**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA24/2013**
**[2013] NZCA 174**

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| BETWEEN | NEW ZEALAND AIRLINE PILOTS' ASSOCIATION INC<br>First Applicant |
| AND | MARK PAUL RITCHIE<br>Second Applicant |
| AND | MOUNT COOK AIRLINES LIMITED<br>Respondent |

Hearing: 13 May 2013

Court: Arnold, Ellen France and Stevens JJ

Counsel: S C Dench for Applicants
T P Cleary for Respondent

Judgment: 23 May 2013 at 4.00 pm

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**JUDGMENT OF THE COURT**

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**A The application for leave to argue a question of law under s 214 of the Employment Relations Act 2000 is dismissed.**

**B The applicants must pay the respondent one set of costs for a standard application on a band A basis and usual disbursements.**

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**REASONS OF THE COURT**

(Given by Stevens J)

## The application

[1] The New Zealand Airline Pilots' Association and Mark Paul Ritchie[1] (the applicants) have applied for leave[2] to submit to this Court a question of law arising from a decision of Judge Ford in the Employment Court delivered on 17 December 2012.[3]

[2] The case concerns the method of calculating "relevant daily pay" (RDP) for the purposes of ss 9(1) and 50(1) of the Holidays Act 2003 (the Act) in relation to pilots employed by the respondent.

[3] Section 9(1) of the Act relevantly provides:

> **9 Meaning of relevant daily pay**
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> (1) In this Act, unless the context otherwise requires, **relevant daily pay**, for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave,–
>
> (a) means the amount of pay that the employee would have received had the employee worked on the day concerned; …

[4] All of the pilots employed by the respondent (of which there are about 100) are parties to a collective employment agreement (the agreement). Under the agreement, pilots are paid an annual salary, for which they are required to work a maximum of nine days per fortnight and a maximum of 206 days per annum (or 235 days if holidays are included). Some pilots may work more than others, depending on how the rostering works out, but will be paid the same annual salary as that paid to all the other pilots in the same pay band. Pilots are paid fortnightly, and are paid for each of the 14 days in a fortnightly period on the basis of a notional figure of 112.30 hours per fortnight. This equates to payment for an eight hour day on 365 days of the year. Rosters are issued fortnightly, and prior to a roster being issued, there is no certainty as to how many hours a pilot will have to work that fortnight.

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1 Mr Ritchie is an airline captain and a member of the New Zealand Airline Pilots' Association. He has been employed by Mt Cook Airlines, the respondent, since 2002.

2 Under s 214 of the Employment Relations Act 2000.

3 *New Zealand Airline Pilots' Association Inc v Mt Cook Airlines Ltd* [2012] NZEmpC 218 [Employment Court decision].

[5] The relevance of calculating RDP in this case concerns the appropriate pay for a pilot who works on a public holiday. Section 50 of the Act requires that a person be paid at least time and a half of his or her RDP for working on a public holiday. Section 50(1) of the Act provides:

> **50 Employer must pay employee at least time and a half for working on public holiday**
>
> (1) If an employee works (in accordance with his or her employment agreement) on any part of a public holiday, the employer must pay the employee the greater of–
>
> (a) the portion of the employee's relevant daily pay or average daily pay (less any penal rates) that relates to the time actually worked on the day plus half that amount again; or
>
> (b) the portion of the employee's relevant daily pay that relates to the time actually worked on the day.

[6] Under s 56(2)(a) of the Act the employer must also provide the employee with an alternative holiday. The respondent has been calculating RDP by dividing a pilot's annual salary by 365. The applicant argued before the Employment Relations Authority and the Employment Court that the divisor should in fact be 206 (that is, the number of days the pilots are actually required to work), or, in the alternative, 235 (that is 206 plus the annual holiday entitlement). Both the Employment Relations Authority and the Employment Court found the respondent was permitted under the Act to use 365 as the divisor.

[7] The applicants have identified two questions of law for which leave was sought:

(a) Did the Employment Court err in its approach to the calculation of RDP?

(b) What is the correct approach in law to this case?

[8] The respondent opposes the grant of leave on three grounds:

(a) The decision of the Employment Court contains no error of law.

(b) In the alternative, the decision of the Employment Court involves the construction of the collective agreements.

(c) In the further alternative, no question of law arises which by reason of its general or public importance or any other reason ought to be heard by this Court.[4]

**Submissions of the applicants**

[9] The specific grounds advanced by the applicants in support of the grant of leave are:

(a) Under s 9(1) of the Act, RDP means the amount of pay the employee would have "received" had the employee worked on the day concerned. In s 9(1)(a) the word "received" does not literally mean the amount the employer paid, but must refer to the employee's entitlement under his or her employment agreement. Moreover, under s 9(3) of the Act, if it is not possible to determine relevant daily pay under s 9(1) an averaging formula must be used. That formula excludes from the denominator days on which the employee did not actually work, producing an average day's pay per working day.

(b) The respondent has an internal practice of calculating and allocating pay on the assumption that pilots are paid for a notional eight hour day on 364 days of the year (with an adjustment to compensate for the 365th day). The Employment Court erred in failing to treat the amount "received" as the amount the pilots were contractually entitled to receive under their employment agreements for a day of work (according to the fortnightly roster) but, instead, treating the amount "received" as that portion of the pilots' salary that the respondent chose to allocate to each day in accordance with its internal calculation.

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4 Relying on s 214(3) of the Employment Relations Act.

