

QF:048/2008

16th May 2008



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❖ NOTICE ❖

TO: ALL QANTAS ALAEA MEMBERS



RE: ANNUAL LEAVE AIRC C2008/2158 DECISION

Please find attached to this Notice the decision of VP Watson in regard to the revocation of Annual Leave by Qantas.

In summary, "....Qantas can alter the time fixed for taking leave of employees provided that in doing so, it would not be denying an employee the opportunity to take leave within 12 months of the leave entitlement arising under the Agreement. As the right to fix the time for taking leave is created by the agreement of the parties and the decision to cancel leave is made for operational reasons arising from intended industrial action, I do not believe that any interference with the decision of Qantas is justified. I determine the dispute between the parties accordingly."

The ALAEA will be considering the effect and implications of the decision and whether or not there are grounds for appeal.

In the meantime members who have been denied *"the opportunity to take leave within 12 months of the leave entitlement arising"* should notify the ALAEA office, preferably by email, so that we can have each individual matter resolved on their personal circumstances through the disputes procedure. Send email to alaea@alaea.asn.au with "Annual Leave" in the title box.

Gary Norris
Senior Industrial Officer

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

s.170LW – pre-reform Act - Application for settlement of dispute (certified agreement)

The Australian Licensed Aircraft Engineers Association

and

Qantas Airways Limited
(C2008/2158)

**LICENCED AIRCRAFT ENGINEERS (QANTAS AIRWAYS LIMITED)
ENTERPRISE AGREEMENT IV [1998-2001]
[AG787549]**

Airline operations

VICE PRESIDENT WATSON

MELBOURNE, 16 MAY 2008

Certified agreement – application of the agreement – cancellation of annual leave – whether cancellation consistent with certified agreement – whether leave should be cancelled - Workplace Relations Act 1996 (Cth) – s 170LW

DECISION

INTRODUCTION

[1] On 8 January 2008 the Australian Licenced Aircraft Engineers Association (“the ALAEA”) filed an application to have a dispute resolution process conducted by the Commission under the *Licensed Aircraft Engineers (Qantas Airways Limited) Enterprise Agreement IV [1998-2001]* (“EBA IV”). The dispute notification relevantly concerned the decision by Qantas Airways Limited (“Qantas”) to cancel annual leave scheduled to be taken by members of the ALAEA in January 2008 in the context of planned industrial action by members of the ALAEA.

[2] A conciliation conference was held on 10 January 2008. At the conclusion of conciliation proceedings it was agreed that planned industrial action would not take place, a joint application would be made to the Commission to extend the period of authorisation of industrial action under s 478(3) of the Act, Qantas would reinstate all leave approved and fixed in January and both parties would withdraw all current applications relating to annual leave and industrial action. An Order was issued on 10 January 2008 extending the period of protected action authorised by ballot under s 478(3) to 18 February 2008.

[3] The ALAEA subsequently made a further application for a protected action ballot. A conference was convened in this matter at the request of the ALAEA on 29 April 2008. The conference was adjourned to allow further consideration of particular employee circumstances brought to the attention of Qantas at the conference.

[4] On 6 May 2008, the ALAEA requested that the matter be re-listed for hearing and the issuing of interim orders. The ALAEA advised the Commission that the matter could not be resolved by agreement and requested that the outstanding matters be determined by the Commission pursuant to the dispute settlement clause of EBA IV.

[5] Clause 5 of the *Licensed Aircraft Engineers (Qantas Airways Limited) Enterprise Agreement VII* ("EBA VII") provides that disputes over any matters contained in that Agreement will be processed in accordance with the procedure contained in clause 29 of Part C of EBA IV. EBA VII also provides that many of the conditions of employment will be as provided in EBA IV. EBA IV was certified by the Commission on 22 September 1998. EBA VII was certified on 1 July 2005. Both agreements were certified under the then s 170LJ of the *Workplace Relations Act 1996* (Cth) ("the Act").

[6] The dispute settlement clause of EBA VII provides:

"The parties agree that any matters contained in this Agreement in dispute will be processed in accordance with the procedure contained in Clause 29 of Part C of EBA IV.

Provided that if the Dispute Settlement Procedure is being followed, the parties are committed to the Australian Industrial Relations Commission (AIRC) ultimately having the capacity to determine any matter(s) in dispute (i.e. matters that have been traditionally regarded as arbitral matters or as traditionally coming within the Commission's jurisdiction). Consequently, neither party will pursue a jurisdictional objection that would have the effect of preventing this process occurring. To the extent that it is necessary to do so, the parties are therefore committed to the Commission performing a private arbitration function if necessary on matters contained in this Agreement"

[7] Clause 29 of EBA IV provides:

"29.1 Employees bound by this Agreement shall not take part in any stoppage of work unless such stoppage is called by the Federal Executive of the Association. Should the Federal Executive call a stoppage it shall notify the head office of the employer concerned immediately such decision is made.

