IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 23
ARC 91/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ROBERT RICHARD GREENSLADE Plaintiff
AND	JETSTAR AIRWAYS LIMITED Defendant

Hearing:	6-7 May 2013
Court:	Chief Judge G L Colgan Judge Christina Inglis Judge M E Perkins
Appearances:	Rodney Harrison QC and Richard McCabe, counsel for plaintiff Michael O'Brien and Joey James, counsel for defendant
Judgment:	14 February 2014

JUDGMENT OF THE FULL COURT

Introduction

[1] The issues for decision in this case are whether the defendant, Jetstar Airways Limited, has complied with its statutory and contractual obligations to provide the plaintiff, a pilot employee (Richard Greenslade), with rest breaks and meal breaks during his work time. The Employment Relations Authority (the Authority) found that there was no breach.[1]

[2] This challenge by hearing de novo is the first time the statutory requirements for rest breaks and meal breaks, provided for under Part 6D of the Employment

[1] [2012] NZERA Auckland 436.

Relations Act 2000 (the Act), have been considered by this Court. The questions for decision affect not only the plaintiff but other pilots employed by Jetstar, and not only this employer and its employees, but other parties to employment relationships. A full Court has been assembled to consider and decide these novel issues and to give guidance to others.

Factual context

[3] The defendant is a New Zealand registered company which employs flight crew on aircraft bearing Jetstar livery. In this judgment we refer to the defendant as "Jetstar New Zealand". Jetstar New Zealand is a wholly owned subsidiary of Jetstar Pty Ltd, an Australian registered company which we will refer to as "Jetstar Australia" to distinguish it, where necessary, from the defendant.

[4] Jetstar Australia operates passenger airline services from, to and within New Zealand. Mr Greenslade is employed by Jetstar New Zealand as a pilot on Jetstar Australia's Airbus A320 type aircraft. The aircraft flown by Mr Greenslade and other New Zealand based pilots are registered in Australia under Australian civil aviation laws. The A320 is a narrow bodied (single aisle) passenger aircraft operated by two pilots.

[5] Mr Greenslade (who is based in Christchurch) flies inter-city services within New Zealand (Auckland, Wellington, Christchurch, Dunedin and Queenstown), to and from the eastern seaboard of Australia (Melbourne Sydney, Gold Coast), and to and from Fiji. Flying times range between 45 and 90 minutes on domestic services and four hours on trans-Tasman and Fiji services. The A320 type aircraft flown by Jetstar do not have flight crew rest areas as do larger wide bodied aircraft.

[6] As a captain (although the position is not materially different for first officer pilots as well), Mr Greenslade can work between hours that start as early as 0500 hours (5.00 am) and finish as late as 2400 hours (midnight) on any given day. He undertakes tours of duty (continuous absence from home base) which can last for up to three days. The legs of any given duty can range from one to five sectors, that is, flights between airports. Domestic operations' duty times can range from just under

four hours (including a total flight time within that span of one hour and 20 minutes) to a more typical day of eight hours and 15 minutes duty time during which total flight time amounts to five hours and 30 minutes over four sectors.

[7] The scheduled turnaround time for international flights is 40 minutes and, for New Zealand domestic flights, 30 minutes.[2] Turnaround times are calculated from engine shut-down on arrival, to either push-back or engine ignition for the next departure. During turnaround times Mr Greenslade is required to perform a number of duties including flight planning, aircraft preparation, completion of documentation, supervision and checking of load planning data, supervision of aircraft boarding and loading, ensuring aircraft safety for flight and appropriate authorisations, participating in crew briefings and any other similar matters that require his attention. The full 40 minutes of a turnaround (or 30 minutes on domestic flights) is required potentially, and in many cases actually, to perform those tasks.

[8] The defendant's position is that during turnaround times on the ground there is no opportunity for a pilot to have a rest break or meal break. This is especially so given that a key feature of Jetstar operations is minimal turnaround time of aircraft and their crews while on the ground between revenue generating flights.

[9] With the exception of quick toilet breaks if and when necessary and the aircraft's toilet is available, both pilots on an A320 flight deck are required to be there during the whole flight. Meals are provided to pilots and these are eaten (alternately) on the flight deck while both pilots continue to monitor the operation of the aircraft. If anything occurs requiring the attention of both flight crew members while one pilot is having a meal in these circumstances, then the meal must be put to one side while that occurrence is attended to. Meals are usually provided to flight crew once an aircraft is in its cruise phase[3] although, particularly on some domestic sectors, this requires rapid consumption of the meal because the cruise phase is short

[2] Domestic turnaround times are 10 minutes less than for international sectors because the former does not require engineering sign-off before flights as in the case of the latter.
[3] The part of a flight, after ascent and before descent, when the aircraft is flying at its maximum continuous altitude. This may be a period of hours on longer flights and as little as a few minutes on the shortest sectors.

and the full attention of both pilots is required for the ascent and descent phases of flights. On some short sectors of an hour or less flying time, there is no time at all for any break for a meal or rest while the aircraft is in the air.

[10] There is no argument that the plaintiff has not had, and continues not to have, rest or meal breaks during his working duty periods. That is illustrated by an actual working example postulated by the plaintiff in his evidence. This involves a duty period encompassing Christchurch-Auckland-Christchurch-Auckland-Christchurch sectors, signing on at 0545 hours (5.45 am) and signing off 1400 hours (2.00 pm). He calculates that within this period, he would be entitled to 10 minute rest breaks at approximately 0745 hours, 1145 hours, and 1345 hours, as well as a 30 minute rest break at approximately 0945 hours.

[11] There are two distinct periods of time at issue in these proceedings. The first is from 14 October 2010 to 26 March 2013 during which the plaintiff was party to an individual employment agreement (IEA). Under the agreement he was employed "to operate on flights for the Company [Jetstar New Zealand] or [Jetstar Australia] …("the Client") or any other aircraft type or airline with which the Company has a client relationship in the future."[4]

[12] The IEA made specific reference to "breaks" under cl 19. Clause 19 provided that:

> The parties agree that breaks will be provided in accordance with the statutory requirements set out in section 69ZD of the Employment Relations Act 2000, or any amending or substituting Acts. The parties agree that the Company may direct the most appropriate time for these breaks to be taken in accordance with operational requirements.

[4] Clause 1.2 of the IEA. Clause 4 of the IEA dealt with 'Pilot duties & responsibilities'. Clause 4.2 provided that: "The duties and responsibilities contained in the relevant position description and any other duties associated with the role of Pilot as may be reasonably required, as varied from time to time, will be performed according to the Company's or Client's instructions ... and in accordance with all applicable legislation." In terms of responsibilities the plaintiff was required to: "comply with Civil Aviation Regulations as applicable to the Company and its Client(s) Air Operating Certificate as amended from time to time." (cl 4.4.2).