(c) While the starting point must be the agreement, the Employment Court took too narrow an approach to the meaning of RDP and had insufficient regard to the purposes of the Act as set out in s 3. The decision did not fit the social purposes of the legislation as discussed by the Supreme Court in *New Zealand Airline Pilots Association International Union of Workers Inc v Air New Zealand Ltd*.[5]

[10] For the applicants, Mr Dench submitted that this case concerned the calculation of RDP for earners on an annual salary. He noted that this Court had granted leave in *Postal Workers Union of Aotearoa v New Zealand Post Ltd*[6] which concerned calculation of RDP for workers on a weekly wage but that case gave rise to different issues.

**Respondent's submissions**

[11] For the respondent, Mr Cleary emphasised that the determination of RDP in this case was essentially a factual enquiry depending on the circumstances of the particular case. Mr Cleary noted that the Judge had recognised that s 9(1) of the Act posed an "intensely practical" question.[7] The sole issue for the Judge was to determine factually the correct salary divisor for the calculation of RDP in the circumstances of this case. In applying the facts to the law the Judge made no operative error of law.

[12] Mr Cleary also submitted that if a question of law arose, it involved the construction of a collective employment agreement and was thus immune from appeal.[8] In any given employment relationship the only way to calculate RDP is to interpret what the employment agreement expresses or implies should be paid for a day's work.

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5 *New Zealand Airline Pilots Association International Union of Workers Inc v Air New Zealand Ltd* [2007] NZSC 89, [2008] 2 NZLR 1 at [37]–[38] and [48].

6 *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* [2012] NZCA 481, [2013] 1 NZLR 66.

7 Employment Court decision at [41].

8 Employment Relations Act, s 214(1).

[13] Finally, Mr Cleary submitted that if a question of law can be identified, the question is not of such general or public importance and there is no other reason for which leave might be granted. This appeal directly affects only one employer and about 100 employees. Any appeal will necessarily be of limited application due to the nature of the work of this business and the particular employment arrangements between the parties. Furthermore s 9(1)(a) has been interpreted by this Court in the *Postal Workers* case and further interpretation is neither necessary nor desirable.[9]

**Our evaluation**

[14] We accept Mr Dench's submission that the meaning of "received" gives rise to a question of law. However, in this case, we are satisfied that the question is not one of the requisite general or public importance. Our reasons are as follows.

[15] The decision is fact intensive. As Mr Cleary submitted, it reflected the specific employment relations between these parties and their contractual arrangements. Mr Dench's argument was consistent with this in that he suggested the meaning of "received" must refer to employees' entitlements.

[16] We agree with Mr Cleary that the approach in this case is strongly shaped by the nature of the work undertaken by the pilots and terms of the agreement between the parties. Although Mr Dench is correct that the central feature of the Judge's reasoning[10] referred to the practice that operated when the Act was introduced we are satisfied that the Judge's reasoning was more broadly based. The Judge had earlier identified the specific features of the respondent's business, including its operation 365 days a year. He also referred to the fortnightly rostering and the limits on rostering of pilots to work no more than nine days in any 14 day period without agreement. These provisions of the agreement were negotiated in exchange for the ability of the company to require its pilots to report for duty and perform flying and

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9 *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd*, above n 6. An application to the Supreme Court for leave to appeal this decision was dismissed: *New Zealand Post Ltd v Postal Workers Union of Aotearoa Inc* [2013] NZSC 15.

10 At [41]–[42].

other duties whenever called upon.[11] The pilots were entitled to an annual salary and other allowances to be paid fortnightly for each day within that period.

[17] However, because of the factual context in which these salaried pilots work and the tailored provisions of their employment agreement, we are not satisfied that the questions of law sought to be submitted are of general or public importance such that we should grant leave. We agree with Mr Cleary that this case concerns a relatively small group of salaried pilots with specific obligations to be available to work on roster on a 365 day basis and with provisions of an agreement that are specific to their needs to be paid an even, regular portion fortnightly of their yearly salary.[12] We note, however, that this would not necessarily be a disqualifying factor if the point of law would otherwise be relevant in a wider context.[13]

[18] We doubt that the answer to the question of the meaning of "received" in s 9(1) would necessarily provide useful guidance in cases of other salaried workers. The employment arrangement of such employees is likely to involve a wide range of collective employment agreements involving different industry or business contexts with highly varying work conditions and a range of payment mechanisms. Each case is likely to turn very much on its own facts. Thus we do not consider that the present case is suitable for appeal on the legal questions sought to be submitted.

[19] We see some merit in the proposition that, in the context of this employment relationship, the daily rate of pay of a pilot had at the very least become a contractual term through custom. A pilot's salary, by definition payable for a year's service, was payable no matter how many rostered days were worked. The payment of a daily amount was the only practical way the payroll could work with the contracted rostering system. This method had been accepted by the parties from the beginning and was consistent with the terms of the agreement.

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11 Clause 3 of the collective employment agreement.

12 We note that the provisions of this agreement are different from those collective employment agreements negotiated by groups of pilots employed by Eagle Airways, Air Nelson and Air New Zealand: Employment Court decision at [34]–[36].

13 See *New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc v Witney Investments Ltd (formerly Epic Packaging Ltd)* [2006] ERNZ 1076 (CA).

[20] In those circumstances, it is not surprising that the Judge found as a fact that the appropriate divisor for calculating RDP in these circumstances was 365 – quite apart from the existence of the company practice which had been in operation since 1997 and which had been applied since the Act was introduced in 2004.

**Result and costs**

[21] The application for leave to argue a question of law under s 214 of the Employment Relations Act 2000 is dismissed.

[22] The applicants must pay the respondent one set of costs for a standard application on a band A basis and usual disbursements.