IN THE EMPLOYMENT COURT
AUCKLAND

AC 17A/08
ARC 37/08

IN THE MATTER OF	an application for interlocutory injunction to prevent strike action
BETWEEN	AIR NELSON LIMITED Plaintiff
AND	NEW ZEALAND AIR LINE PILOTS ASSOCIATION INDUSTRIAL UNION OF WORKERS INC First Defendant
AND	SIMON PALMER Second Defendant

Hearing: 23 May 2008
(Heard at Auckland)

Appearances: Kevin Thompson, Counsel for Plaintiff
Richard McCabe, Counsel for Defendant

Judgment: 23 May 2008

Reasons: 28 May 2008

REASONS FOR JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] These are the reasons for the brief oral judgment given at the end of last Friday's hearing dismissing Air Nelson's application for an interlocutory injunction to prevent strike action scheduled to begin on Monday 26 May 2008. That judgment was delivered as soon as possible to enable the parties, and the plaintiff in particular, to further prepare for the consequences of the strike.

[2] The question for urgent decision was whether strike action by Air Nelson pilots scheduled to begin last Monday, and to continue on each of the following 8 days, should be restrained by injunction pending determination of its lawfulness.

[3] Air Nelson Limited is an airline operator carrying passengers and freight throughout New Zealand. A substantial number of its pilots, but by no means all of them, are members of the first defendant union. The second defendant is one of those and is cited nominally as representative of those pilots.

[4] Many of the terms and conditions of employment of the relevant pilots are set by a collective agreement ("ca"), the term of which has now expired but which remains in force statutorily. Since about mid-July 2007 Air Nelson and the first defendant ("NZALPA") have been in negotiations for a replacement ca. Particularly over recent months, there have been strikes of different sorts by pilots seeking to lever their bargaining strength in those negotiations.

[5] The employer's application to restrain forthcoming strike action was filed and, necessarily, heard urgently. The orders it sought were to cover the period until the Court can hear and decide the substantive proceedings between the parties on the usual basis of evidence, cross-examination and considered submissions.

[6] The interlocutory nature of the relief sought dictates that the Court should apply three tests. First, I must determine whether there is a serious question for trial between the parties and, in particular, an arguable case that if strike action takes place as notified, it will be unlawful. Second, and if so, I must consider where the balance of convenience will lie until trial. That is an assessment of whether it will be more just to stop the strike action taking place in the event that it may eventually be found to be lawful or, on the other hand, to allow the strikes to take place but, as may transpire, unlawfully. A sub-set of this test is whether the plaintiff has established that damages will not be an adequate remedy should it be successful. Third, and finally, the remedy of injunction being discretionary, the Court must stand back from the detail of the first two tests and assess where the overall justice of the case lies for that interim period.

[7] For relevant purposes, the story starts with the receipt by Air Nelson of a statutory notice of intended strike action on 9 May 2008. Excluding the schedule to it nominating numerous air fields around New Zealand, and that is not relevant for the purposes of this decision, the notice is attached to this judgment as Annexure 1.

[8] At issue particularly are the following parts of that notice. As to the nature of the proposed strike, it stated:

> *(i) A refusal to fly when on approach other than in accordance with Instrument approach procedure (as defined in Civil Aviation Rules Part 1), except where:*
>
> *(a) the pilot is undergoing or providing line training; or*
> *(b) the pilot is flying with a pilot who is not an ALPA member; or*
> *(c) an event occurs which makes it impossible or unsafe for the pilot to fly in accordance with instrument approach procedure (such as equipment unserviceability; emergency situation, or similar event).*
>
> *This action shall be continuous for the period specified in paragraph (C) hereunder; and*
>
> *(ii) A refusal to fly when on departure other than in accordance with standard instrument departure (SID) (as defined in ICAQ Procedures for Air Navigation Services, Aircraft Operations, Vol 1, Flight Procedures Doc 8168, OPS/611, Amendment 2, 22/11/07) procedure, except where:*
>
> *(a) the pilot is undergoing or providing line training; or*
> *(b) the pilot is flying with a pilot who is not an ALPA member; or*
> *(c) an event occurs which makes it impossible or unsafe for the pilot to fly in accordance with SID (standard instrument departure) procedure (such as equipment unserviceability; emergency situation; or similar event).*
>
> …

[9] The strike action is said to be continuous for the whole of Monday 26 May 2008. Similar successive notices have been given to the employer so that, in effect, the strike action will continue over all of the following 8 days.