29.2 Subject to 29.6 hereof, all disputes should be resolved without cessation of work;

29.3 A conference shall be held between the local representative of the Association and the Management of the Company. Such conference to be commenced as soon as Practicable by the parties.

29.4 In the event of the dispute not being resolved as in 29.1 above, a conference shall be held between the Federal office of the Association and the Management of the Company.

29.5 Should such conference be non-productive of a solution to the dispute, the parties shall refer the dispute to an arbitrator, to be mutually agreed upon, for determination. Should there be no mutual agreement as to the arbitrator, the matter may then be notified to the Australian Industrial Relations Commission for conciliation or arbitration of the said dispute, by either party.

29.6 *Employees directly concerned, shall have the right to cease work pending the resolution of any bona fide safety issue but shall notify the Supervisor in charge. In the case of a stoppage which is finally determined not to be bona fide safety issue, no wages shall be paid to the employees involved for the duration of the stoppage.*

29.7 *The Company will not dismiss a job representative without the matter first being referred to the Association for attention and consultation."*

[8] The matters in dispute were heard on 8 and 14 May 2008. Initially the ALAEA sought interim orders. With the agreement of the parties I decided to hold a hearing and determine the matter expeditiously on a final basis. Mr Norris represented the ALAEA. Mr Parry, Senior Counsel, and Mr Dalton, of counsel, represented Qantas. Evidence was given on behalf of ALAEA by Mr Brett Bradbury and Mr Paul Cousins. Mr McDermott and Mr Hyland gave evidence on behalf of Qantas. Documentary material was produced and written and oral submissions were made by the parties. I have had regard to all of the material relied on by the parties in this matter.

BACKGROUND

[9] On 5 May 2008, the Group General Manager, Industrial Relations of Qantas, Ms Sue Bussell wrote to the Federal Secretary of the ALAEA in the following terms:

"We advise that as of 5 May 2008, the Company has decided to cancel annual leave for the period of 15 May 2008 to 15 July 2008. We advise that approved long service leave, days in lieu, and rostered days off will not be cancelled. Any pending annual or long service leave requests will not be approved, however other types of leave requests will be approved should they not adversely impact operations.

The Company has carefully considered the operational impact of the types of industrial action the ALAEA has asked its members to approve. This unfortunate step of cancelling leave has been taken in order to provide essential operational coverage during the period that the ALAEA have indicated industrial action is to be undertaken.

Throughout this period the Company will carefully monitor the situation and assess operational requirements. Qantas will resume granting annual leave when it believes it can do so without affecting operational requirements.

Compassionate circumstances will be taken into consideration. We have a robust review process for such leave requests, and any compassionate leave will not be rejected without the GGM people for Engineering, Dennis Ratcliffe having a final review.

As was the case in January, the Company is prepared to reimburse the reasonable costs of non-refundable deposits in circumstances where the leave has been approved and has been cancelled.

Please find attached a copy of the Notice issued to employees regarding this matter. Individuals who have had their annual leave cancelled will also be advised separately by letter.

If you have any questions regarding this matter, please contact me on 02 9691 2058."

[10] The ALAEA contests the ability of Qantas to cancel annual leave under the relevant terms of the certified agreements and the decision to cancel leave generally. It seeks a determination that Qantas cannot or should not cancel the leave once approved through approval processes which apply at the various locations at which licenced aircraft engineers are employed.

[11] Clause 15 of EBA IV is the clause which governs annual leave entitlements of the employees concerned. It relevantly provides:

"15 - ANNUAL LEAVE

15.1 Period of Leave

Except as hereinafter provided a period of 152 hours leave shall be allowed annually to an employee after 12 months continuous service (less the period of annual leave) as an employee covered by this Agreement.

15.2 Seven Day Shift Workers

15.2.1 In addition to the leave hereinafter prescribed, 7-day shift workers, that is, shift workers who are rostered to work regularly on Sundays and holidays, shall be allowed 38 hours leave.

15.2.2 Where an employee works for part- of the twelve months period as a seven day shift worker as aforesaid, he/she' shall be granted -leave. calculated by taking the same proportion of 190 hours as the proportion which the time worked as a seven-day shift worker bears to a year.

Provided that any fraction of a full shift in the result may at the Company' s discretion be paid for in cash.

