

QF: 041/2007

12 September 2007



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❖ NOTICE ❖

TO: QANTAS AND FORSTAFF MEMBERS

RE: 12 HOUR ROSTER FULL BENCH APPEAL

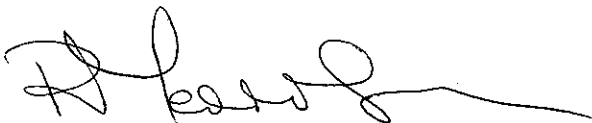
Members may recall a case heard by the AIRC earlier this year regarding the call for DMM members in Perth to revert to an 8 hour roster. After Qantas rejected the ALAEAs withdrawal from the extended hour roster agreement we lodged a dispute resolution case with the AIRC. Vice President Watson determined in favour of the ALAEA and ordered Perth DMMs to revert to an 8 hour roster as the ALAEA no longer agreed to allow Perth members to work under the previous 12 hour agreement. Furthermore he determined that the ALAEA could withdraw from extended hour agreements "for any reason or none".

Qantas appealed this decision to the full bench of the Industrial Relations Commission. The ALAEA understood the importance of our first victory in many years and decided to employ one of Australia's leading legal practitioners Josh Bornstein to defend our position. The matter was heard on the 12th of September.

The full bench have supported the original decision of Vice President Watson and again ruled in favour of the ALAEA. The following is taken from today's decision –

"We have not been persuaded that there is any basis to read cl.12.8.2 as subject to some overall requirement of reasonableness or efficiency. In our view the Vice President was correct to find that there is no implied limitation or other encumbrance on the freedom of the ALAEA to agree, or to withdraw its agreement, to 12 hour shifts pursuant to cl.12.8.2."

A full copy of the decision is attached.

PP 

STEPHEN PURVINAS
Federal Secretary

"To undertake supervise and certify for the safety of all who fly."

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

s.120 appeal against a decision and order [[2007] AIRC 406]
issued by Vice President Watson on 21 May 2007

Qantas Airways Limited
(C2007/2817)

s.170LW - application for settlement of dispute (certified agreement)

The Australian Licensed Aircraft Engineers Association

and

Qantas Airways Limited
(C2006/1153)

**LICENSED AIRCRAFT ENGINEERS (QANTAS AIRWAYS LIMITED)
ENTERPRISE AGREEMENT VII**
(ODN AG2005/4776)
[AG840856]

Airline operations

JUSTICE GIUDICE, PRESIDENT
SENIOR DEPUTY PRESIDENT DRAKE
COMMISSIONER RAFFAELLI

MELBOURNE, 12 SEPTEMBER 2007

Appeal – certified agreement – settlement of dispute – hours of work – 12 hour shifts by agreement – whether implied limitation of reasonableness or efficiency – whether error in decision – Workplace Relations Act 1996 s.120

DECISION

Introduction

[1] These proceedings concern a dispute over the duration of shifts worked by employees in the Customer Services Division of Qantas Airways Limited (Qantas) at Perth airport. The employees are in two categories: licensed aircraft maintenance engineers and Duty Maintenance Managers. The Duty Maintenance Managers (DMMs) supervise the engineers.

[2] At all relevant times the applicable industrial instrument has provided for ordinary hours not exceeding 12 per day “*by agreement between the employer and the (Australian Licensed Aircraft Engineers) Association.*” In the absence of agreement, provisions based on an 8 hour day apply.

[3] In 1995 Qantas and the Australian Licensed Engineers Association (the Association) reached agreement on 12 hour shift rosters which were duly introduced in that year. Twelve hour shifts became the norm for the employees concerned and operated until the latter half of 2006. At that time Qantas wished to change from 12 hour shifts to shifts of 10.9 hours. It

sought the Association's agreement. In October 2006 Qantas gave notice that as it had not been able to secure the Association's agreement to a change in shift lengths it would require the engineers to revert to 8 hour shifts. In November 2006 it introduced 8 hour shifts for the engineers but did not alter the shift lengths for DMMs. The Association took the position that the DMMs as well as the engineers should revert to 8 hour shifts and withdrew its agreement to 12 hour shifts for DMMs.

[4] On 21 December 2006 the Association notified the Commission of a dispute pursuant to the relevant dispute resolution provision. The dispute was dealt with by Vice President Watson. Conciliation did not lead to a settlement and in due course a decision was published on 21 May 2007.¹ The Vice President found that Qantas could withdraw from the 12 hour shift agreement and so could the Association. He determined that while Qantas should not be required to reinstate the 12 hour roster for the engineers, the Association should not be prevented from withdrawing its agreement to shift lengths of more than 8 hours for the DMMs.

