IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 11
EMPC 437/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND AIR LINE PILOTS' ASSOCIATION IUOW INCORPORATED Plaintiff
AND	AIRWAYS CORPORATION OF NEW ZEALAND LIMITED Defendant

Hearing: 19 July 2022 and further submissions on 26 August 2022

Appearances: R E Harrison KC and R McCabe, counsel for plaintiff
K Dunn and J Berg, counsel for defendant

Judgment: 10 February 2023

JUDGMENT OF JUDGE K G SMITH

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[1] A dispute has arisen between New Zealand Air Line Pilots' Assoc IUOW Inc (NZALPA) and Airways Corp of New Zealand Ltd (Airways) about whether Airways is able to require air traffic controllers to take annual holidays under the Holidays Act 2003 (the Act) given the provisions of their collective agreement.

The determination

[2] In the Employment Relations Authority, Airways succeeded in its argument that the collective agreement did not prevent it from being able to give individual air traffic controllers (ATCs) notice under s 19(1) of the Act of a requirement to take

annual holidays.[1] The Authority held that the exercise of the statutory power was subject to two provisos, namely:

(a) that s 19 of the Act must be met in that Airways has attempted to reach agreement with the relevant employee in the first instance; and

(b) Airways' requirement must comply with cl 52 of the collective agreement by being for a period of between one week and 12 days of annual leave to be taken unless the ATC concerned agreed otherwise.[2]

The challenge

[3] NZALPA challenged the determination and initially sought to have it set aside on three grounds, that:

(a) there was no live issue because of the "chronic shortage" of ATCs;

(b) custom and practice prohibited Airways from directing ATCs to take annual holidays under s 19(1); and

(c) the collective agreement contained an agreement under s 18(3) of the Act, so that s 19(1) cannot be applied by Airways.

[4] Mr Harrison KC, counsel for NZALPA, confirmed that grounds [3](a) and [3](b) were not pursued.[3]

The dispute in more detail

[5] Airways is a state-owned enterprise under the State-Owned Enterprises Act 1986. It is New Zealand's air navigation service provider and has a monopoly.

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1 *Airways Corp of New Zealand Ltd v New Zealand Air Line Pilots Assoc Industrial Union of Workers Inc* [2021] NZERA 499 (Member Cheyne).

2 At [26](a)i–ii.

3 Other disputes touching on whether Airways satisfied its staffing establishment numbers were not pursued.

[6] NZALPA and Airways are parties to the Airways Corp Air Traffic Controllers Collective Employment Agreement, the relevant version of which was in force until 31 March 2021. Bargaining was initiated to renew the collective agreement before it expired. However, during bargaining the parties did not discuss the agreement's annual leave provisions. The case was presented on the basis that the annual leave clauses in the collective agreement that applied as at March 2021 would be unchanged and continue to apply.

[7] Airways employs about 380 ATCs, most of whom are members of NZALPA. ATCs work at air traffic control towers and certain other locations, all of which are known as units. Currently there are 17 units throughout the country. Each ATC is allocated to a unit and works according to a roster pattern established by the unit's rostering committee.

[8] The collective agreement contains extensive provisions for annual leave. ATCs are entitled to between 23 days and 31 days' annual leave depending on each employee's length of service. As shift workers, they also earn shift leave entitlements.

[9] Many of the ATCs have significant accrued annual leave balances. At the time of the hearing approximately 134 ATCs were each entitled to more than 50 days of accrued annual leave and the largest untaken entitlement was 253 days.

[10] The dispute over taking annual leave came to a head recently when Airways and NZALPA were developing contingency plans for the COVID-19 pandemic. Sally Williams, Airways Employment Relations Manager, said during that time Airways and NZALPA were meeting regularly to discuss rosters given the sudden reduction in the numbers of flights and, in that context, discussions started about annual leave.

[11] Ms Williams said Airways did not intend to direct ATCs to begin taking their current annual leave allocation, or accrued leave balances, but explained that its idea was to identify how much annual leave the company wanted taken and to work with ATCs to achieve that outcome. She went on to say that Airways was not, and is not,

intending to direct ATCs to take annual leave at a particular time unless agreement could not be reached.

The issue

[12] The nub of the dispute is that Airways considers that if it cannot reach agreement with an ATC about when he or she will take annual leave it can lawfully require that leave to be taken by using s 19 of the Act.