[13] The IEA did not define the term "breaks", and nor was the term referred to other than in cl 19. Section 69ZD,[5] to which cl 19 made express reference, is set out below.

[14] The second period of time at issue in these proceedings commenced when the IEA was replaced by a collective agreement, the Jetstar Airways Limited and New Zealand Airline Pilots' Association Industrial Union of Workers Incorporated (NZALPA) Jetstar Pilots' Collective Agreement 2013 (CA), with effect from 26 March 2013 . The CA refers to rest periods but contains no reference to rest breaks and/or meal breaks. "Rest period" is defined in the CA to mean "a period of time during which a pilot is at suitable resting accommodation or suitable sleeping accommodation and is relieved of all duties associated with his/her employment." These rest periods must be taken on the ground and not in the aircraft, and a pilot must be relieved of all duties during them.

[15] In a letter of 31 January 2011 sent on Mr Greenslade's behalf to Jetstar, concerns were raised that it was not complying with the rest and meal break provisions set out in Part 6D of the Act. . Mark Rindfleish, Jetstar's Chief Pilot, replied expressing the view that s 69ZH(2) applied.

[16] Mr Rindfleish advised that the company operated in the New Zealand market pursuant to Part 1A of the New Zealand Civil Aviation Act 1990 (New Zealand CAA) under an Australian air operator's certificate (AOC) issued by the Australian Civil Aviation Safety Authority (CASA), and that:

> The ANZA Mutual Recognition provisions require an Australian operator conducting operations in New Zealand to abide by the obligations arising under the CASA AOC. The relevant schedule (Flight Crew Flight and Duty Limits) under the CASA AOC requires that flight crew (including pilots) take rest periods and is prescriptive as to the timing of such rest periods.
>
> Jetstar's position is that mandatory requirements under the schedule that apply to pilots instead of the provisions or entitlements of Part 6D [Employment Relations Act 2000].

[5] Section 69ZD was inserted, on 1 April 2009, by s 6 of the Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008.

[17] Discussions between the parties followed but failed to resolve the concerns that had been identified.

[18] There has been a further development since the Authority's investigation and determination. Whereas Jetstar New Zealand's form of IEA entered into by Mr Greenslade was generic in the sense that it applied with minor individual variations (including the provisions at issue in this case) to all the company's pilots, the employer has now developed a new form of generic individual employment agreement that it offers to new pilots. The relevant provisions in Mr Greenslade's agreement referred specifically to s 69ZD of the Act. The new template individual agreements offered to pilots (who are not subject to the CA) contain no reference at all to rest breaks and meal breaks under the Act but provide, at cl 8:

> **8 Rest and meal breaks**
>
> You and the Company agree that breaks will be determined by the relevant provisions of the aviation legislation applicable to the Company or the Client's Air Operator's Certificate (AOC) at that time.

[19] It is against this backdrop that the current proceedings arise. While we heard evidence from a number of witnesses, we agree with counsel for the plaintiff Mr Harrison QC's submission that determination of the issues principally turns on issues of law rather than fact.

[20] Although these proceedings raise issues relating to the historic position under the IEA, the focus of the parties' submissions was on the legal obligations that presently apply under the CA and the Act. We accordingly approach the issues for determination in reverse chronological order.

The legislative maze

[21] A number of statutory requirements relating to rest breaks and meal breaks applied during both the IEA and CA periods covered by the case, by virtue of Part 6D of the Act. Part 6D of the Act spans from s 69ZC to s 69ZH (inclusive). The parts of those sections which are material to this proceeding are as follows:

69ZC Interpretation

In this Part, unless the context otherwise requires, **work period—**

(a) means the period—

(i) beginning with the time when, in accordance with an employee's terms and conditions of employment, an employee starts work; and

(ii) ending with the time when, in accordance with an employee's terms and conditions of employment, an employee finishes work; and

(b) to avoid doubt, includes all authorised breaks (whether paid or not) provided to an employee or to which an employee is entitled during the period specified in paragraph (a).

69ZD Entitlement to rest breaks and meal breaks

(1) An employee is entitled to, and the employer must provide the employee with, rest breaks and meal breaks in accordance with this Part.

(2) If an employee's work period is 2 hours or more but not more than 4 hours, the employee is entitled to one 10-minute paid rest break.

(3) If an employee's work period is more than 4 hours but not more than 6 hours, the employee is entitled to—

(a) one 10-minute paid rest break; and

(b) one 30-minute meal break.

(4) If an employee's work period is more than 6 hours but not more than 8 hours, the employee is entitled to—

(a) two 10-minute paid rest breaks; and

(b) one 30-minute meal break.

(5) If an employee's work period is more than 8 hours, the employee is entitled to—

(a) the same breaks as specified in subsection (4); and

(b) the breaks as specified in subsections (2) and (3) as if the employee's work period had started at the end of the eighth hour.

69ZE When employer to provide rest breaks and meal breaks

(1) Rest breaks and meal breaks are to be observed during an employee's work period—

(a) at the times agreed between the employee and his or her employer; but

(b) in the absence of such an agreement, as specified in subsections (2) to (5).

(2) Where section 69ZD(2) applies, an employer must, so far as is reasonable and practicable, provide the employee with the rest break in the middle of the work period.

(3) Where section 69ZD(3) applies, an employer must, so far as is reasonable and practicable, provide the employee with—

(a) the rest break one-third of the way through the work period; and

(b) the meal break two-thirds of the way through the work period.

(4) Where section 69ZD(4) applies, an employer must, so far as is reasonable and practicable, provide the employee with—

(a) the meal break in the middle of the work period; and

(b) a rest break halfway between—

(i) the start of work and the meal break; and

(ii) the meal break and the finish of work.

(5) Where section 69ZD(5) applies, an employer must, so far as is reasonable and practicable, provide the employee with the rest breaks and meal breaks in accordance with the applicable provision in subsections (2) to (4).

…

69ZG Relationship between Part and employment agreements

(1) This Part does not prevent an employer providing an employee with enhanced or additional entitlements to rest breaks and meal breaks (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.

(2) An employment agreement that excludes, restricts, or reduces an employee's entitlements under section 69ZD—

(a) has no effect to the extent that it does so; but

(b) is not an illegal contract under the Illegal Contracts Act 1970.

69ZH Relationship between Part and other enactments

(1) Where an employee is provided with, or entitled to, rest breaks or meal breaks under another enactment,—

(a) this Part prevails if the breaks provided under this Part are additional or enhanced breaks:

(b) the other enactment prevails if the breaks provided under the other enactment are additional or enhanced breaks.