15.3.1 If a public holiday as prescribed in this Agreement occurs during a period of annual leave, and provided the employee would have worked on that public holiday had he/she not been on annual leave, the employee shall be entitled to a day in lieu of the public holiday. If the public holiday falls on a rostered off day during a period of annual leave, eight hours, pay at single time shall be paid, or if agreed between the employee and the employer a day may he added to annual leave.

15.3.2 An employee entitled to a day in lieu of a public holiday, as prescribed in paragraph 15.3.1 above, may elect to receive an additional eight hour's pay rather than take advantage of a day in lieu of a public holiday.

15.3.3 Where a holiday falls as aforesaid and the employee fails without reasonable cause proof whereof shall he upon him to attend for work at his ordinary starting time on the working day immediately following the last day of the period of his annual leave he shall not be entitled to be paid for any such holiday.

15.3.4 The leave prescribed by paragraphs 15.2.1 and 15.2.2 shall be taken at a time fixed by the employer. Leave may be split into separate periods by mutual agreement between the employee and employer. A minimum of one week will normally

be granted. Where an employee takes leave in two or more periods, the period of leave must include a rostered 20th day.

Should the employee split leave and not include a 20th day/s during the periods, a recovery of a day/s salary will be made at the end of each 52 week cycle where the full annual leave entitlement has been used, or on a pro rata basis where less than the full Annual Leave entitlement has been used.

...

15.10 Calculation of Service

15.10.1 Service before the date of the Agreement shall be taken into consideration for the purpose of calculating annual leave. But an employee shall not be entitled to leave or payment in lieu thereof for any period in respect of which leave or a payment in lieu thereof has been allowed.

15.10.2 The period of annual leave to be allowed under this subclause shall be calculated to the nearest' day, any broken part of a day in the result not exceeding half a day to be disregarded.

15.11 Leave to be taken

The annual leave provided for by this clause shall be allowed and shall be taken and except as provided by subclause 15.3 hereof payments shall not be made or accepted in lieu of annual leave.

15.12 Time of Taking Leave

Annual leave shall be given at a time fixed by the employer within the period not exceeding 12 months from the date when the rights to annual leave accrued -and where practicable with 4 weeks minimum notice to the employee. This notice may be reduced by mutual consent.

15.12.1. An employer may apply a system of annual close-down with respect to all or the bulk of employees in a plant or section thereof in which case at least one month's notice shall be given.

...”

[12] These provisions have their genesis in awards applying to Qantas. Most of the provisions are in similar or identical terms to the annual leave provisions of other awards including the *Metal, Engineering and Associated Industries Award 1998*.

[13] Evidence given by the parties established that at all relevant times the practice in relation to annual leave is that employees apply to take annual leave at a specified time and it is generally agreed to and fixed by the employer at the time requested. There is some variation in the forms and processes adopted at different ports and work locations. Evidence was given that at various times employees and Qantas have requested a change to approved annual leave, and to the extent this has occurred, changes to leave arrangements have been made. The incidence of such occurrences is not great.

THE ISSUES FOR DETERMINATION

[14] The issues for determination are whether Qantas has the right to cancel annual leave after it has been approved, and if so, whether it should exercise that right in the current circumstances. Apart from the terms of clause 15 of EBA IV, the ALAEA also relies on the provisions of the dispute settlement clause of EBA IV to argue that Qantas cannot change the status quo while the dispute is being determined and that the act of cancelling leave is in breach of the 'No Extra Claims' clause of EBA VII.

PRINCIPLES REGARDING THE INTERPRETATION OF AGREEMENTS

[15] The High Court in *the Amcor Case*¹ has endorsed the following passage from the decision of Justice Madgwick of the Federal Court as to the approach in interpreting the provisions of a certified agreement:²

"It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand."

[16] Once a term, which may have previously been a term of an applicable award, becomes a term of a certified agreement, there is the potential for different rules of construction to apply. An award should be construed in a purposive manner to give effect to the ordinary and natural meaning of its terms and the intention of the award maker. In the event of ambiguity, it is permissible to have regard to relevant documents such as any decision of the tribunal member who made the award. An agreement is of a different nature. Primary regard is had to the terms of the agreement, and in the event of ambiguity, regard may be had to the mutual intention of the parties ascertained objectively from the surrounding circumstances.³ In neither case, is it permissible to adopt an interpretation which contradicts the language of the instrument.

THE OPERATION OF CLAUSE 15

[17] The meaning of the various provisions of clause 15 is central to the determination of this dispute. The ALAEA contends that the words "shall be allowed" in clause 15.1 impose an obligation to grant leave and in the absence of an express right to cancel leave once granted, no right to cancel leave exists. Qantas contends that the right to fix the time for taking leave under clause 15.3.4 and 15.12 carries with it the right to unfix leave if the company decides to do so for any reason. Despite the common form of the relevant provisions, neither party was able to refer me to any decision where the issue of the right to cancel leave has been considered.