[13] NZALPA disagrees. It says that the collective agreement contains either an agreement about when annual leave is to be taken, or a mechanism resulting in one, but in either case that is an agreement under s 18(3) precluding Airways from using s 19.

The Holidays Act 2003

[14] The purpose of the Holidays Act is to promote balance between work and other aspects of employee's lives.[4]

[15] Part 2 of the Act contains a separate statement of purpose to:[5]

> (a) provide all employees with a minimum of 4 weeks' annual holidays to be paid at the time the holidays are taken; and
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> (b) enable an employee to request that up to 1 week of his or her annual holidays entitlement be paid out; and
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> (c) require employers to pay employees at the end of their employment for annual holidays not taken or paid out; and
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> (d) enable employers to manage their businesses, taking into account the annual holiday entitlements of their employees.

[16] The Act provides employees with minimum entitlements to annual holidays to provide the opportunity for rest and recreation.[6] Each employee becomes eligible for not less than four weeks paid annual holidays after completing 12 months' continuous

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4 Section 3.
5 Section 15.
6 Section 3(a).

employment.[7] That entitlement remains until it has been taken by the employee or paid out.[8]

[17] Relevant to this proceeding are ss 17, 18 and 19. Under s 17 an employer and employee may agree on how an employee's annual holiday entitlement is to be met based on what genuinely constitutes a working week for the employee. If they cannot agree s 17(2) provides that a Labour Inspector may determine the matter for them.

[18] Section 18 deals with taking annual holidays:

> **18 Taking of annual holidays**
>
> (1) An employer must allow an employee to take annual holidays within 12 months after the date on which the employee's entitlement to the holidays arose.
>
> (2) If an employee elects to do so, the employer must allow the employee to take at least 2 weeks of his or her annual holidays entitlement in a continuous period.
>
> (3) When annual holidays are to be taken by the employee is to be agreed between the employer and employee.
>
> (4) An employer must not unreasonably withhold consent to an employee's request to take annual holidays.

[19] Under s 19 an employer may require a holiday to be taken:

> **19 When employee may be required to take annual holidays**
>
> (1) An employer may require an employee to take annual holidays if—
>
> (a) the employer and employee are unable to reach agreement under section 18(3) as to when the employee will take his or her annual holidays; or
>
> (b) section 32 (which relates to closedown periods) applies.
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> …

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7 Section 16(1).
8 Sections 16(4) and 28B.

The collective agreement

[20] The relevant provisions of the collective agreement are cls 29, 52 and 53. Clause 29 establishes unit rostering committees and deals with their functions. The clause acknowledges NZALPA's and Airways' mutual objective to provide "full and active participation of staff in the development of rosters".

[21] The functions of each unit rostering committee are mandatory. Clause 29 provides that those committees shall be responsible for ensuring that rosters:

> (a) comply with the collective agreement;
>
> (b) contain operational coverage adequate for the unit and are reviewed whenever those requirements change;
>
> (c) achieve the most effective staff utilisation practicable; and
>
> (d) are acceptable to the majority of staff to whom they apply.

[22] The constitution of each committee is provided for in cl 29. It must be composed of an officer of the local unit management and a staff representative "appropriate to the roster concerned".

[23] Roster preparation under the collective agreement is a consultative process. Clause 29.3.3 requires that there should be the "utmost consultation and co-operation" in preparing them. As part of this process, unit rostering committees and managers are to ensure that all staff are given adequate time to discuss and offer suggestions before a roster is finalised or amended. The clause provides that any alternative that is required by the majority of staff "shall be" included provided that the specifications in cl 29 are met. Once rosters are completed they must be published.

[24] Annual leave and provision for it to be rostered are dealt with in cls 52 and 53. Clause 52.1 provides for the amount of annual leave, with each ATC's entitlement varying depending on his or her years of service. It reads:

> After each year's service, an employee shall be entitled to 20 days paid leave, except air traffic control employees shall be entitled to 23 days annual leave, increasing to 28 days each year for the 5th to 9th years of service and then 31 days for the 10th and subsequent years of service. Periods of annual leave shall not be less than one shift cycle or one week nor more than 12 days, unless otherwise agreed by the employee concerned.

[25] Those leave entitlements are an enhancement over the statutory minimum provided in the Act. Clause 52.2 allows leave to be taken in advance or postponed only with Airways' consent, while cl 52.3 preserves annual leave entitlements where an employee agrees to return to work early.