[5] This is an appeal, for which leave is required, by Qantas against the Vice President's decision of 21 May 2007. The appeal is brought pursuant to s.120 of the *Workplace Relations Act 1996*.

The Appeal

[6] The relevant facts are comprehensively set out in the Vice President's decision and we shall repeat only so much of them as is necessary to deal with the appeal.

[7] The industrial instrument currently applying to the employees is the *Licensed Aircraft Engineers (Qantas Airways Limited) Enterprise Agreement VII* (EBA VII).² The hours of work provisions for engineers and DMMs are contained in the *Licensed Aircraft Engineers (Qantas Airways Ltd) EBA IV* (EBA IV).³ Those provisions are incorporated by reference into EBA VII. Clause 12.8.2 of EBA IV is as follows:

"12.8.2 Daily ordinary hours shall not exceed 12 per day and can be worked by agreement between the employer and Association in any combination, however, in the absence of agreement subclause 12.1, 12.2, 12.3 and 12.4 hereof will apply."

[8] The origin of cl.12 was described by the Vice President in the following passage:

"[6] As the meaning, effect and intent of this provision is central to the determination of this matter, it is worth noting its origin. Clause 12 of EBA IV has its origins in identically worded provisions of previous awards and agreements. Indeed, it is almost identical to cl 9 of the Licensed Aircraft Engineers (Domestic Airlines) (Consolidated) Award 1991. The equivalent provision of the current cl 12.8 was not present until a variation in 1991 made in accordance with the 'Structural Efficiency Principle' adopted in the August 1988 National Wage Case [1988] 25 IR 170]. The August 1988 National Wage Case decision introduced a condition for wage adjustments to all awards to the effect that respondent unions formally agree to cooperate in a review of the award to give effect to the 'Structural Efficiency Principle'. The 'Structural Efficiency Principle', in turn, required a review of award provisions with a view, amongst other things, to ensuring that working patterns and arrangements enhance the flexibility and efficiency of the industry.[Ibid at 179]"⁴

[9] The appeal involves two principle contentions. The first contention is that the Vice President should have construed cl.12.8.2 such that it did not permit the Association to withdraw its agreement to 12 hour shifts for DMMs. The second contention is that, even if on its true construction cl.12.8.2 permitted the Association to withdraw its agreement to 12 hour shifts for DMMs, the Vice President could and should have determined that DMMs should work 12 shifts. We shall deal with the construction point first.

The Construction of cl.12.8.2

[10] As we have indicated, Qantas submitted that on its true construction cl.12.8.2 did not permit the ALAEA to withdraw its agreement to the DMMs working 12 hour shifts and that the Vice President was wrong to conclude to the contrary. The nub of the argument was that, applying a purposive approach to the construction of the clause, it should be interpreted so as not to operate unreasonably with respect to the agreement of the Association to efficiency measures sought by Qantas. Qantas sought to bolster this approach by invoking the history of the provision and its origins in the implementation of the "*Structural Efficiency Principle*" referred to in the passage from the Vice President's decision set out above.

[11] It can be seen that Qantas' submission depends upon the implication of a limitation on the Association's right to agree pursuant to cl.12.8.2. The effect would be that the Association could not withhold its agreement to any shift length up to and including 12 hours if such shift length was demonstrably reasonable or "*efficient*". In our view that would be a provision of a distinctly different character to the one the parties have agreed upon. Qantas could select the shift duration it wished, up to a maximum of 12 hours, provided the duration could be demonstrated to be reasonable or efficient and the agreement of the Association would be rendered irrelevant.

[12] Furthermore such a construction would lead to considerable uncertainty in the operation of the provision. While the concept of efficiency might focus predominantly on the interests of the employer, the concept of reasonableness would include the interests of both Qantas and the employees. The potential for prolonged inquiry and disputation is clear.

[13] There is another reason to doubt that the framers of the clause intended that it should operate subject to an implication of the kind Qantas supports. The clause prescribes what is to occur if there is no agreement, namely: the shifts are to be of 8 hours. On its face the clause provides two alternatives only. Shift lengths of more than 8 hours but not exceeding 12 hours may be worked by agreement. In default of agreement 8 hour shifts must be worked. If the framers of the clause had intended that in some circumstances shifts of more than 8 hours might be worked without agreement, a clearer indication of those circumstances might have been expected.

