

[3] Mr Beacham claims that by failing to honour its undertaking to him the respondent has breached a term of his individual employment agreement. He brings a claim of constructive dismissal arising out of the alleged breach. In the alternative he seeks damages for losses arising out of the same alleged breach.

[4] The respondent says that there was no breach because there was no undertaking of the type Mr Beacham describes. It denies that there was a constructive dismissal but asserts that Mr Beacham is in any event barred from bringing a personal grievance claim because he did not raise his personal grievance within ninety days.

[5] Both parties agreed that because the matter was brought as a damages claim as well as a personal grievance claim I should proceed to investigate the employment relationship problem without first determining the ninety day issue. The latter is therefore an additional issue for determination here.

Issues

[6] The issues for determination are:

- i. what was agreed at the time of the employment regarding hours of work, including “overnights;”
- ii. whether the respondent breached such agreement or, in the absence of any such agreement, required Mr Beacham to work an unreasonable number of overnights;
- iii. whether the number of overnights worked was critical to the decision to resign, and
- iv. whether the grievance was raised within ninety days.

[7] If Mr Beacham is successful in his claim the issue of remedies will also fall to be determined.

(i) The agreed terms

[8] Mr Beacham was interviewed for his position by a senior pilot, Mr Ian King, accompanied by one of the respondent's human resources managers. Mr Beacham told me that he made a point of asking how many overnights he would have per roster period. He says that Mr King told him "two to three per roster period."

[9] In his evidence, Mr King agreed that Mr Beacham asked about overnights as indeed did most interviewees. He said he replied with a standard answer: that he personally was doing about three or four per roster period. Mr King told me that this was all he could say since at the time he had no overall information about rosters and did not know the average number of overnights per pilot. He also said in evidence that he noted that there might be more overnights during the training period. Mr Beacham does not recall this but does accept that it was to be expected that the number of overnights might be higher during the training period.

[10] Following the interview, Mr Beacham proceeded to undertake further pre-employment testing. Arranging this involved contacting Flight Operations Manager Mr Bruce Alabaster, who happened to be an acquaintance of Mr Beacham. Mr Beacham took the opportunity of asking Mr Alabaster what he knew about the number of overnights to be expected. The answer was two to three per roster period.

[11] After successfully completing the pre-employment testing Mr Beacham was offered a position. Mr Alabaster was not involved in making that offer to him. The letter of offer noted that rosters could be subject to change and that work was at the discretion of the employer. He accepted and executed an individual employment agreement containing the following:

"3. Hours of Work

3.1 The employee's hours of work will vary from week to week, based on the needs of Jetconnect's business. The Employee agrees to work as and when rostered to do so by Jetconnect, which due to the rostered nature of the role, will include public holidays.

3.2 *The Employee's hours of work will be advised by roster and/or telephone. The Employee will be rostered to perform the Employee's duties in accordance with New Zealand Civil Aviation Authority (NZCAA) requirements, or any exception that NZCAA may approve.*

3.3 *Jetconnect will endeavour to issue rosters at least 7 days prior to the commencement of each roster. Jetconnect will advise the Employee of any delay in issuing any such roster. Each roster shall specify the Employee's designated days off, duties and leave periods.*

3.4 *The Employee's designated days off in each roster shall be fixed and shall not be subject to change during that roster period without mutual agreement. The Employee shall receive a minimum of eight designated days off in each 28 day roster period.*

3.5 *For the avoidance of doubt, any recurring days and hours worked by the Employee and designated days off shall not be treated as comprising a pattern of hours of work or days off which the Employee may expect to continue. The setting of work days and hours is entirely at Jetconnect's discretion...*

[and]

20 Complete Agreement

20.1 *This agreement, including the attached position description, duties and responsibilities (Schedule 1) and procedures for resolving employment relationship problems (Schedule 2) together with...*

(b) the letter of offer of employment ...

...

comprise the entire agreement between the parties and supersede any previous representations or agreements or understandings between the parties (whether written or oral) relating to the Employee's employment."

[12] Mr Beacham signed an acknowledgement that he had read, understood and accepted the conditions of the offer of employment and had been provided with an opportunity for independent advice. There is no specific documentation regarding overnights.

Determination

[13] The respondent's submission is that there was no binding representation or commitment to limit the number of overnights. It says:

- i. Mr King's answer at interview related only (as stated) to his own current level of work, and was indicative only;
- ii. the respondent had no way of knowing the level of reliance and emphasis Mr Beacham placed on Mr King's answer, because there was no indication of this at any time before the employment agreement was entered into;
- iii. in any event, anything Mr King said was superseded by the letter of offer and Individual Employment Agreement which emphasised the variable and flexible nature of the work hours, and
- iv. Clause 20 was a very extensive "complete employment" provision and removed any possible doubt that the terms of employment were other than as set out in that agreement.