[26] Clause 53 requires each unit rostering committee to compile a leave schedule or roster. Clause 53.1 reads:

> The unit rostering committee shall compile a leave schedule or roster for each year for all rostered unit staff, to ensure that, as far as practicable, all leave commitments are planned to be met and are spread as evenly as possible throughout the year.

[27] Clause 53.2 provides for staff to be consulted and to have their preferences taken into account when leave rosters are compiled.

[28] It was common ground that each unit has a degree of autonomy over the way its rostering committee functions. Some units adopt a formal approach with an application and assessment process while others are less formal. Michael Bishop, an ATC and NZALPA's Council Admin Head, explained that in his Christchurch unit annual leave is dealt with twice each year, usually in December/January and June/July.

[29] In Mr Bishop's unit demand for popular holiday times is managed by applying a demerit point system. It works by reducing an ATC's chances of having annual leave approved for a popular holiday slot in one year if he or she was granted leave for that slot in the previous year.

[30] In Mr Bishop's experience not all leave requests are granted initially. Some flexibility is required and the committee may suggest to an ATC other periods that can be applied for. A similar approach is taken by the rostering committee for allocating annual leave for public holidays or periods of high demand because it tries to balance requests by allocating leave even-handedly.

Analysis

[31] There was little or no disagreement between NZALPA and Airways over how unit rostering committees function or about their purpose. Similarly, the parties agreed that the committees' leave rosters constituted an agreement for the purposes of s 18(3). Where they disagreed was about whether that agreement precluded Airways from using the power in s 19(1)(a).[9] That difference is about the scope of cls 52 and 53 of the collective agreement and the relationship between them and ss 18(3) and 19(1).

[32] Mr Harrison submitted that the key stipulation in the Act is s 18(3), emphasising the primacy of agreement between an employer and an employee as to when annual leave is to be taken by the employee. That required the fixing of a start and finish date for the holiday which cl 53 achieves by an agreed process. The point was that if an agreement as to the timing of annual leave was already in place it could not be said that Airways and the individual ATC were unable to reach agreement under s 18(3) so there was nothing to trigger the use of s 19(1)(a).

[33] Mr Harrison acknowledged that cl 53 does not stipulate annual leave dates but is a mechanism for reaching agreement. Nevertheless, it was submitted that Airways could not bypass or ignore that mechanism to which it was party and to then claim there was an inability to reach agreement.

[34] NZALPA's case was that cl 29 provides both the process for identifying when leave is to be taken and the outcome. The clause provides for "when" leave is to be taken as referred to in s 18(3). The wording of cl 29 means it is a mandatory process and a binding outcome results when the leave roster is produced.

[35] According to NZALPA no assistance is available to Airways in the hypothetical situation where an annual leave roster did not, for some reason, comply with the collective agreement. In such a situation the alleged inability to reach agreement must be assessed in terms of the collective agreement and in any event s 19(1)(a) could only

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[9] A contention between the parties, about establishment numbers for ATCs, while referred to in the evidence was not developed as an argument relevant to this case.

be used in relation to the unit where the committee had not produced a complying roster.

[36] On this analysis, the functions of the rostering committees meant that there could not be a situation where Airways and NZALPA were unable to agree, so s 19(1)(a) had no role to play. The structure of the collective agreement meant nothing turned on whether Airways and an individual ATC had come to a separate agreement. Mr Harrison accepted that there was some evidence of non-compliance when it came to leave allocation, but submitted that could not undermine the rostering process as required by the collective agreement.

[37] In summary, NZALPA's position was that the unit leave rosters fix and delimit the timing, duration and extent of an individual ATC's annual leave for the roster period in question. An agreement on behalf of an individual ATC was therefore reached through this process and addressed the current annual leave entitlement and historical leave balances which may have accrued because previous annual leave was not taken in full.

[38] Ms Dunn, counsel for Airways, drew attention to a claimed shift in NZALPA's case compared to the one presented in the Authority, that s 19(1)(a) did not apply to any leave other than the current entitlement. In response, she submitted that ss 18(1) and 18(3), read in context, did not differentiate between leave entitlements and, therefore, s 19(1)(a) was able to be used for all accrued annual leave no matter when that holiday entitlement was earned.[10]

[39] Airways' case was that cls 52 and 53 do not exclude the application of s 19. Clause 52 was described as containing general provisions for annual leave. Its first sentence dealt with an entitlement to annual leave based on years of service. The second sentence was said to set upper and lower bounds for the amount of leave that could be taken in one go unless otherwise agreed. Setting limits in that way was said

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[10] While Ms Dunn referred to *Rainbow Falls Organic Farm Ltd v Rockell* [2014] NZEmpC 136, [2014] ERNZ 275, she accepted that the case did not involve anything other than a general discussion of s 18(3) and may have limited application to the present situation.

to only be required if the rostering committee process was not exhaustive; otherwise the committee would schedule all leave.