[10] As to the places where the proposed strike shall occur, these are said to be at the nominated aerodromes or air fields and: *"(ii) In the air within the New Zealand*

Flight Information Region, en route between any two of the aerodromes and airfields specified in the Schedule annexed to this Notice at which the Pilots or any of them are or may be required by the Employer or by their respective employment agreements to attend …".

[11] Finally, and significantly for the purpose of this case, the paragraph over the hand of Dawn Handforth, NZALPA's legal officer, contains the following:

> ***THIS NOTICE*** *is given and signed on behalf of all the pilot members of NZALPA represented by NZALPA in negotiations for a collective employment agreement with Air Nelson Limited and being employed by the Employer as airline pilots …*

[12] Put simply, the strike action is in the nature of, but not precisely, a work to rule. Pilots will follow instrument procedures for many landings and takeoffs, rather than visual procedures. Both sorts of procedures are permitted in many, but not all, circumstances. They are followed by pilots on a case by case basis depending on contingencies including, but not limited to, civil aviation directives, visibility, weather and other traffic. Instrument takeoffs and landings are safer than their visual counterparts, but often more time-consuming and so are inefficient. By that I mean, for example, that instrument operations require greater separation between aircraft than can be achieved on occasions when operating visually. So pilots must wait until other traffic has cleared the minimum distances or times for instrument operation whereas visual operational rules might permit more efficient takeoffs and landings. Sometimes, such as at night and at the three largest airfields where Air Nelson aircraft operate, instrument takeoffs and landings are mandatory. The decision on any flight as to which method is used, is discussed by the two pilots of an aircraft and permission is then sought from air traffic control which must in any event be informed of the method being used. Ultimately, as with all such flying decisions, it is determined by the pilot in command of the particular aircraft.

[13] So the effect of the strike action will be to slow some services and increase Air Nelson's costs including of fuel used. There may be a cumulative delay of up to an hour for each crew of pilots over the course of a day. The question of the safety of the intended strike action is an important issue in the case, both as to the sufficiency

of the notice given and extending to the balance of convenience and overall justice should there be a serious case for trial.

Serious case for trial

[14] Air Nelson claims that in a number of respects the notices do not conform to the legislative requirements and that this is fatal to the lawfulness of the intended strike action. Whether the plaintiff has a serious arguable case in these respects is the first question for determination.

Specification of notice period

[15] The plaintiff's first challenge to the lawfulness of the strike notices is that they fail to comply with s90(3)(a) of the Act. The notices say that the pilots "*intend to strike after the expiry of fourteen (14) days and before the expiry of twenty eight (28) days of the date of receipt of this notice by the Employer*". The plaintiff says that s90(3)(a) requires that the notice "*must specify … the period of notice …*" and that the formula used does not meet this statutory requirement.

[16] Mr Thompson for Air Nelson argued that the statute requires, in effect, a notice to include a sentence such as: "*The union gives you X days notice of strike action*", X being the precise number of days between 14 and 28 from the date of the giving of the notice to the date of commencement of the strike action. In this regard, counsel relies upon the well-known and authoritatively based requirement that the courts should require strict adherence to statutory notice requirements in essential industries and services: *Secretary for Justice v NZPSA (Inc)* (1990) ERNZ Sel Cas 601 and *NZ Rail Ltd v NZ Combined Union of Rail Employees* [1995] 1 ERNZ 84.

[17] Although Mr Thompson argued that merely stating in the notice the dates on which the strikes will begin will require the recipient of such a notice to speculate about the period of notice, I do not think that can be so. As in this case, there is unlikely to be any doubt about the date of the giving of the notice. Here, notices were given by facsimile transmission machines during normal office hours with the receipt copies being date stamped automatically. In these circumstances there would

not be, and is not said by Air Nelson to have been, a difficulty in establishing the period of notice. It is arguable that the statutory formula under s90(3)(a) requires only that the giver of the notice specify what the union included in its notice, that is advice that it was of no less than 14 and no more than 28 days.