(2) Despite subsection (1), where an employee is a person who is required to take a rest break by, or under, another enactment, the requirement for a rest break defined by, or under, the other enactment applies instead of the provisions or entitlements for rest breaks or meal breaks provided under this Part.

[22] The defendant accepts that it is not providing, and has not previously provided, rest and meal breaks to the plaintiff in accordance with s 69ZD. It argues that that s 69ZH(2) applies to exempt it from the statutory formula set out in that provision. As Mr O'Brien (counsel for the defendant) acknowledged, before s 69ZH(2) can apply, two hurdles must be overcome. First, the employee must be required to take a "rest break" and, second, this requirement must arise under another "enactment".

[23] It is common ground that Jetstar New Zealand's operations are governed, at least initially, by the New Zealand CAA. Part 1A of that Act provides that the "holder" of an Australian AOC with Australia New Zealand Aviation (ANZA) privileges is entitled to conduct air operations to, from and within New Zealand (s 11B). "Holder" is defined in s 2 as including any person lawfully entitled to exercise privileges in respect of any aviation document.

[24] An AOC has been issued to Jetstar Australia. Section 28BD of the Australian Civil Aviation Act 1988 (Cth) (Australian CAA) provides that the holder of an AOC must comply with all requirements of that Act, regulations made under it, and Civil Aviation Orders (CAOs) that apply to the holder. The holder of an Australian AOC with ANZA privileges must also comply with all requirements of the New Zealand CAA and regulations and rules made under that Act that apply to the holder in relation to the ANZA activities in New Zealand. The (Australian) Civil Aviation Regulations 1988 (CAR) and the (Australian) Civil Aviation Safety Regulations 1998 (CASR), made pursuant to s 98 of the Australian CAA, provide for general regulatory controls for the safety of air navigation in Australia. CASA is empowered to issue CAOs under reg 5 of the CAR. Regulation 5.55 of the CAR empowers CASA to issue instructions to the holder of an AOC regarding flight duty time limitations and rest periods. CAO 48 is the relevant CAO that has been issued pursuant to this authority and specifies duty time limitations applicable to air operators.

[25] Section 4 of CAO 48 provides that CASA may, by instrument, exempt a person from any of the requirements set out under CAO 48. The Manager of CASA Operations Southern Region has issued the defendant with an exemption to CAO 48 pursuant to authority said to have been delegated to him under reg 215(3)(a) of the CAR. This exemption is referred to as "the CAO 48 exemption". The exemption is issued to both Jetstar Australia (as "the operator") and "flight crew members working for Jetstar Airways Pty Limited" on condition that Jetstar Australia and flight crew members engaged in operations conducted by Jetstar Australia are "subject, at all times, to the flight and duty limits set out in the document attached as Schedule 1 to Instrument SR 224/12 titled 'Flight Crew Flight and Duty Limits'". The CAO 48 exemption also includes a direction that the flight and duty limits set out in the Schedule be included in the "Operator's Operations Manual."

[26] Section 4(3) of the New Zealand CAA sets out a number of requirements of the holder of an aviation document while outside New Zealand and exercising privileges under the document. It requires every foreign registered aircraft operating in New Zealand to comply with the requirements of the New Zealand CAA and all regulations and rules made under that Act (s 4(1)). This Act recognises the

requirement on aircraft to comply with the laws of any foreign state and contains a number of exceptions to the obligation to comply with the Act.

[27] The Minister of Transport is given the authority to make rules under the New Zealand Civil Aviation Advisory Circular by s 28 of the Act. Section 30 specifies that these rules can include matters involving pilots and flight crew members. Rule 121.803 of the Civil Aviation Rules relates to operator responsibilities. It provides that the operator of an aeroplane must not cause or permit an air operation to be performed unless a scheme has been established for the regulation of "flight and duty times for every person flying as a flight crew member" (Rule 121.803(a)(1)). The scheme addresses "rest periods before flight" and "in-flight relief". Rule 121.805 sets out flight crew responsibilities, including that a flight crew member must not exceed flight and duty time limitations prescribed in the scheme required by Rule 121.803(a)(1). A CAA Advisory Circular, which provides information about the standards, practices and procedures acceptable in order to comply with a specific rule, has been issued for Subpart K of Parts 121, 125 and 135 of the Civil Aviation Rules that sets out a rest and meal break scheme.

[28] Rule 121.15 provides that Rule 121.803 Subpart K (which sets out the scheme) does not apply in the case of air operations conducted in New Zealand under an Australian AOC with ANZA privileges.

[29] We understood the defendant to accept that the phrase "by or under another enactment" cannot include an enactment in another jurisdiction unless, as it submits is the case here, there is a legislative link by an enactment of the New Zealand Parliament that incorporates the foreign enactment and makes it, or relevant parts of it, or instruments made under it, applicable in New Zealand.

[30] As we understand the defendant's argument, it is the convoluted linkage between the New Zealand CAA (plainly an enactment) and CAO 48 and its exemption, that meets the threshold requirements of s 69ZH(2) of the Act. Numerous issues were identified in relation to various links along the chain, many relating to which company various civil aviation instruments had been issued and the potential impact of this. Ultimately we do not find it necessary to reach a concluded

view on these points as we have formed a clear view on the two pivotal threshold issues contained within s 69ZH(2) itself.

What is a "rest break"?

[31] The plaintiff's case is that a "rest break" is a period when an employee is freed from the performance of his or her work duties, during a working day or a working period. The defendant submits that a "rest break" can include a rest period which is a period of rest between working days or working periods. We agree with the plaintiff and do not accept the defendant's proposition for the reasons that follow.

[32] Part 6D draws a clear distinction between "work periods", which are defined under s 69ZC as the period between the start and finish of work, and "rest and/or meal breaks", which are breaks taken *during* work periods (s69ZC(b)). Under s 69ZD the extent of an individual's entitlement to a rest break is calculated by way of reference to the overall duration of the work period. Part 6D does not regulate the durations of the employees' work periods or the minimum durations of periods between those work periods. Rather, it regulates the frequency, duration and timing of rest breaks and meal breaks during employees' work periods.[6] While Part 6D legislates for minimum requirements, more generous meal and rest breaks can be agreed upon between employers and employees.[7]

[33] There is also a distinction between rest breaks and meal breaks, even though the latter might be said to be a subspecies of the former. Minimum periods for meal breaks are longer than those for rest breaks and although not specified, we conclude that it is implicit in the notion of a meal break that this must be such as to allow an employee to partake of a meal, that is, to consume food and beverage. Again, there is a cross-over between the two sorts of breaks in the sense that a rest break may allow an employee to have food and/or refreshment although not necessarily on the same scale as during a meal break.

