument (Civil Aviation Order 48 exemption) that was required to be complied with pursuant to a New Zealand enactment (Civil Aviation Act 1990) was not a requirement "under another enactment" for the purposes of s 69ZH(2) of the Employment Relations Act, but this error was not material to the result in view of the conclusion on (a).

(c) The Employment Court did not err in finding that cl 19 of the respondent's Individual Employment Agreement fell within s 69ZG of the Employment Relations Act and was not an unlawful contracting out of s 69ZH(2) of the Employment Relations Act that was precluded by s 238 of the Employment Relations Act.

[74] Mr Goddard submitted that the argument was of sufficient difficulty to warrant an order for costs on the basis of a complex appeal. We accept Mr Harrison's submission that costs for a standard appeal are appropriate. Although the appellant was successful on one issue, the error identified was not material to the outcome and the issue occupied only a minor part of the overall argument. The appellant must pay costs to the respondent for a standard appeal on a Band A basis with usual disbursements. We certify for second counsel.

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