[18] It is difficult to accept the submissions of counsel for the plaintiff that in all these circumstances the notice was open to real confusion and uncertainty about its period. Although for the sake of certainty, givers of such notices may of course include a formula that would meet the stringent test proposed by the plaintiff, it is arguable that this is unnecessary to meet the statutory objective of proper notification of what will happen and when. I do not think it is strongly arguable for the plaintiff, as Mr Thompson contended, that by failing to nominate a particular number of days, the notice leaves the employer to infer its period from a range of possible dates. That is because certainty is arguably achieved by a combination of the date of arrival of the notice (that was known to the employer) and the detail of the time and date of commencement of the strike action that was contained in it.

[19] It is also arguable, as the Court found in *Chief Executive Officer of the Department of Corrections* v *Corrections Association of New Zealand Inc* [2006] 1 ERNZ 235, that requiring compliance with what the plaintiff asserts should be the position, may itself cause uncertainty. That is because calculations must then be made about whether the date of service of the notice is to be included or excluded and similarly with the date on which the strike commences. Although Mr Thompson contended that there will not, in fact, be any uncertainty because the law (*Harder v NZ Tramways etc IUOW* [1977] 2 NZLR 162) makes this certain, that will not necessarily be so.

[20] It is arguable also that it is irrelevant, as Mr Thompson submitted, whether or not the employer can work out how many days remain before strike action commences. As was emphasised in the earlier cases, the importance of notice is not in its method of giving and content but, rather, in what it conveys reasonably to the recipient. That must be the nature of the strike action intended and when it will begin.

[21] So, for the foregoing reasons, although I conclude that the plaintiff has an arguable case, it is by no means an inarguable one.

Is the notice sufficiently clear?

[22] Next, the plaintiff says that the intended strike action notified is unclear or uncertain or confusing. It says that because strike action will take place in the cockpits of operational aircraft carrying passengers, there is a critical need for certainty and the avoidance of any possible confusion.

[23] Air Nelson says that it and pilots affected in aircraft cockpits will not know whether such strike action is to occur until questioning or discussion between the two pilots in the cockpit and, even then, that process of "*inquisition*" may not produce sufficiently certain answers. The plaintiff says the intended strike action will require an additional process of inquisition or decision making by a pilot or pilots concerned on the day in question before any decision can be made whether to participate in strike action and/or this might result in disagreement between the two pilots concerned. The plaintiff says this could cause confusion or conflict or disharmony in the cockpit about who will be participating in strike action and whether it will occur.

[24] I have concluded, however, that a combination of the strike notice's provisions and standard operating practices will mean that it is very unlikely that there will be any confusion between pilots or by the airline. First, the strike action will only occur when both the pilots of an aircraft are NZALPA members. If one is not, then strike action cannot take place. Second, as in normal circumstances, there will continue to be discussion between pilots about operational questions including whether instrument or visual rules will apply to the departure of a flight. Such pre-flight discussions will also and naturally resolve any doubts about whether both pilots are NZALPA members. Third, such operational decisions are made by pilots on a flight by flight basis exercising their professional judgment and in collaboration with air traffic controllers. Such decisions are not usually the concern of the airline in the sense that it does not determine them and pilots are not answerable to the airline for those operating decisions.

[25] Although Air Nelson expresses a concern about potential conflict between pilots about such decisions, that is unlikely to occur because strike action will only take place when both pilots on an aircraft are NZALPA members and are therefore participants in the strike.

[26] There is not a sufficiently arguable case of absence of clarity in the notice in this regard.

Who will be on strike?

[27] Next, Air Nelson says that NZALPA has failed and refused to notify it of its members who are employed by the airline as pilots and even when a list was supplied by the union to it on 16 May 2008, this was both inaccurate and did not give the employer the requisite notice period for the purposes of certainty. The plaintiff points to a number of inaccuracies in the list of names supplied on 16 May. It says the description in the strike notice of *"an ALPA member"* is insufficiently defined to meet the relevant level of certainty.

