

Attention is drawn to paragraph [8] of this determination prohibiting publication of certain information

Determination Number: AA 147/07
File Number: 5027762

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Michael Alexander Talbot, of Papakura (Applicant)

AND Air New Zealand Limited (Respondent)

REPRESENTATIVES Applicant in person
Kevin Thompson for Respondent

MEMBER OF AUTHORITY Robin Arthur

INVESTIGATION MEETING 20 November 2006

SUBMISSIONS RECEIVED 27 November 2006 (applicant); 5 December 2006 (respondent); 6 December 2007 (further correspondence from applicant); and 7 December 2006 (further correspondence from respondent).

DATE OF DETERMINATION 16 May 2007

DETERMINATION OF THE AUTHORITY

[1] The applicant, a pilot flying 747 aircraft on international routes for the respondent, seeks a declaration regarding the status of arrangements for his accommodation when he is required to stop over in London while on duty.

[2] Although initially more widely framed, the issue for determination narrowed during the Authority's investigation to this: Had an arrangement made by the respondent to provide the applicant with alternative hotel accommodation, because of his concern at what he saw as the safety risk of staying at a nominated hotel near the United States Embassy in London, become a term of employment which the respondent was not able to end without the applicant's agreement?

[3] The applicant seeks reimbursement of hotel costs he incurred by staying elsewhere after the respondent ended the arrangement and he was not prepared to stay at the hotel near the US Embassy for which the respondent would pay.

[4] The respondent says that it has complied with all requirements under its collective employment agreement with pilots (including the applicant) to provide appropriate accommodation. It accepts that it ended an alternative arrangement but did so after assessing any security risk from staying at the hotel near the US Embassy as "low". It denies that an option it allowed during 2004 and 2005 for pilots to choose to stay at a selected alternative hotel amounted to a term of employment.

[5] To some extent the issue became of historical interest by the time of the investigation meeting. In mid-October 2006 the respondent advised that the 747 pilots would be accommodated at a different hotel, although 777 crews would continue to use the hotel near the US Embassy. The applicant, as a 747 pilot, was prepared to stay at the newly nominated

hotel and consequently would no longer incur the costs of alternative accommodation arranged at his own expense.

Investigation

[6] Mediation had not resolved this matter. The Authority's investigation had the benefit of witness statements from the respondent's former International Fleet Manager Gerry Dunn, its human resources manager Chris Hancock and the applicant. The parties provided extensive background documentation. Mr Dunn, Mr Hancock and the applicant each answered questions at the investigation meeting. As well as discussing the legal issues during the meeting, the parties later provided written closing submissions.

[7] While I have had regard to all the information and issues canvassed by the parties and witnesses, this determination records only the facts and findings necessary to deal with the issue identified above. Some aspects discussed during the investigation proved peripheral and I have not dealt with them in determining this employment relationship problem.

Order for non-publication of certain evidence

[8] The evidence included copies of reports prepared by consultants on security arrangements at some London hotels. Mr Thompson applied for non-publication orders regarding the details of information given in those reports, except for reference to their overall assessment of risk as high or low or otherwise. I accept that such an order is appropriate and make it under Schedule 2 clause 10 of the Employment Relations Act ("the Act").

The facts

[9] Under a collective employment agreement with the Airline Pilots Association ("ALPA"), the respondent provides and pays for pilots to receive first class meals, travel and hotel accommodation at overseas stopovers. The agreement provides for a pilot acting as a union representative to be involved in the airline's process of inspecting those hotels being considered for selection as designated accommodation. Submissions from pilot representatives must be considered before the respondent finalises its contracts with hotels to provide accommodation to pilot crews.

[10] In November 2003 the 747 pilots became aware that in future they would not be put up during layovers in London at a hotel in Kensington but would instead stay at the Millenium Mayfair, a hotel on Grosvenor Square.

[11] The US Embassy also fronts onto Grosvenor Square. By way of background I note that what is commonly called the "Iraq war" or the "Second Gulf War" had begun in March 2003 with the invasion of Iraq by the armed forces of the United States and a coalition of its allies, including Britain. US embassies have been targets of bombings by so-called 'fundamentalist' Mulsim groups and individuals who believe they are waging a holy war or "jihad" against the United States government and its allies. Examples of attacks on US embassies are: Kenya (1998), Tanzania (1998), Syria (2006) and Greece (2007). Other targets have included the World Trade Center (September 1999), trains in Madrid (March 2004) and trains and a bus in London (July 2005).