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[6] This is also reflected in s 69ZE, which specifies the timeframes within which breaks must be provided, and s 69ZG, which makes it clear that employers may provide additional or enhanced meal and rest break entitlements on an agreed basis.

[7] Employment Relations Act 2000, s 69ZG.

[34] The circumstances in which rest breaks and meal breaks may be taken may differ. Although both types of break contemplate freedom for the employee not to engage in work activities for the period of the break, a meal break contemplates that it will be able to be taken in circumstances in which a meal can be prepared and/or consumed which may not be the same circumstances as for a rest break. Also implicit in the notion of (certainly) a meal break, and perhaps also a rest break, is the ability of the employee to refresh himself or herself by attending to their toilet requirements.

[35] It is perhaps not surprising that Parliament has not defined "rest breaks" and "meal breaks" because the detail of when these must be taken, set out in s 69ZD, make it very clear that these are periods of time within a working period rather than periods of time between working periods.

[36] We do not accept the defendant's argument that the wording of s 69ZH(2) effectively shifts the focus away from the definition of rest break in Part 6D by referring to a rest break "defined by or under another enactment." It is clear that it is the requirement, and the scope of it, rather than the nature of the break itself that is "defined" by the other enactment.

[37] So, pertinently for the purposes of this case, the phrase "a rest break" in s 69ZH(2) has the same meaning as the phrase in s 69ZD. It follows that for s 69ZH(2) to apply, the "rest break" which an employee is required to take by or under another enactment, is a rest break *during* a period of work and not a rest period *between* periods of work. To put it another way, it is an intra, rather than inter, duty break that is required.

[38] We have considered the legislative material referred to us, including the Hansard records of the Parliamentary debates surrounding the enactment of Part 6D to cross-check our interpretation of the phrase.

[39] Part 6D was inserted into the Act, with effect from 1 April 2009, by s 6 of the Employment Relations (Breaks, Infant Feeding and Other Matters) Amendment Act 2008. Prior to its enactment there was no statutory requirement for employers to

provide rest breaks and meal breaks for employees. In many sectors, these issues had been dealt with in collective agreements and their predecessors, collective contracts, awards and the like. Many individual employment agreements also dealt with these matters although in an ad hoc way. However, a significant number of employees had no express entitlements to rest breaks and meal breaks even though customs and practices had developed and become entrenched in certain sectors.

[40] There is not a significant amount of background legislative material which discloses the rationale for the enactment of Part 6D. It accompanied the more publicised provisions allowing employees opportunities for infant breastfeeding. But in a sense the issues are associated because they both mandate an entitlement of employees to time away from immediate work concerns during a working period, although for different purposes.

[41] Mr Harrison identified the rationale as being an issue of human dignity and this appears to be so from the sparse background information provided in support of the Bill which introduced what is now Part 6D. Also discernible are equally general references to qualities of work/life balance and, we infer, in connection with both of these, that relief from work fatigue and what was referred to in the hearing as the desirability for nourishment or sustenance of employees during their working days, can also be seen to be the impetus of Part 6D.

[42] Introducing the Bill into the House at first reading the Minister of Labour, the Honourable Trevor Mallard, spoke of the objects of the legislation. He said that it was "… to boost protections for vulnerable workers and breastfeeding mothers by legislating for minimum meal and rest breaks, and the protection of employees who wish to breastfeed their babies at work" and to amend the principal Act "… to provide employees with rest and meal breaks".[8]

[43] The Minister went on to observe that:

> These amendments will create minimum standards for a modern workforce in respect of the protection and promotion of infant feeding and, I might say, in respect of what many of us had thought had been the case for 100 years,

[8] (9 April 2008) 646 NZPD 15511.

> as far as the provision of rest and meal breaks is concerned. The amendments also support Government policy concerning the choices of employees, particularly when it comes to work-life balance and parenting responsibilities.
> …
> I think it would surprise many people that no statutory requirement for meal and rest breaks exists, but minimum entitlements to rest breaks and meal breaks during a working day are already in the vast majority of collective agreements. However, anecdotal evidence has suggested that some sectors—service and manufacturing sectors, in particular, and sectors where there are vulnerable workers—may be providing less than the breaks specified in this bill. Most New Zealanders would have thought, like me, that these sorts of minimum entitlements are already part of the law, and although many workers do enjoy these protections, the Government is making sure that there is absolutely no doubt that these basic entitlements must be provided for.
> …
> The bill also amends the Employment Relations Act to require employers to provide employees with paid rest breaks and unpaid meal breaks. …

[44] After summarising the duration and frequency of the intended breaks, the Minister continued:

> The rest and meal breaks must be provided in the middle of the work period, where reasonable and practicable. However, employees and employers may agree to vary the timing of the breaks. Employers and employees will also be able to enhance or to have additional entitlements to rest and meal breaks. These entitlements will not apply to employees who are already provided with them by other legislative or regulatory provisions, or by their employment agreements, where those other enactments are enhanced or additional to the entitlements in the bill. …
>
> This bill reflects the Government's commitment to the protection of our country's more vulnerable workers …

[45] What is now s 69ZH(2) was absent completely from the Bill as introduced by the Minister of Labour and referred to the Select Committee for consideration. The Select Committee's report was also relatively brief. It did not recommend any change to the clause that was to become s 69ZH(2). Even a Supplementary Order Paper introduced for the purpose of making a number of changes at the time of the third reading of the Bill in the House, did not include any reference to what became s 69ZH(2). This subsection appears, from Hansard, to have been introduced by Mr Peter Brown, a member of the New Zealand First Party and adopted by the House, without explanation or discussion.[9] There is some suggestion that it was related to the detailed submissions that had been made to the Select Committee by the Bus and

[9] (2 September 2008) 649 NZPD 18191.

Coach Association of New Zealand about the effect of the proposed legislation upon its members, but there is no reference at all to that submission or any recommendation arising from it in the Select Committee's report. In these circumstances, there is no specific relevant commentary on the section that might assist us in its interpretation.

Is there a requirement for a "rest break" under the CAO 48 exemption?

[46] We turn to consider whether CAO 48 or its exemption set out a requirement for a rest break as defined.

[47] CAO 48 does not refer specifically to rest (or meal) breaks. Rather it refers to rest periods before and after a period of active duty, or a tour of duties. The only references to what occurs during a period of duty (in respect of rest) appear at cls 3.2 and 3.12, which provide that:

> 3.2 An operator shall ensure that bunks or berths of a type approved by CASA are provided for resting flight crew members.
>
> …
>
> 3.12 Notwithstanding the provision of paragraph 3.2 of this subsection, where a tour of duty is restricted to not more than 14 hours, a seat approved by CASA as capable of providing adequate rest, may be provided for resting flight crew members in lieu of bunks or berths.