[14] We have not been persuaded that there is any basis to read cl.12.8.2 as subject to some overall requirement of reasonableness or efficiency. In our view the Vice President was correct to find that there is no implied limitation or other encumbrance on the freedom of the ALAEA to agree, or to withdraw its agreement, to 12 hour shifts pursuant to cl.12.8.2.

[15] Before leaving this issue we should mention the question of the notice which might be required of withdrawal from an agreement under cl.12.8.2. The parties did not address us on that question at any length. On general principles, and in the absence of a relevant term in the agreement, reasonable notice would be required.

The decision not to require 12 hour shifts for DMMs

[16] Qantas' other principal contention was that it was within the Commission's power to settle the dispute by determining that the DMMs work 12 hour shifts in any event. This contention was accompanied by a submission that the Vice President had wrongly declined to make such an order.

[17] It is clear that the Vice President decided to determine the dispute in a way which did not cut across the Association's freedom to agree or disagree to 12 hour shifts. Qantas submitted that the decision may have been based on a perceived lack of power to determine the dispute in a way which was inconsistent with the parties' agreement. We do not accept that characterization of the Vice President's reasons. The better view is that the decision was made in the exercise of a discretion. It is only necessary to refer to the following passage:

*"[31] Although the above decisions concerned findings of jurisdictional error, and the parties in this agreement have agreed to the Commission determining disputes without resorting to jurisdictional objections, I nevertheless believe that ensuring that any determination is consistent with the terms of the agreement is an important consideration – if not as a matter of jurisdiction, then as a matter of discretion. In my view, therefore, the proper interpretation of the terms of the agreement in a case such as the present is likely to be a very important, and perhaps determinative, consideration in the matter."*⁵

[18] Accepting that the Vice President decided not to require the DMMs to work 12 hour shifts in the exercise of his discretion, we can find no error in the exercise of that discretion. He appears to have taken all relevant considerations into account and no irrelevant ones and there is no error of law or principle apparent either in the reasons given or in the result. We add that the Vice President's concern to respect the terms of the parties' agreement in exercising his discretion seems to us appropriate.

[19] There is Full Bench authority suggesting, to put it at its lowest, that the Commission cannot determine a dispute pursuant to a dispute settlement provision in an agreement in a way inconsistent with the agreement as a whole.⁶ Had the Vice President's decision contained a finding that the Commission had no power to determine the dispute in a way inconsistent with the agreement it would have been necessary to examine those authorities. In the circumstances it is unnecessary that we do so.

Conclusion

[20] We were informed by counsel for the Association that agreement has been reached between Qantas and the Association on a new roster system to operate in Perth. The roster involves shifts of 11.385 hours and 12 hours duration. It is clear that the underlying dispute which gave rise to the proceedings has been resolved. We have taken this consideration into account in considering whether we should grant leave to appeal.

[21] The Vice President's decision is not affected by any appealable error. There is no reason, in the public interest or otherwise, why leave ought be granted to appeal and we decline to do so.

[22] In the course of his decision the Vice President made some criticism of the Association for opposing 12 hour shifts for DMMs. He said that the ALAEA had not acted "*responsibly or consistent with the objectives of efficiency and productivity*" in withdrawing

its agreement to 12 hour shifts for DMMs.⁷ On the material available to us, including the fact that agreement has been reached on shifts of 11.385 hours and 12 hours, it seems that both parties adopted negotiating positions in order to achieve the outcome they wanted. Of course the Vice President was more closely involved with the detail of the dispute and conducted a number of conciliation conferences. While Qantas and the Association made submissions to us about the Vice President's findings, it is not necessary that we decide whether those findings are correct and in light of the fact that settlement has now been reached it is undesirable that we do so.

BY THE COMMISSION:

PRESIDENT

Appearances:

H Dixon SC with *S Meehan* and *R Bernasconi* for Qantas Airways Limited.
J Bornstein of counsel with *S Purvinas* for The Australian Licensed Aircraft Engineers Association.

Hearing details:

2007
Sydney.
August 29.

¹ [2007] AIRC 406.

² AG840856.

³ L0629 Cas N Doc Q6379.

⁴ [2007] AIRC 406.

⁵ Ibid.

⁶ *CEPU v Telstra Corporation* (2003) 128 IR 385; *Australian Broadcasting Corporation v Media, Entertainment and Arts Alliance* (2004) 136 IR 99.

⁷ Op cit. para [38].