[12] In late November 2003 one pilot sent an email to the respondent's then-Chief Executive Officer Ralph Norris. The pilot described the Mayfair hotel as "*a highly undesirable location given the current terrorist environment*" because it was near the US Embassy which was "*such a known high profile terrorist target*". He told Mr Norris that he had raised the issue with ALPA (which said the hotel met contractual requirements), with the fleet manager and with the respondent's vice president for security. He attached a note from the security vice president which acknowledged that "*Grosvenor Square and its environs*" was one of many potential terrorist targets. However the security vice president's assessment was that the risk to crew staying at the hotel was lower than most locations in London because of the high Police presence and physical barriers around the Square.

[13] Mr Norris replied to the pilot's email:

I think due consideration was given to the security issues relating to the Millenium [Mayfair]'s proximity to the US Embassy, however in the end if people feel uncomfortable, it makes sense to use another hotel.

[14] On 22 December 2003 a memo to 747 flight crew confirmed the Millenium Mayfair as the London layover hotel. However crew who did not want to stay at the Mayfair were given an option of staying at a hotel in Kensington, provided they advised a designated manager that they wish to exercise that option within three weeks of the memo being issued.

[15] The applicant was one pilot who exercised that option, sending a note to that effect on 9 January 2004.

[16] In April 2004 the fleet manager advised 747 pilots by memo that "*crews should ideally stay at the same hotel, the Mayfair Millenium which has recently had a second and very satisfactory security assessment completed*". The manager said this was a measure necessary for crew safety and operational integrity, referring to "*inclement weather and London city traffic congestion*". However he said "*those who are unhappy to stay at the Millenium*" could still meet "*safety and operational integrity requirements*" by staying at a Sheraton hotel near London's Heathrow airport. The Sheraton had been approved as a hotel under the process set out in the pilots' collective agreement.

[17] In an email exchange with one pilot regarding the rationale for this change, the fleet manager stated the company's position this way:

There is no intention to entertain other hotels nor negotiate separate arrangements with with (sic) individual crew members.

It is your choice to stay at the Sheraton if you are sincerely unhappy with the [M]illenium security. This is a compromise by the Company as Fleet Management would prefer crews to all be at the same hotel.

[18] The applicant opted to stay at the Sheraton near the airport.

[19] This continued to be the arrangement until June 2005 when the applicant was told that a further security assessment had confirmed that the security risks at the Millenium Mayfair were "low". In light of that assessment the respondent decided to "*review the facility for pilots to elect to stay at alternative accommodation in London*".

[20] The respondent decided that from 10 June 2005 pilots on London tours of duty would be accommodated at the Millenium Mayfair "*unless advised by the individual pilot that he/she will be arranging his/her own accommodation*". Staying at the Sheraton near the airport was no longer an option to be offered.

[21] Mr Dunn's evidence was that around 30 of the respondent's complement of 180 pilots on the 747 fleet had originally opted to stay at the Kensington hotel from April 2004 but by June 2005 there were only four pilots who continued to elect to stay at the Sheraton. Mr Dunn says that the applicant is the only pilot who did not accept the change.

[22] In a letter protesting to Mr Dunn about the change, the applicant described his concern about having to stay at the Millenium Mayfair hotel on Grosvenor Square in this way:

I am accommodated in London at a hotel sited right on the perimeter of the US Embassy building which is surrounded by heavy blocks and entanglement wire and patrolled by armed police which I view as a dangerous and potentially life-threatening hazard to me during my stay because of the terrorist target the US and British authorities believe this building to be.

[23] The applicant asked to be allowed to continue to stay at the Sheraton. The respondent

would not agree to this. After a further security review – prompted by the July 2005 London transport bombings – the respondent confirmed to the applicant its view that having pilots stay at the Millenimum Mayfair was the “least risk” option.

[24] The applicant responded by raising an employment relationship problem and making his own accommodation arrangements for London. He booked himself into a smaller suburban hotel in West London. The hotel, in Chiswick, was near the route taken by a minivan which transported crew from the Millenimum Mayfair to Heathrow. On each occasion he stayed in London the applicant arranged to walk to a point on that route and be picked up by the van taking the crew out to the airport.

[25] The cost of the alternative accommodation arranged by the applicant was slightly more than the cost of staying at the Sheraton nearer the airport. He claims for his costs of accommodation to the equivalent value of staying at the Sheraton.