[40] Ms Dunn accepted that the unit rostering committee process is a method of agreeing on annual leave. She described it as a method by which requests are processed and competing requests can be dealt with. The question then became whether, after that process was completed, Airways and an individual ATC were able to agree on when leave is to be taken or whether the unit rostering process is the only mechanism for agreeing on annual leave. Her point was that the rostering process is not the only mechanism for determining leave, because ATCs can and do take annual holidays at times other than those allocated by the unit rostering committees.

[41] Ms Dunn said there was nothing in the wording of cls 52 and 53 suggesting an employee could not ask for and take annual leave outside of the unit rostering committee process and, likewise, nothing in those clauses to the effect that Airways could not require an employee to take annual leave outside the process either. The proviso to this submission was that such a requirement occurs after the rostering committee process has been completed.

[42] Ms Dunn also argued that if the parties intended cl 53 to be the only way leave could be taken that such an outcome would need to clearly expressed, because Airways' statutory right should not be removed "by implication".

[43] On Ms Dunn's analysis the absence of a comprehensive agreement meant that Airways and individual ATCs were free to reach agreement over when annual leave would be taken, including addressing accumulated leave from previous years. If they were free to reach such an agreement, it followed that parts of the annual leave allocation due to an ATC that were not dealt with by a rostering committee could be the subject of a requirement by Airways under s 19(1)(a) of the Act. Such a power being available to the company was said to be consistent with its other obligations, including health and safety, by ensuring that ATCs take regular breaks and periods off work.

[44] I do not accept Ms Dunn's submissions. The principles relating to the interpretation of contracts generally apply to employment agreements. The proper approach is an objective one; to ascertain the meaning the agreement would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract.[11]

[45] Viewed objectively, cl 53 is clear. It is intended to provide a comprehensive mechanism to roster annual leave. Each rostering committee is required to compile a leave roster or schedule; that is apparent from the use of "shall" in the statement of the committee's leave-related functions in cl 53. The all-encompassing scope of the clause is reinforced by its reference to that roster being for "each year for all rostered unit staff", followed by the statement of purpose which is to ensure that, so far as practicable, all leave commitments are planned to be met and spread as evenly as possible throughout the year.

[46] The obligation to consult staff and to take their preferences into account when compiling the leave roster, and the existence of an appeal process by referring any disagreement to head office, supports the conclusion that the parties created a comprehensive mechanism. The second sentence in cl 5.2.1 Ms Dunn relied on, specifying how much leave may be allocated, does not assist Airways. It does not limit the function of the rostering committee; it merely sets parameters for the leave that is taken at any one time.

[47] I accept Mr Harrison's submission that any practice which has developed about the allocation of annual leave for time slots left over after the rostering committee has completed a leave roster, or where the committee takes a less formal approach than the unit Mr Bishop works in, does not derogate from cl 53. If practices have slipped, or varied, from one unit to another that does not adversely affect how cl 53 is interpreted.

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[11] See *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948, [2017] ERNZ 428; *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432; and *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.

[48] Having made that observation, the collective agreement does not prevent other agreements being made between Airways and an individual ATC. There is nothing in cls 52 or 53, or elsewhere in the collective agreement, precluding them. However, that is not the same thing as saying that because other agreements for annual leave are possible the collective agreement is deprived of its force as an agreement under s 18(3).

[49] Finally, there is no weight in the submission that health and safety considerations necessitated the availability of the statutory power to direct leave to be taken. The collective agreement contains other provisions to assist in meeting those obligations which indicates that is not the purpose of the leave provisions.

[50] This analysis means that the Authority's determination must be set aside. It is not necessary to consider the subsidiary argument about whether ss 18(3) and 19(1)(a) can apply to accrued but untaken annual leave entitlements earned in previous years.

Conclusion

[51] The collective agreement contains a mechanism that results in agreement pursuant to s 18(3) of the Act. Therefore, Airways cannot use the power under s 19(1)(a) to direct individual ATCs to take annual leave.

[52] Costs are reserved. If any issues as to costs arise memoranda may be filed.

K G Smith
Judge

Judgment signed at 4.05 pm on 10 February 2023