[28] The statute permits a union to give notice on behalf of members without identifying them individually. In this case, the pilots identified as taking strike action are those who are members of NZALPA, represented by it in negotiations for the collective agreement and employed by the employer as airline pilots. As with any employer of substantial numbers of employees, the identities of those employees will change for a number of usual reasons including new appointments, resignations from employment, new union members, and resignations from the union. Although Air Nelson claims not to be aware of which of its pilots are NZALPA members, as was pointed out by the union, s130(1)(f) of the Employment Relations Act 2000 requires employers to maintain wage records and, where employees are paid by reference to a collective agreement, to identify that instrument.

[29] Given that union membership determines coverage by a collective agreement, the defendant points out that assuming Air Nelson complies with its statutory obligations as I do for the purposes of this decision, it should be able easily to identify those pilot employees who are NZALPA members.

[30] It is arguable that the list of union members as at 16 May sent to the employer operated to clarify rather than to confuse the employer with regard to the identities of pilots taking strike action. It is unrealistic to expect that such a list of more than 150 names will be a precise and accurate list of all union member employees at any one time.

[31] I do not think it can be contended seriously that Air Nelson could have been genuinely confused about which of its pilots would be undertaking strike action. Its intention was to attempt to re-roster NZALPA pilots with non-NZALPA pilots to avoid strike action on as many crew combination services as possible. It ought to have been able to do so by reference to its own records that it is obliged to keep.

[32] There is no seriously arguable case on this issue.

NZALPA/ALPA differences?

[33] This argument of last resort advanced for the plaintiff can be dealt with quite shortly. Air Nelson asserted that it added to its confusion that the union referred on occasions to "NZALPA" members and on other occasions to "ALPA" members. These are two acronyms for the same organisation, the first defendant. As Mr McCabe pointed out, the airline itself uses the terms interchangeably and there cannot possibly be any arguable case of confusion as a result of these minor differences.

Further notice confusion?

[34] Next, Air Nelson says the notices refer to different ICAO (International Confederation of Aircraft Operators) procedures than those prescribed in New Zealand and with which Air Nelson are required to comply in the relevant Airways Corporation Aeronautical Information Publication.

[35] Again, it is difficult to see the existence of an arguable case of confusion in this regard. The particular aviation organisation's standards with which the striking pilots propose to comply does not seem to affect the real question of the nature of the

strike action. That is whether takeoffs and landings will, in identified circumstances, be by instrument flight rules as opposed to visual flight rules. I do not understand there to be any relevant question, insofar as it affects the defendant, of which aviation organisation promulgates those rules. The effect will be the same, that is a more deliberate and therefore less efficient operational method resulting in possible delays to services and causing the plaintiff financial loss. Likewise there is, in my view at this stage, no arguable case of non-compliance with the statute in this regard.

Strike by "pilot flying" and/or "pilot not flying"?

[36] Another ground of confusion in the notice argued for by the plaintiff is that it does not clarify which of two pilots on any aircraft may be on strike. That is because although there will be at least a captain and a first officer in the cockpit of Air Nelson aircraft, on any particular flight one of those pilots is designated to be the "*pilot flying*" with the other having a supporting role and available in emergencies.

[37] There is likewise no seriously arguable question in my conclusion that such confusion has been created. That is because strike action will only take place in aircraft cockpits in which there are two striking pilots, that is where both members of the flight crew are NZALPA members on whose behalf strike notice has been given. It is then immaterial which of the pilots is operating the aircraft as the "*pilot flying*" because either will undertake the strike action.

Simulator flying?

[38] The plaintiff's next ground of challenge is that the notice does not clarify whether the strike action extends to simulated flying as well as to actual flying in service. Again I consider that the strike notice makes it sufficiently plain to Air Nelson that it is "*flying*" that will be the subject of strike action and not simulated flying as occurs in a mechanical cockpit replica on the ground in which training and testing of pilots occurs in a simulated environment. In addition, and as distinct from actual flying, simulated takeoffs and landings will be performed by visual or instrument rules at the direction of a trainer or checker rather than by decision of the pilots as occurs in real flying. The notice is clear that simulated flying is not

included within the strike action. There is no sufficiently arguable cause of action disclosed at this stage to persuade me that the notice is genuinely confusing in this regard.