[14] The respondent's submissions are accepted in their entirety. Even on Mr Beacham's account, I am not satisfied that the evidence establishes that the respondent gave Mr Beacham a binding undertaking that he would be required to work two to three overnights per roster period, on average.

(ii) Was Mr Beacham required to work an unreasonable number of overnights?

[15] Notwithstanding my conclusion in relation to the first issue, it remains that the provisions of the employment agreement did not give the employer an unfettered discretion to deploy Mr Beacham at will. Even in the absence of a specific undertaking, the respondent must show that it exercised its discretion regarding overnights in a reasonable way.

[16] There are three stages in qualifying to fly a Boeing 737. First a pilot is required to obtain the relevant licence. Mr Beacham did this at his own expense before taking up his employment with the respondent. Then, once employment commences, the pilot must complete the requisite number of flying hours in “line training” with a training officer. Mr Beacham’s first day flying for the respondent was 26 December 2007. It was the respondent’s practice, as much as possible, to have new pilots complete their line training with one training officer. Consistent with this, Mr Beacham flew with training captain Steve Eaton during most of his training.

[17] Mr Beacham completed his training on Friday 15 February 2008. The following week he was due to complete the final stage of the qualification process: the “check to line” or final assessment. Mr Eaton told me it is rare for pilots to fail the check to line as they are not usually put forward for it until their training officer is satisfied they are ready. He told me he had no concerns that Mr Beacham would not be successful in his check to line. However, Mr Beacham never completed the check to line. Without telling Mr Eaton, he resigned during his last day of training.

[18] Mr Beacham’s flying time took in three roster periods although only the middle one was a full roster period. Respondent witnesses (Mr King, Mr Eaton and Chief Pilot Mr Griffin) all told me that the number of overnights was higher than normal during training because where possible trainees were scheduled to fly with one training captain. (Flying time was also sometimes higher than usual.)

[19] Mr Beacham worked six overnights in each of the first two roster periods of his employment. He told me that he was prepared (albeit reluctantly) to accept a high level of overnights over the holiday period and whilst he was in training. However he said he became more concerned when the February roster came out on 31 January.

This was for the 28 day period from 4 February, the latter part of which was after he would be coming out of training. In total he was scheduled to do eight overnights in that roster period, although in the end (because he resigned) he did only five. He also told me that he made further inquiries of Mr Alabaster and the rostering co-ordinator, both of whom indicated that staffing levels were not expected to improve for about six months, with the consequence that rosters would not change significantly during that time. Mr Beacham concluded that he could expect to do six to eight overnights per roster throughout the next six months. He had not however seen the roster for the next period, which was due to come out about the end of February.

[20] Although Mr Griffin accepts that staffing levels were not expected to improve significantly for another six months he denies that it was expected that pilots would be doing six to eight overnights a month throughout that time. He said the number of overnights varied from month to month and it was high for Mr Beacham in the February roster. He expected that once the first “normal” roster for Mr Beacham came out it would have been likely to contain fewer overnights. Over the whole of 2008, he said, the number of overnights pilots ended up with was consistent with the indication (two to three per roster period) that Mr King had originally given.

Determination

[21] Dealing first with the training period, I accept that training could not be completed in a timely way without scheduling a higher than normal level of overnights. The rosters which were exclusively during training were reasonable at six overnights each.

[22] The next question is whether it was reasonable for the respondent to ask Mr Beacham to work eight overnights in the February roster period. The respondent says that this too was an atypical roster period, given that it contained a mix of training and normal flying duties. It also says that it would have been balanced by subsequent roster periods with fewer overnights. It says that Mr Beacham was premature in concluding that he would continue to work this many overnights, given that he had yet to see a normal roster.

[23] Eight overnights in one roster period are significantly more than Mr Beacham expected to get. However, if he had waited, he would have found that the year as a whole saw much lower levels of overnights. I conclude that he was premature in assuming that February represented the start of a regular pattern of six to eight overnights per roster period, and do not consider it unreasonable or a breach of duty for a single roster period to be at this level.

(iii) Was the number of overnights critical in the decision to resign?

[24] Although my findings on the first two issues effectively dispose of the employment relationship problem, for completeness I address the remaining issues also.

[25] Mr Beacham first tendered his resignation on 6 February 2008 in a letter to Mr Griffin. It read, in its entirety, as follows:

“After careful consideration of my own performance during my line training over the past six weeks I no longer have the confidence that I can meet the standards required by Jetconnect. This became evidence during my “Progress Check” on 5 February 2008.

Although I have considerable jet experience I have found the B737 particularly difficult. This has also been compounded by the nature of Jetconnect operations which is very demanding.

In view of the above I am tendering my resignation. I am aware this may cause some difficulty in regards to the roster and am prepared for my resignation to take effect from a mutually acceptable date.”