[48] The exemption to CAO 48 deals with rest periods before and after active duty.[10] For the reasons we have already expressed, such periods are not the sort of within or intra duty break that s 69ZH is directed at. The only reference to within duty breaks provided for in the CAO 48 exemption relates to the suitability and

[10] See for example cl 2.13 "Rest Period: A period of time during which a flight crew member is at suitable resting accommodation or suitable sleeping accommodation, and is relieved of all duties associated with employment" [inter-duty]; cl 3.1.1 "A flight crew member shall not knowingly operate an aircraft and an operator shall not knowingly require or knowingly permit a flight crew member to operate an aircraft unless at the start of any duty period: (a) the operator has provided opportunity for and the flight crew member has taken adequate rest" [pre-duty]; cl 3.2.1 "An operator shall provide opportunity for and a flight crew member shall ensure that adequate rest is taken during the period prior to commencing or recommencing duty [pre-duty]; 3.7.4 which sets out the period of "free of all duty"; and 3.8 which places limits on flying hours.

availability of a seat and/or bunk.[11] This makes provision for rest facilities, rather than a requirement to take a rest break. As we have noted already, the A320 type aircraft flown by the plaintiff have no onboard flight crew rest facilities.

[49] Similarly, cl 3.3.1 of the CAO 48 exemption provides that:

> Following commencement of a flight duty period, an operator shall provide opportunity for and a flight crew member shall ensure that sustenance adequate for physical well being is taken during any duty period, and shall not knowingly continue to operate an aircraft past the nearest suitable point of landing, if during the flight duty period the individual is affected by any physical or psychological condition which could impair the safe exercise of the flight crew member's licence privileges.

[50] Again, this clause relates to sustenance, not rest (as required by s 69ZH(2)), and cannot sensibly be interpreted as imposing a requirement to take a rest break.

[51] As Matthew Bell, Manager Flight Operations Resources for Jetstar Australia and Jetstar New Zealand, accepted in cross examination, nothing undertaken on the A320 flights which the plaintiff operates, triggers augmented crew requirements which, in turn, trigger flight crew rest under the exemption. Bradley Hayward, an expert in Australian aviation law called on behalf of the defendant, also accepted the proposition put to him that the sustenance provision (cl 3.3.1 of the CAO 48 exemption) did not amount to a rest or meal break and ultimately that there was nothing in the exemption itself that either provides for, far less requires, the taking of a break during the flight duty period.

[52] We conclude that there is no requirement in CAO 48, or its exemption, for a rest break, even if these instruments otherwise apply in the circumstances of this case and have been made by or under an enactment for the purposes of s 69ZH(2). It is the latter point that we now consider.

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[11] See, for example, cl 2.3.1 " The maximum rostered flight duty period for augmented flight crew is 22 hours, where the flight crew being relieved has access (for the complete relief period) to rest facilities consisting of a bunk..." Clauses 2.3.2 and 3 are to similar effect, relating to access to a "comfortable seat".

What is an "enactment" for the purposes of s 69ZH(2)?

[53] The Act does not define the term "enactment". The term is, however, defined in s 29 of the Interpretation Act 1999 as meaning "the whole or a portion of an Act or regulations". "Act" is defined as meaning "an Act of the Parliament of New Zealand or of the General Assembly; and includes an Imperial Act that is part of the law of New Zealand". "Regulations" are defined as:

> (a) regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown:
>
> (b) an Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment:
>
> (c) an Order in Council that brings into force, repeals, or suspends an enactment:
>
> (d) regulations, rules, or an instrument made under an Imperial Act or the Royal prerogative and having the force of law in New Zealand:
>
> (e) an instrument that is a legislative instrument or a disallowable instrument for the purposes of the Legislation Act 2012:
>
> (f) an instrument that revokes regulations, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument, referred to in paragraphs (a) to (e).

[54] We agree with Mr Harrison's submission that an "enactment" for the purposes of s 69ZH(2) must be read (consistently with the definition of that term in the Interpretation Act) as a New Zealand enactment. There is nothing in the Act to suggest that the term "another enactment" in s 69ZH(2) was intended to extend to enactments made in other jurisdictions. Such a broad reading would potentially undermine the minimum standards for employment relationships imposed by the New Zealand legislation, having regard to the variable standards applying elsewhere. We do not think that Parliament can sensibly be taken to have been importing them for the purposes of s 69ZH(2), which otherwise sets no base requirements in terms of rest breaks (in comparison with s 69ZH(1)).

[55] Even more fundamentally, the requirements contained in CAO 48 and its exemption have not been made "by, or under" a New Zealand enactment. A direct statutory link is plainly required. Regulations and rules made pursuant to the

empowering provisions of an Act are an example. CAO 48 and its exemption have, as the instruments themselves expressly state, been made under their own empowering legislation (the Australian CAA and CAR).

[56] The defendant argues that the CAO 48 exemption is incorporated into New Zealand law by means of the way in which it is dealt with in cl 121.15 of Part 121 of New Zealand's Civil Aviation Rules, which are themselves made under the the New Zealand CAA. That may or may not be so, but s 69ZH(2) is limited in its terms. It does not extend to rest break requirements incorporated into New Zealand law, however obliquely. And, as Mr Harrison points out, cl 121.15 simply provides that certain (New Zealand) safety rules that would otherwise apply do not apply in the case of air operations conducted in New Zealand under an Australian AOC with ANZA privileges.

[57] The defendant further submits that CAO 48 and its exemption is a legislative instrument for the purposes of the (Australian) Legislative Instruments Act 2003 (Cth).

[58] The defendant called the evidence of an expert witness on Australian aviation law. This evidence was not contradicted by any expert evidence for the plaintiff although the defendant's expert witness, Mr Hayward, was cross-examined by Mr Harrison.

[59] Evidence, including expert evidence, is governed by s 189(2) of the Act which provides materially that the Court may accept or admit "such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not." In this regard, the Court is guided by the general law of evidence including, where appropriate, provisions of the Evidence Act 2006 and authoritative case law. Section 144 of the Evidence Act 2006 deals with evidence of foreign law. It provides that a party may offer, as evidence of a foreign country's statute or other written law, evidence given by an expert.[12]

[12] Evidence Act 2006, s144(1)(a)

[60] Generally, if the evidence of an expert witness is uncontradicted, a court will accept this unless it is obviously unreliable or extravagant.[13] If faced with expert evidence on the one hand, and purely documentary evidence as to the meaning of a foreign enactment on the other, courts will generally give more weight to the former.[14]

[61] Against that background, we turn now to the evidence of Australian law in this case. There was one important element of Mr Hayward's evidence, established unequivocally in cross-examination, from which the defendant subsequently sought to resile in submissions. This was Mr Hayward's statement that the content of what is known as "Waiver of CAO 48" (the CAO 48 exemption) is not an Australian statutory instrument.