Applicant’s case

[26] The applicant submits that, by its memo of December 2003, the respondent made an open-ended offer to provide alternative accommodation. By electing to stay in the alternative accommodation, the applicant says he accepted that offer and the respondent was not legally entitled to change that arrangement without his agreement – that, in short, it had become an individual term of his employment. He says that such a term is permitted under s 61 of the Act as a term not inconsistent with the applicable collective agreement.

[27] Another argument advanced suggested that a provision in the collective agreement allowing a captain to move the flight crew to more suitable accommodation for reasons of safety, security or quality of rest could be applied to the applicant’s individual decision to make alternative accommodation arrangements once the company would no longer provide a hotel other than the one near the US Embassy. As discussed in the investigation meeting, that provision appears to provide for temporary action by a captain in emergency situations, such as civil unrest and natural disaster. It also appears to apply to situations where a captain moves his or her whole crew from a hotel at short notice. That is different from the present situation where only the captain – the applicant – has moved and the crew remain at the accommodation nominated by the company. However because of conclusions I have reached on whether the accommodation arrangements are an individual term of employment, I need not and do not deal with construction of the scope of the term of the collective agreement clause referred to.

Respondent’s case

[28] The respondent submits alternative hotel accommodation was offered as an “option” that could be withdrawn by the respondent at any time. It says the option had neither the certainty of content and duration nor the consideration required to amount to an enforceable contractual provision.

[29] It submits the arrangement was, if anything, a temporary waiver of the requirement that the applicant stay in the hotel accommodation provided and paid for by the respondent, and that waiver could be terminated at the company’s discretion. It submits this was a “unilateral concession” for which the applicant gave no consideration as he continued to do no more than perform his usual duties.

[30] The respondent also submits that the applicant’s concern about security risks do not meet the objective standard required for reasonable fears for his health and safety. It says the issue is not whether the applicant has a sincerely held belief that staying near the US Embassy is too risky but whether there are reasonable grounds for that belief. In light of at least three security reviews concluding the risk at the Millenimum Mayfair was “low” and the higher level of security measures in place around Grosvenor Square, the respondent submits that the applicant’s fears are not objectively reasonable.

[31] It also says that the applicant could have opted to have fewer trips to London if he was so concerned to reduce his risk. It also noted that the applicant was prepared to visit the Millenium Mayfair to pick up cash allowances provided to pilots during their layovers.

Discussion

[32] In determining the nature of the arrangements made for alternative accommodation in December 2003 and subsequently, I look at the content of the contemporary documents, the language used in them and what the conduct of the parties shows about what was intended.

[33] In late November 2003 the respondent's chief executive responded to concerns expressed by some pilots. The company's December 2003 memo made what I accept was an open offer to those pilots who had personal concerns. The language used was of an offer to make accommodation arrangements that were different from those concluded under the process set out in the collective employment agreement. Acceptance was by an individual act of each pilot who wanted to take up the offer, and they had to make that election by advising the company within three weeks. The applicant was one of around 30 pilots who did so.

[34] The company subsequently changed the hotel – from one in Kensington to a Sheraton near Heathrow airport – that was provided as the alternative accommodation. Both hotels continued to be ones which were “approved” under the process set out in the collective agreement. The responsible manager described the provision of alternative accommodation as a choice for the individual pilots and a compromise by the company. The applicant accepted that the company could move him from one hotel to another (as it did from the Kensington to the Sheraton), provided that it continued to be a hotel well away from the perceived risk of the location near the US Embassy.

[35] For the reasons of the language used and the subsequent conduct of both parties, I accept that the arrangement for alternative accommodation did amount to an individual term of the applicant's employment. The respondent had literally made an “accommodation” for him, and having done so, was not, I find entitled to change that without his agreement.

[36] I do not accept the respondent's submission that there was no consideration for the variation. As the Court of Appeal recently emphasised in the employment context, while there must be consideration, there is generally no inquiry into the adequacy of that consideration: *Fuel Expresso v Victor Hsieh* (unreported, CA 88/07, 9 March 2007). At para [18] the Court stated:

The traditional definition of consideration requires that there be “something of value” which must be given, and that consideration is either some detriment to the promisee or some benefit to the promisor. But the law does not enquire into the adequacy of the consideration, ... [] ... It is also a very well settled principle of contract law that even mutual promises can be consideration for each other. As Treitel (9ed) Contract at 66 puts it:

A person who makes a commercial promise expects to have to perform it ... correspondingly, one who receives such a promise expects it to be kept. These expectations can properly be called a detriment and a benefit and they satisfy the requirement of consideration in the case of mutual promises.