[26] At the time in question, Jetconnect desperately needed pilots. It was the assessment of Mr Eaton, who was training Mr Beacham, that he was being unnecessarily hard on himself and would master the 737 in a normal training timeframe. He relayed this to Mr Griffin who met with Mr Beacham to try and persuade him to reconsider.

[27] Mr Griffin told me the primary focus of their conversation was Mr Beacham's familiarity with the 737 and with his skill level. He told me that the issue of overnights did come up, but only briefly, and Mr Beacham did not indicate that it was a significant factor in his decision to resign. Mr Beacham agreed in his evidence that his primary concern (and the reason for his resignation on 6 February) was his performance at the progress check on 5 February.

[28] Mr Griffin told Mr Beacham that he would put the resignation letter in his top drawer and would not take it out unless Mr Beacham told him to. On or about Monday 11 February, after talking with other colleagues over the weekend, Mr Beacham confirmed that he wanted to continue his training. He had only that week to complete before sitting his "check to line." From Mr Eaton's perspective, the week went well. However on Friday 15 February Mr Beacham telephoned Mr Griffin and told him to take his resignation letter out of his top drawer. He did not offer, and Mr Griffin did not seek, any further explanation. Mr Griffin told me he did not think this was necessary as they had already been over Mr Beacham's reasons for resigning. In light of Mr Beacham's apparent crisis of confidence, Mr Griffin had misgivings about letting him continue to fly. He therefore removed Mr Beacham from the roster immediately the resignation was confirmed.

[29] I asked Mr Beacham what had changed his mind between 11 February and 15 February. He told me that a roster alteration had meant that he had done four overnights that week (11th-14th inclusive) when he had originally been down for three.² Although he did not have a particular problem with overnights coming in one block (the monthly total being his main concern) he told me that getting an extra night in an already busy month "*was not what he had bargained for*" and was the last straw.

Determination

[30] I accept that the stretch of four consecutive overnights in his final week was a factor in Mr Beacham's decision to resign. I do not accept however that it was the principal reason, given the emphasis that was placed on other issues in the letter dated 6 February and in his discussions with Mr Griffin.

² The four overnights that week being included in the total of 17 for his training period.

Was the grievance raised within ninety days?

[31] Mr Beacham says he raised his constructive dismissal grievance in a letter to Mr Griffin dated 1 April 2008. In this letter he set out concerns about a number of issues, including having taken the job on the understanding that he could expect two to three overnights per roster period. He pointed out that he averaged considerably more than this during his line training. He noted that he would have been prepared to work out his two month's notice and (in light of the fact that he had been put off the roster by Mr Griffin) requested to be paid out for that time. He also sought to be reimbursed the cost of obtaining his B737 licence (which he had arranged before he began line training.)

[32] On 22 April he wrote again, rectifying an earlier error by confirming "the date of resignation" as 6 April 2008 and noting "*I presume in the absence of any agreement I am still in the employ of Jetconnect. Part-time employment with Jetconnect continues to be an option on my part.*"

[33] Negotiations continued, with another issue arising: the question whether Mr Beacham was obliged to repay a \$5,000.00 training bond he had given to Jetconnect when he began training. In correspondence dated 1 May 2008 he agreed that the final date of employment (as proposed by Mr Griffin) be 15 April but debated the level of bond to be forfeited on the basis that he had been willing to work out his notice. He did not, this time, refer to reimbursement of the cost of his 737 licence.

[34] Mr Griffin responded in a letter dated 4 June, telling Mr Beacham that on 20 June 2008 he would receive his final pay, which would include payment to 15 April less the bond payable in circumstances where four months service was completed. The letter concluded by saying that if Mr Beacham wished to discuss this matter he should call Mr Griffin. He did not. The respondent heard nothing more from him until 6 August 2008, when his representative wrote and (in the view of the respondent) raised a grievance for the first time.

Determination

[35] It is clear from the words of the letter of 22 April that Mr Beacham did not consider his employment to have ended at that stage. He was indeed open to remaining in Jetconnect's employment. Mr Griffin told me that he did consider offering part time work to Mr Beacham but this could not be meshed with the work arrangements of the majority of the respondent's pilots, who were covered by a Collective Employment Agreement.

[36] If Mr Beacham was raising a grievance on either 1 April or 22 April, it certainly was not one of constructive dismissal. Nor is there anything in the letter of 1 May to indicate that it raised a grievance. I am not satisfied that the grievance was raised before 6 August 2008, that is to say, I am not satisfied that it was raised within the 90 day period.

Summary

[37] Mr Beacham has failed to establish that he lodged a constructive dismissal grievance within 90 days and he has failed to establish that the respondent made or breached any undertaking or obligation in relation to the number of overnights to be worked. Mr Beacham is not entitled to remedies.

Costs

[38] This issued is reserved. If either party wish to make a request for costs this must be done within a period of 28 days.

Yvonne Oldfield

Member of the Employment Relations Authority