Balance of convenience

[39] This favours the defendants for the following reasons. First, the sole cause of action in which the plaintiff has established a sufficiently arguable case, impresses me as not a strong one. That is consistent with assessments made about the same issue, albeit on different facts, in at least one case: see *Chief Executive Officer of Department of Corrections v Corrections Association of New Zealand* [2006] 1 ERNZ 235. Even if the plaintiff may be right that a strike notice in an essential service must spell out the period of notice by reference to the number of days of the notice, it is also arguable that this is only a superfluous and formal technical requirement. Looking at the purposes of the notice, to enable the recipient to prepare for strike action to begin at a known and precise time and to enable efforts to be undertaken to avoid it, the interpretation for which the plaintiff contends cannot add to this information that the employer will otherwise have on the first defendant's notice.

[40] The plaintiff has not established that damages will not be an adequate remedy if the strike action later transpires to have been unlawful. As I understand its case, Air Nelson says that if a team of two pilots undertake landings and takeoffs over the course of a working day, using instrument procedures rather than visual procedures, the accumulated delay may be up to 1 hour. Although there was no evidence about the number of flight sectors that may be flown by pilots on any one day of duty, commonsense and logic mean that there will be at least four sectors flown and maybe more. Scheduled flight times for Air Nelson services do not generally exceed 90 minutes and the collective agreement put in evidence that addresses these things permits Air Nelson to roster pilots in two pilot crews for up to 8 hours in a single duty period. As I put to counsel for the airline, and he did not disagree, scheduled flight planning for passenger aircraft takes account of inevitable delays for a variety of reasons so that even if, for example, the arrival of any particular flight is delayed for, say, 15 minutes, there may be no or at least a significantly lesser delay to the

aircraft's next departure. So while an accumulated delay of up to 1 hour a day may occur as a result of the strike action, it seems unlikely that individual service departure and arrival times will be affected significantly.

[41] Air Nelson's case is also that it will use more fuel as a result of the strike and it estimates that this and related increased engineering costs may amount to $20,000 per day. If that is so, those losses will be capable of quantification and there is nothing to suggest that they would not be able to be paid as damages by the first defendant and/or individual pilots if they were subsequently joined as parties to the litigation.

[42] Given my conclusions about possible delays and disruptions, such notoriously difficult losses to calculate as of goodwill of customers are unlikely to be a significant consequence of this form of strike action. So damages are unlikely to be an inadequate remedy for the plaintiff if it is correct that the strikes will be unlawful.

[43] Finally, in this regard, it is said that other employees than those striking may lose bonus remuneration based on efficient and timely operations by the airline. The evidence establishes that such payments are, however, discretionary and so the plaintiff has it within its power to avoid incurring them as losses claimable from the defendants.

[44] As Mr McCabe submitted, the right to strike lawfully is an important one for employees and their unions and ought not to be sacrificed at the altar of economics. That is so and the cases have recognised this principle. Although it might be said, that at worst for the defendant, strike action might be delayed, the Court must be careful not to interfere with what is probably a delicate balance in bargaining and of industrial strength by prohibiting, except on substantial grounds, what appears to be lawful strike action for a period of several weeks. In all the circumstances, the balance of convenience at this stage favours permitting the union to continue with its notified strike action.

Overall justice

[45] This, too, favours not intervening by injunction to prevent the strike action. It is of a discriminating kind aimed at inconveniencing and causing some loss to the employer while not inconveniencing, at least significantly, its customers, travelling passengers and consignors of freight. The strike action is an inherently safer way of flying aircraft, although that is not to suggest that takeoffs and landings by visual rules are not safe in appropriate circumstances. There are no other discretionary considerations in the events leading to these strikes that would cause me to exercise the overall discretion against the defendants.

Substantive hearing

[46] Having learned of the refusal to grant the interim relief sought, Mr Thompson for Air Nelson indicated his client's wish to move promptly to a substantive trial. It is of course entitled to do so. The Registrar should arrange a conference between counsel and a Judge so that a timetable can be set for the settling of the pleadings and a substantive hearing as soon as the Court can accommodate this and the case is ready for trial.

