

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2022] NZEmpC 92  
EMPC 437/2021**

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

AND IN THE MATTER OF an application for a stay of proceedings

BETWEEN NEW ZEALAND AIR LINE PILOTS'  
ASSOCIATION IUOW  
INCORPORATED  
Plaintiff

AND AIRWAYS CORPORATION OF NEW  
ZEALAND LIMITED  
Defendant

Hearing: 13 May 2022  
(Heard at Christchurch via Virtual Meeting Room)

Appearances: R Harrison QC and R McCabe, counsel for plaintiff  
K Dunn, counsel for defendant

Judgment: 26 May 2022

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**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH  
(Application for a stay of proceedings)**

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[1] Airways Corporation of New Zealand Ltd is a state-owned enterprise.<sup>1</sup> It provides air navigation and air traffic management services throughout New Zealand and overseas.

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<sup>1</sup> State-Owned Enterprises Act 1986 and Companies Act 1993.

[2] Airways employs approximately 360 air traffic controllers who are all members of the New Zealand Air Line Pilots' Association IUOW Incorporated (NZALPA).

[3] A dispute has arisen between NZALPA and Airways over the interpretation and application of the provisions of their collective agreement relating to holidays and ss 18 and 19 of the Holidays Act 2003 (the Act).

[4] Section 18 provides that an employee's annual holidays are to be taken at a time agreed between the employee and employer.<sup>2</sup> Under s 19 an employer may direct when annual holidays are to be taken if agreement cannot be reached with the employee.<sup>3</sup>

[5] Clause 52 of the collective agreement provides for annual holidays including enhanced entitlements above the statutory minimum. Clause 53 provides that a unit rostering committee is to compile a leave schedule for each year for all rostered unit staff. The purpose of the committee's work is to ensure, as far as practicable, that all leave commitments are planned to be met and are spread as evenly as possible throughout the year.

[6] The Employment Relations Authority determined that cl 53 of the collective agreement did not prevent Airways from giving an air traffic controller, covered by the collective agreement, notice of a requirement to take annual holidays.<sup>4</sup>

[7] NZALPA has challenged that determination and has elected to have the whole matter heard again. It has applied for a stay of the determination pending the outcome of the challenge. The application is opposed by Airways.

### **The grounds of the challenge**

[8] The grounds of NZALPA's application can be summarised as:

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<sup>2</sup> Holidays Act 2003, s 18(3).

<sup>3</sup> Or s 32 relating to a close-down period applies.

<sup>4</sup> *Airways Corporation of New Zealand Ltd v New Zealand Air Line Pilots Association Industrial Union of Workers Inc* [2021] NZERA 499 (Member Cheyne) at [26].

- (a) The issue raised by the challenge is the ability of Airways to direct air traffic controllers to take annual holidays under s 19(1) of the Act.
- (b) Other than the determination there is no authority on the relationship between ss 18 and 19 of the Act and provisions of collective agreements such as the one between NZALPA and Airways.
- (c) If air traffic controllers are required to take annual holidays using s 19, and the Court subsequently overturns the determination, those annual holidays will be “lost”.
- (d) Due to shortages of air traffic controllers, Airways will not in fact be able to direct that annual holidays be taken.

[9] Airways’ opposition is based on being adversely impacted if a stay is granted because it will be deprived of the ability, should it wish to do so, to require an air traffic controller to take an annual holiday.

[10] The Court has power to order a stay of the Authority’s determination.<sup>5</sup> The overarching consideration is whether granting a stay will be in the interests of justice. That decision is informed by factors such as:<sup>6</sup>

- (a) Whether the challenge will be rendered ineffectual if the stay is not granted.
- (b) Whether the challenge is brought and pursued in good faith.
- (c) Whether the successful party at first instance will be injuriously affected by the stay.
- (d) The extent of any impact of granting it on third parties.

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<sup>5</sup> Employment Court Regulations 2000, reg 64(1).

<sup>6</sup> *Dymoocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (CA); *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50; *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582.

- (e) The novelty and/or importance of the question involved.
- (f) The public interest in the proceeding.
- (g) The overall balance of convenience.

[11] The core of NZALPA's challenge is that the Authority has looked at this issue only through the lens of applying s 19 and reached the conclusion that an employer may deal directly with an employee when it comes to organising and taking annual holidays. Its argument is that the Authority's conclusion overlooks the provisions of the collective agreement in cls 52 and 53.

[12] As explained by Mr Harrison QC, counsel for NZALPA, the issue to be decided is whether the collective agreement provides the agreement contemplated by s 18, precluding the operation of s 19.<sup>7</sup>

[13] While NZALPA's application expressed the consequences for the air traffic controllers as the loss of annual holidays, a modest change was made during submissions. It became an argument that an individual employee would lose the entitlement to take that holiday at a different time from the one directed by Airways. Any subsequent success by NZALPA in its challenge would become academic for an employee who had been required to take a holiday. In that sense, it was said, the absence of a stay could render the challenge ineffectual.

[14] Mr Harrison supplemented that submission by pointing out that there is no evidence of a current desire on the part of Airways to exercise the power the Authority held was conferred by s 19.

[15] Ms Dunn, counsel for Airways, argued that NZALPA's right to challenge the determination would not be rendered ineffectual. An employee required to take a holiday had not lost the entitlement. It would have been taken but not at the time preferred by the air traffic controller.

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<sup>7</sup> See s 19(1)(a).

[16] In the affidavits filed by Airways none of its witnesses stated an intention to direct any air traffic controller to take annual holidays now or in the near future. It follows that Airways' opposition to a stay being granted is about preserving the legal position as found by the Authority unless and until a different decision is reached by the Court.

[17] In that situation the assessment favours granting a stay. There is a risk of a disadvantage to individual air traffic controllers if Airways is not constrained, but no detriment to Airways. In the absence of any detriment to Airways the balance of convenience also favour granting a stay.

[18] Granting the application for a stay is reinforced by the Court being able to hear the substantive proceeding during the week of 18–22 July 2022. That possibility was canvassed with counsel during the hearing, and they confirmed their availability, and the availability of the parties then.

### **Outcome**

[19] The application for a stay is successful. The Authority's determination is stayed pending further order of the Court.

[20] Costs are reserved.

K G Smith  
Judge

Judgment signed at 11.05 am on 26 May 2022