[62] With some hesitation, we permitted Mr O'Brien to make submissions and to refer us to copies of Australian statutory material which he said would establish that his expert witness was wrong. However, on further reflection, we have concluded that we must rely on Mr Hayward's expert evidence given at the hearing under cross examination. Although some of the documentary material that we allowed Mr O'Brien to adduce may, on its face, call into some doubt Mr Hayward's evidence, Mr O'Brien elected not to seek leave to recall Mr Hayward to give more evidence on the point. Further, the additional documentary evidence that Mr O'Brien adduced could have been admitted without the benefit of an expert to explain and put it into context. There would, in these circumstances, have been some dangers in such a course and those persisted when the documents were used by the defendant in an attempt to impeach its own expert's evidence. For example, the expert could have given evidence about how those provisions had been applied by courts, whether there were other relevant provisions affecting them, and the like.

[63] In these circumstances, we have not been persuaded that even if we had been prepared to allow the defendant to impeach the evidence of its own expert, his evidence about the status of CAO 48 and its exemption was wrong.

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[13] See *Laws of New Zealand* Conflict of Laws: Choice of Law (online ed) at [271].
[14] See David Goddard and Campbell McLachlan "Private International Law – Litigating in the Trans-Tasman Context and Beyond" (paper presented at the New Zealand Law Society Seminar 2012).

[64] Even if we had been persuaded that CAO 48 and its exemption fell within the definition of a legislative instrument as a matter of Australian law, that does not address the issue of whether they constitute enactments for the purposes of New Zealand law or whether they have been made by or under a (New Zealand) enactment.

[65] For the foregoing reasons, we do not accept that either CAO 48 or its exemption have been made by or under another enactment for the purposes of s 69ZH(2).

Breach of clause 19 of the plaintiff's individual employment agreement?

[66] Under cl 19 the parties agreed that "breaks [would] be provided in accordance with the statutory requirements set out in section 69ZD". The term "breaks" is not defined in the IEA. Nor is it referred to other than in cl 19. However, it is plain that the reference in cl 19 refers to rest and meal breaks, given that this is what s 69ZD (which has been incorporated into the parties' agreement by way of reference) specifically relates to. This can be contrasted to other references in the IEA to, for example, "rest periods" and "days off".[15] As we have already observed, "rest periods", "meal breaks" and "rest breaks" are clearly and separately distinguished concepts. Rest periods are periods of rest between duty periods, meal breaks are breaks allowing the employee to have a meal, and rest breaks are shorter breaks for otherwise unspecified purposes of rest, both of the latter "breaks" occurring during a period of duty.

[67] The plaintiff's case is that he believed he would be provided with the breaks (rest breaks and meal breaks) as required by s 69ZD of the Act and that the detail of those breaks is ascertainable by reading s 69ZD. He says that he and Jetstar New Zealand also agreed that it was able to direct the most appropriate time for those breaks to be taken in accordance with operational requirements and that this caused him to expect that the company would tell him when these breaks should be taken in

[15] "Rest periods" is referred to in cls 16.1. and 17.5. and "days off" is referred to in cls 17.1.5. and 17.8.

accordance with its operational requirements, reinforcing for him that the breaks specified in s 69ZD would be provided. This did not occur.

[68] The defendant's case, on the other hand, is that what was agreed between the parties in cl 19 was an entitlement to such breaks as were afforded, not just by s 69ZD, but by the whole of Part 6D of the Act of which s 69ZD is only one of six sections. Its case is that because of the exemption created by s 69ZH(2), Mr Greenslade was in fact not entitled to any meal or rest breaks under s 69ZD, so that it was not in breach of cl 19 by failing or refusing to provide any.

[69] If the plaintiff's interpretation of cl 19 is correct, then the defendant was in breach. If the defendant's interpretation of cl 19 is correct, then it must establish that s 69ZH(2) applies and that another enactment is applicable to avoid being in breach. We have already found that it is unable to do so.

[70] While the parties could have agreed to alternative arrangements under the Act, they did not do so. Rather they agreed that rest and meal breaks would be provided in accordance with the statutory requirements set out in s 69ZD, but that "the Company may direct the most appropriate time for these breaks to be taken in accordance with operational requirements". It is common ground that no breaks as set out in s 69ZD were provided and that Jetstar New Zealand did not direct when any breaks could or would be taken according to its operational requirements. We cannot accept that the parties agreed to rest and meal breaks being taken but at the same time that none would be in practice, as is the effect of the defendant's case.

[71] In the absence of any direction, the statutory formula in s 69ZD(2) to (5) (per s 69ZD(1)) applies, unless (as the defendant effectively submits) cl 19 is to be read down.

Is cl 19 to be interpreted subject to s 69ZH(2)?

[72] Mr O'Brien submitted that s 69ZH(2) is incorporated - although not expressly - by virtue of the reference to the introductory words "in accordance with this Part" in s 69ZD(1).

[73] Section 69ZH(1) applies where an employee is entitled to, and an employer must provide the employee with, rest breaks or meal breaks under the Act and, in particular, under s 69ZD. Subsection (1) applies to circumstances where such an employee is also provided with, or entitled to, additional or enhanced rest breaks or meals breaks under another enactment.

[74] Subsection (1) then operates to promote and apply whichever of s 69ZD or the entitlements of the other enactment, is better from the employee's point of view, although it uses the phrase "additional or enhanced breaks". So subs (1) resolves any conflict between, or duplication of, entitlements to rest breaks or meal breaks by deeming that the additional or enhanced breaks, trump the inferior breaks.

[75] Subsection (2) of s 69ZH detracts from subs (1) in some specified circumstances. It applies where an employee is a person who is required to take a rest break (but not a meal break) by or under any other enactment. In such circumstances subs (2) deems that the requirement for a rest break, defined by the other enactment, is to apply instead of the provision of, or entitlements to, rest breaks or meal breaks under Part 6D and, in particular, under s 69ZD. Subsection (2) cancels out, in relevant cases, the ascendancy of the superior over the inferior under subs (1). It also has the effect of negating not only a Part 6D rest break, but also a Part 6D meal break if there is any rest break requirement under another enactment, even if that rest break requirement is only minimal and manifestly inferior to the entitlements to rest breaks and meal breaks under Part 6D.