[47] Leave is reserved for any party to apply on reasonable notice for any further interlocutory orders or directions. Costs are reserved

GL Colgan
Chief Judge

Judgment signed at 4.50 pm on Wednesday 28 May 2008

ANNEXURE 1

NOTICE OF STRIKE IN RELATION TO THE NEGOTIATION OF THE AIR NELSON LIMITED NZALPA PILOTS' COLLECTIVE EMPLOYMENT AGREEMENT

To: Air Nelson Limited

At: Its Registered Office at Air New Zealand House, 185 Fanshawe Street, Auckland and by fax to John Hambleton, Air Nelson

TAKE NOTICE THAT members of the New Zealand Air Line Pilots' Association Industrial Union of Workers (Incorporated) [NZALPA] employed as airline pilots by Air Nelson Limited [the Employer] represented by NZALPA in negotiations for a collective employment agreement with the Employer, being persons to whom s9 of Part A of Schedule 1 to the Employment Relations Act 2000 applies [the Pilots], intend to strike after the expiry of fourteen (14) days and before the expiry of twenty eight (28) days of the date of receipt of this notice by the Employer.

INFORMATION REQUIRED TO BE SPECIFIED UNDER S90(3) OF THE EMPLOYMENT RELATIONS ACT 2000:

The particulars of the proposed strike, required by section 90(3) of the Employment Relations Act 2000 to be specified in this Notice, are as follows:

(A) **NATURE OF THE PROPOSED STRIKE:**

(i) A refusal to fly when on approach other than in accordance with instrument approach procedure (as defined in Civil Aviation Rules Part 1), except where:

(a) the pilot is undergoing or providing line training; or
(b) the pilot is flying with a pilot who is not an ALPA member; or
(c) an event occurs which makes it impossible or unsafe for the pilot to fly in accordance with instrument approach procedure (such as equipment unserviceability; emergency situation, or similar event).

This action shall be continuous for the period specified in paragraph (C) hereunder; and

(ii) A refusal to fly when on departure other than in accordance with standard instrument departure (SID) (as defined in ICAO Procedures for Air Navigation Services, Aircraft Operations, Vol 1, Flight Procedures Doc 8168, OPS/611, Amendment 2, 22/11/07) procedure, except where:

(a) the pilot is undergoing or providing line training; or
(b) the pilot is flying with a pilot who is not an ALPA member; or
(c) an event occurs which makes it impossible or unsafe for the pilot to fly in

accordance with SID (standard instrument departure) procedure (such as equipment unserviceability; emergency situation, or similar event).

This action shall be continuous for the period specified in paragraph (C) hereunder.

(B) **THE PLACES WHERE THE PROPOSED STRIKE SHALL OCCUR SHALL BE:**

(i) All of the aerodromes and airfields specified in the Schedule annexed to this Notice at which the Pilots or any of them are or may be required by the Employer or by their respective employment agreements to attend as from the time of commencement of and at any time during the proposed strike (as specified in paragraphs (A) above and (C) below); and

(ii) In the air within the New Zealand Flight Information Region, en route between any two of the aerodromes and airfields specified in the Schedule annexed to this Notice at which the Pilots or any of them are or may be required by the Employer or by their respective employment agreements to attend as from the time of commencement of and at any time during the proposed strike (as specified in paragraphs (A) above and (C) below).

(C) **THE DATE AND DURATION OF THE PROPOSED STRIKE SHALL BE:**

Commencing on MONDAY the 26TH day of MAY 2008 at 00.01 hours (00.01 a.m.) and continuing until 23.59 hours (11.59 p.m.) on MONDAY the 26TH day of MAY 2008.

THIS NOTICE is given and signed on behalf of all the pilot members of NZALPA represented by NZALPA in negotiations for a collective employment agreement with Air Nelson Limited and being employed by the Employer as airline pilots in the places referred to in paragraph (B) set out herein and in the Schedule annexed hereunto, being places where an essential service is carried out.

DATED this FRIDAY the 9TH day of MAY 2008.

DAWN HANDFORTH
LEGAL OFFICER
THE NEW ZEALAND AIR LINE
PILOTS' ASSOCIATION INDUSTRIAL
UNION OF WORKERS (INCORPORATED)