¹ (2005) 222 CLR 241.

² (1996) 66 IR 182 at 184.

³ *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337.

[18] In my view Clause 15 deals with four different but related concepts. The first is the obligation created by clauses 15.1 and 15.2 to **allow** leave. In my view this is in the nature of creating an entitlement to take leave at some indefinite time in the future. The entitlement to leave is also referred to as an accrual. The second concept is the obligation under clause 15.12 to **give** the leave within 12 months from the date when the right to annual leave accrued. This refers to the actual taking of the leave accrued under clause 15.1 and 15.2. The third concept is the obligation created by clause 15.11 for employees to **take** the leave and not accept payment in lieu except on termination of employment. The final concept is the **fixing** of the time for taking leave by the employer under clause 15.12 and clause 15.3.4. While the dispute centred on whether Qantas has the right to cancel leave once fixed, the question needs to be considered in the context of the other provisions.

[19] The right of the employer to fix the time for taking leave is unrestricted, except with regard to the obligation to give it within 12 months of the accrual. The right to fix the time created by the clause is the sole responsibility of the employer. In practice the employer will usually grant leave at a time agreed with the employee by granting an application for leave. However, the employer may direct an employee to take leave or may roster an employee to be on leave within the relevant period between the entitlement arising and the expiry of 12 months.

[20] In my view a right conferred on a party to determine something carries with it the right to alter a determination. I have previously adopted such a construction with respect to the same parties to the agreement in the context of an agreement of the union to work extended hours.⁴ In the absence of a specific limitation on changing an approval or fixing of the time for taking leave, I am of the view that after leave is initially approved, the approval of leave can be withdrawn unless to do so would be to deny an employee the right to be given leave within the 12 month period from the date of accrual. I do not consider that the decision of Qantas to cancel leave within the 12 month period following accrual is inconsistent with its rights under the Agreement.

SHOULD LEAVE BE CANCELLED?

[21] The ALAEA argued that notwithstanding any legal right to cancel leave, Qantas should not do so. It argued that the practice of not doing so in the past, the stated reason of being in response to planned protected industrial action, the alleged contingency arrangement of alternative licenced aircraft engineers, and the impact on family responsibilities all constituted reasons why Qantas should not cancel leave of employees who had applied for and been granted leave.

[22] Qantas argued that as the parties agreed that the employer would have the right to fix the time for taking leave, and the right is clearly provided for operational reasons, this should not be varied in the course of settling a dispute. It said that the step was necessary, in conjunction with other measures, to limit the effect of planned industrial action on its operations.

[23] I do not believe that a case has been made out for interfering with the decision of Qantas to cancel leave. Provided it acts within the rights created by the Agreement, including the obligation to grant leave within 12 months of its accrual, I believe that it should be permitted to exercise those rights. The evidence led by Qantas to the effect that it has operational reasons for cancelling the leave because of the impact of planned industrial action

⁴ ALAEA v Qantas [2007] AIRC 406; upheld on appeal [2007] AIRCFB 747.

constitute compelling reasons in my view for not interfering with its decision, even though the decision will potentially have an impact on employees. In this regard I also note the avenues for the consideration of special cases in the correspondence from Qantas to the ALAEA and employees.

[24] I do not consider that the decision of Qantas to cancel annual leave is an extra claim precluded by the Agreement or in breach of the obligations of the parties under the dispute settlement clauses of the Agreement. Parties are free to exercise rights created by the Agreement during the course of the Agreement. The requirement for work to continue while disputes are being resolved does not in my view prevent Qantas cancelling leave which it believes is necessary for operational reasons.

CONCLUSIONS

[25] For the reasons outlined above I am of the view that Qantas can alter the time fixed for taking leave of employees provided that in doing so, it would not be denying an employee the opportunity to take leave within 12 months of the leave entitlement arising under the Agreement. As the right to fix the time for taking leave is created by the agreement of the parties and the decision to cancel leave is made for operational reasons arising from intended industrial action, I do not believe that any interference with the decision of Qantas is justified. I determine the dispute between the parties accordingly.

BY THE COMMISSION:



VICE PRESIDENT

Appearances:

Mr G. Norris, for the Australian Licensed Aircraft Engineers Association.
Mr F. Parry, Senior Counsel, and *Mr R. Dalton*, of counsel, for Qantas Airways Limited.

Hearing details:

2008.
Melbourne:
May
8, 14.

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