[37] In this case the expectation that the arrangement would be adhered to – as it was, including through changing from one hotel to another – satisfies that the requirement for consideration. If more were needed it would be that the respondent had the benefit of the applicant being satisfied that his contractual entitlement to satisfactory accommodation was being met and being free from further complaint from him and other pilots about being put up too near what they saw as a terrorist target.

[38] Similarly I do not accept there was anything uncertain about the terms of the arrangement. It was to provide everything that the collective agreement required by way of layover accommodation, just not at a site near the US Embassy. The respondent rightly says the option was not offered in perpetuity but the applicant correctly responds that neither was

there a time limit – and the latter view is entirely consistent with the on-going nature of an employment agreement. Neither was it inconsistent with the collective agreement which provides for hotel accommodation and refers to “listed hotels” in the plural. A number of hotel may be and are ‘approved’ under the required process.

[39] For these reasons I accept the applicant’s submission that the arrangement made for and with him amounted to a variation to his terms of employment, which could be made under s61 of the Act. Having accepted that, the arrangement cannot be characterised as a mere waiver or option terminable at the respondent’s discretion.

[40] I accept the respondent’s argument regarding the objective standard of reasonableness regarding health and safety concerns. But that is not the basis on which alternative accommodation was sought and offered. I have no reason to doubt that the security reviews carried out in 2003, 2004 and 2005 made rational and well-informed assessments of the risks around the Millenium Mayfair. However the alternative was offered in response to subjective, not necessarily objective concerns – in the words of Mr Norris’ November 2003 email it was about whether pilots ‘felt’ uncomfortable. The respondent’s December 2003 memo simply referred to whether “*any crew do not **wish** to stay at the Millenimum*” (my emphasis); an April 2004 memo refers just to those who are “*unhappy*” and a email at the same time by the fleet manager refers to those who are “*sincerely unhappy*”.

[41] Even accepting the company’s arguments for the rationality of its assessment of the relative risks, I cannot impose that as grounds to end the alternative accommodation option given to the applicant. The respondent itself accepted the subjective concerns of the applicant and others, and made arrangements to accommodate them. And it cannot be said that those subjective concerns were without any rational basis given that some US embassies have been bombed in recent years and the continued high level of security precautions at US embassies around the world suggests they are still seen as being at risk of attack.

[42] Neither do I accept the respondent’s submission that the applicant should have reduced his risk by trying to get fewer tours to London. The applicant had, on the basis of his subjective concerns, accepted an arrangement which he considered reduced that risk by not staying near the US Embassy in London and was entitled to continue his usual duties with the benefit of that promise. Nor was he responsible for the respondent’s requirement that he physically attend the Millenium Mayfair to pick up his cash allowance when in London.

Determination

[43] For the reasons given I resolve this employment relationship problem by declaring that the arrangement for alternative accommodation of the applicant while on layovers in London had become an individual term of his employment, requiring his agreement for its withdrawal. The respondent’s unilateral termination of the arrangement with the applicant breached that term for which he is entitled to a remedy.

[44] The applicant has quantified his loss as being the costs he incurred in staying at the Chiswick Hotel for certain nights between September 2005 and November 2006. But for the respondent’s actions, he would have continued to stay at the Sheraton Hotel at the respondent’s expense. He accepts that the amount he should be reimbursed is what was described as the nightly Sheraton rate of eighty pounds sterling, not the slightly higher rate charged by the Chiswick Hotel.

[45] The respondent is ordered to pay the applicant that sum for each night that he stayed at the Chiswick Hotel while on tour of duty layovers in London in that period. The applicant has provided copies of invoices. I am confident that I can rely on the parties to work out the exact payments but leave is reserved to apply for further directions if there is any real difficulty. The exchange rate, for the purpose of any necessary calculations, should be taken as the rate at midday NZT on the date of this determination.

[46] No other order is required because, according to information provided by the parties at

the investigation meeting, the applicant was now able to stay, along with other 747 pilots, at another hotel selected by the respondent and he was willing to do so.

Costs

[47] The applicant represented himself throughout this matter. I do not understand an order for legal costs and expenses to be required. However if there is any issue as to costs, the parties are encouraged to resolve that between themselves. In the event they are unable to do so, the applicant may apply within 28 days of the date of this determination for the Authority to determine costs. The respondent will have 14 days from that date to reply before a determination of costs is made. No application will be considered outside this timeframe.

Robin Arthur
Member of Employment Relations Authority