[76] In our view the intention of cl 19 is clear. The IEA was Jetstar New Zealand's generic form of individual pilot employment agreement at the time it was entered into. At this stage Part 6D of the Act was in its current form including s 69ZH. Clause 19 expressly refers to the "statutory requirements set out in section 69ZD". While s 69ZH was in force at the time the agreement was entered into, there is no reference to that provision. This suggests that the formula contained within s 69ZD was intended to apply, subject to any direction from the defendant as to appropriate timing having regard to operational requirements. The point is reinforced by the drafting linkage in cl 19 between the "breaks" and the statutory requirements in s 69ZD. If the parties had intended that the requirements relating to

rest and meal breaks in another enactment were to apply, it is likely they would have made particular reference to s 69ZH rather than 69ZD. More logically, and as Mr Harrison submitted, the reference to "rest breaks and meal breaks in accordance with this Part" is to the provisions in Part 6D which define the rest and meal break entitlements, being ss 69ZD and 69ZE. After all, if s 69ZD is engaged s 69ZH is not and vice versa.

[77] By including the second sentence of cl 19 (giving itself the ability to direct the most appropriate times for the taking of such breaks), Jetstar New Zealand must be held to have intended that breaks would be given and that it would specify when these were to be taken. Had its intention been to provide a right to rest breaks and meal breaks but to then negate that right in reliance on s 69ZH(2) as it now purports to do, the second sentence of cl 19 would have been otiose.

[78] We reject the defendant's argument that the reference in s 69ZD(1) to the phrase "in accordance with this Part" means that the whole of Part 6D must have been intended by the parties to apply, including the exemption in s 69ZH(2). Subsection (1) provides a statutory entitlement to all employees. By entering into cl 19, the parties intended that there would be a contractual entitlement. The contents of s 69ZD(1) were therefore irrelevant to this contractual requirement. What was important for the parties under cl 19 were the provisions in subss (2), (3), (4) and (5) of s 69ZE.

Does cl 16 prevail over cl 19?

[79] Mr O'Brien advanced a further argument that cl 19 must be read subject to cl 16. This argument was one that found favour with the Authority.

[80] Clause 16 of the IEA, entitled "Hours of work, duty limitations and rest periods", provided that:

> The Pilot's hours of work, duty limitations and rest periods will be determined by the relevant aviation legislation applicable to the Company or Client's Air Operator's Certificate (AOC) at that time. The relevant aviation legislation relating to hours of work, duty limitations and rest periods applicable to the Company's AOC at the time of signing of this agreement is attached in Schedule 4.

[81] We do not consider cls 16 and 19 are in conflict with one another. That is because they are directed at two different things. Clause 16 relates to rest *periods*. Clause 19 relates to rest *breaks* and meal *breaks*. If the defendant's argument was correct, cl 19 would be rendered wholly ineffectual. That cannot have been the intention of the parties and there is no extrinsic material before the Court that might otherwise support the interpretation being advanced on behalf of the defendant in relation to the purpose of these two provisions.

Does cl 19 fall foul of s 238 of the Employment Relations Act 2000?

[82] Mr O'Brien's fall-back position was that the plaintiff's interpretation of cl 19, which would exclude any accounting for s 69ZH(2), would constitute an unlawful contracting out of the Act under s 238. This provides that "[t]he provisions of this Act have effect despite any provision to the contrary in any contract or agreement." The defendant's argument is that s 238 prohibits the parties from entering into a contract which includes some elements of the legislation but precludes others. It relies for this proposition on the judgment of the Court of Appeal in *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission.*[16]

[83] The plaintiff's response to this argument is manifold. First, he says that the purpose of s 238 is to prevent what is described in the heading to that section as "contracting out" of provisions of the Act which confer benefits on one or more parties to an employment relationship, rather than an agreement by one party to an employment relationship to provide benefits to which the Act does not extend or, equally, benefits which are better than those for which it makes minimal provision (described as "contracting in"). This interpretation is, it is submitted, supported by the history of s 238, being the descendent of old legislative provisions which recorded that Awards and industrial agreements (pre-1991 collective instruments) set only minimum, but not maximum, terms and conditions of employment.

[84] Next, the plaintiff says that s 238 is not applicable to cl 19 because a specific and dedicated provision for "contracting out" is made in relation to Part 6D by s 69ZG. As we have said, s 69ZG provides that:

[16] [2011] NZCA 595 at [37].

> **69ZG Relationship between Part and employment agreements**
> (1) This Part does not prevent an employer providing an employee with enhanced or additional entitlements to rest breaks and meal breaks (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.
> (2) An employment agreement that excludes, restricts, or reduces an employee's entitlements under section 69ZD—
> (a) has no effect to the extent that it does so; but
> (b) is not an illegal contract under the Illegal Contracts Act 1970.

[85] The reference in s 69ZG(1) to "[t]his Part" includes s 69ZH. The plaintiff says that the "breaks" for which cl 19 makes provision are plainly "enhanced" by those which Jetstar New Zealand contends it is obliged to provide by virtue of obligations arising out of s 69ZH(2) and/or the Jetstar Australia CAO 48 exemption.

[86] Section 238 is not one which protects the rights only of employees. It is a generally applicable provision which ensures primacy of any legislative provision over any inconsistent provision in any contract or agreement including in any employment agreement or any collective agreement. The heading "[n]o contracting out" does not reflect precisely the substance of s 238 which creates primacy rather than prohibits the entering into of contradictory contractual or agreement provisions.

[87] As a general provision, however, s 238 is subject to the more particular s 69ZG. Subsection (1) of s 69ZG is engaged in this case because the entitlements to rest breaks and meal breaks specified in cl 19 (on the plaintiff's interpretation of this which we would otherwise accept) are, or amount to, "enhanced or additional entitlements" when compared to the application of the defendant's interpretation of cl 19 which would provide for no rest or meal breaks (as we have interpreted those phrases). In these circumstances, s 238 must yield to the more specific s 69ZG.

[88] Applying s 69ZG(2), the defendant's interpretation of cl 19 is one that "excludes, restricts, or reduces an employee's entitlements under section 69ZD …". Subsection (2) therefore provides that such an employment agreement "has no effect" but otherwise saves the individual employment agreement from being an illegal contract under the Illegal Contracts Act 1970.

[89] That interpretation of the effect of s 69ZG on s 238 accords with the historical approach to the interpretation of s 238 and its predecessors emphasised by Mr Harrison in his submissions. That is, the legislative scheme does not preclude parties from providing employee benefits which are better, or more generous, than those for which the legislation makes provision.

[90] We find in favour of the plaintiff's interpretation of cl 19. Even if we were to accept the defendant's interpretation, our other conclusions on the claim of statutory breach by the defendant (and the non-applicability of s 69ZH(2) in particular) mean that the defendant was in breach in any event.

[91] It follows that, by failing or refusing to provide rest breaks and meal breaks as defined in s 69ZD of the Act, the defendant breached cl 19 of the IEA with Mr Greenslade for the whole of the period of the currency of that agreement.

Practical consequences arguments

[92] We heard a considerable amount of evidence about the sort of practical issues that may arise if the plaintiff's arguments were accepted. Much was made of the fact that the airline operates according to a low cost/low yield model which would be significantly undermined if Mr Greenslade and other of its pilots were required to take rest and meal breaks during their work periods. The defendant says that if it was required to provide pilots with breaks away from their duties (and aircraft), this would affect adversely its service scheduling, causing additional cost to the airline or the loss of income to it as a result either of operating fewer flights or increasing aircraft and/or pilot numbers.

[93] We accept that in the particular circumstances of piloting passenger service aircraft, there may be consequential and more significant effects of an employee taking a break than might be the case, for example, by the diminution or temporary cessation of a factory's production. We note that there are other duty time limitations on pilots (maximum duty hours, minimum breaks of duty between flight duties, and the like) which affect similarly airlines' abilities to operate their schedules for maximum efficiency and productivity, so that this legislative incursion into an

airline's ability to operate its services is not unique. Such issues have been dealt with in other ways in analogous industries, such as the land transport sector by way of Rules made under the Land Transport Act 1998.[17] These Rules make express provision for rest breaks, as Mr O'Brien pointed out. While there are obvious synergies between the land transport and air transport industries and, we infer, some of the practical realities of working in each, the Act's requirements are clear. We do not consider that a requirement relating to rest breaks has been made by or under another enactment in the sense required by s 69ZD in the particular circumstances of this case.

[94] As witnesses for the defendant accepted, rest and meal breaks (as defined) could be implemented from a practical and operational perspective, although this would likely have an impact on the airline's financial position. It was even suggested that the most drastic consequence of a finding in the plaintiff's favour might be Jetstar's withdrawal from operations based in New Zealand. Such spectres, irrespective of their probability, should not be allowed to influence the interpretation of minimum code legislation or its application in particular cases, and do not do so in this case.

[95] Part 6D is, like other provisions of the Act, designed to impose a floor beneath which employers cannot go in terms of minimum working conditions. This much is reflected in the legislative history material we were referred to. Any statutory minimum regime requiring breaks from duties during a working period will necessarily affect an employee's productivity and, therefore, the cost to the employer of employing an employee. The way in which the defendant has chosen to structure its operations, and deal with the issue of rest and meal breaks, does not justify a departure from these minimum statutory requirements.

[96] As Mr Harrison aptly observed, it is no more a defence to an airline operator to contend that provision of statutory entitlements is inconsistent with its low cost operating model than it is for a garment sweatshop operator to do so.

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[17] Land Transport Rule: Work Time and Logbooks 2007.

[97] Mr Greenslade assures the Court that he is not proposing that he (or, to the extent that he can commit any other pilots,[18] his colleagues) intends that any pilot of a flight crew could or should take their entitlements to a break by withdrawing from operation of an aircraft at any point during the flight, because a theoretical entitlement to a rest or meal break has arisen. Rather, he says that there can and should be a practical allocation of rest breaks and meal breaks as contemplated by the second sentence of cl 19 of his agreement. We understand this is what occurs with comparable Air New Zealand pilots,[19] that is, that rest breaks and meal breaks are provided during the duty period when an aircraft is on the ground.

[98] It is clear that the plaintiff, and the union representing him and others in a similar position, are alive to the operational issues that arise and for this reason have submitted that the Court should defer making any orders relating to relief to enable the parties to enter into negotiations between themselves. We agree with that proposal in the circumstances.

Breach of good faith

[99] These claims by the plaintiff relate to the manner in which the defendant entered into the IEA with Mr Greenslade in 2010. Although there is undisputed evidence from Mr Greenslade that he felt that he had little choice but to accept the defendant's form of contract if he wished to advance by promotion within the airline and in our experience this would not be unusual, a claim of breach of good faith focuses on the state of mind of the defendant's representatives at the time the agreement was entered into and the allegedly misleading conduct undertaken by the defendant. There is insufficient evidence about those events that would enable us to conclude to the necessary standard that there was a breach of good faith by the defendant. The same absence of relevant evidence prevents us from finding that the defendant should now be estopped from asserting an interpretation of cl 19 of the individual employment agreement other than that which it held out to Mr Greenslade that it would perform.

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[18] Although in his name alone, the case has been brought, and is supported by, the New Zealand Air Line Pilots' Association Inc, a union of airline pilots, with other members employed by Jetstar (New Zealand).

[19] Pilots flying two pilot, narrow-bodied aircraft on the same routes.

[100] It may well be that, in view of the strength of his other claims against the defendant, the plaintiff elected not to pursue (at least fully) these good faith/estoppel causes of action but we conclude, in any event, that they fail for want of proof.

Decision of proceeding

[101] The plaintiff succeeds in his claims for breach of his individual agreement and of s 69ZD of the Act. The defendant's defences fail comprehensively and ultimately because of its failure to establish the application of s 69ZH(2) to its case. Mr O'Brien conceded that it had to bring the parties' circumstances within that exemption to the application of s 69ZD if it were to succeed. It has not done so.

[102] In summary, Mr Greenslade was not, and is not, a person who is required to take a rest break by or under another enactment. Although he is required to take a period of rest between periods of duty for Jetstar (New Zealand), such periods are not rest breaks or meal breaks as we have interpreted those phrases in Part 6D of the Act.

[103] We note for completeness that the minimum periods of rest referred to in the CA that a pilot must take while not at work are consistent with mandatory statutory rest periods required by the New Zealand Civil Aviation Authority and its Australian counterpart (CASA), to mitigate fatigue in the interests of aviation safety.

[104] Even if we are wrong that a rest period taken between duty periods is not a rest break under Part 6D, there is no requirement on Mr Greenslade to take such a rest break (so defined) by or under another enactment.

Relief

[105] The parties requested that issues relating to relief be deferred. After hearing from counsel we are confident that such issues may be capable of resolution directly between the parties themselves. If an impasse is reached leave is reserved to bring issues relating to remedies back before the Court. Counsel are requested to file an updating memorandum with the Court no later than 60 days hence.

[106] Costs are reserved.

GL Colgan
Chief Judge
For the Full Court

Judgment signed at 4pm on 14 February 2014