

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 436
5388463**

BETWEEN RICHARD GREENSLADE
Applicant
AND JETSTAR AIRWAYS LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Richard McCabe, Counsel for Applicant
Michael O'Brien, Counsel for Respondent
Investigation Meeting: 24 October 2012 at Auckland
Submissions received: 24 October 2012 from Applicant and from Respondent
Determination: 5 December 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Richard Greenslade, claims that the Respondent, Jetstar Airways Limited (Jetstar), has breached clause 19 of his individual employment agreement between them (the IEA).

[2] Specifically Mr Greenslade claims that Jetstar is not providing him with breaks in accordance with s.69ZD entitled '**Rest breaks and meal breaks**' of Part 6D of the Employment Relations Act 2000 (the Act), which in turn breaches clause 19 of the IEA.

[3] Jetstar claims that it is providing rest and meal breaks in accordance with Part 6D of the Act, and denies that it has breached clause 19 of the IEA.

[4] Jetstar further claims that it is acting in accordance with s.69ZH (2) of Part 6D of the Act which provides that if an employee is required to take a rest break under another enactment, the other enactment applies instead of the provisions or entitlements provided for under s.69ZD of part 6D of the Act.

Issues

[5] The issues for determination are whether Jetstar has breached :

- Part 6D of the Act by not providing Mr Greenslade with breaks in accordance with s.69ZD of the Act
- Clause 19 of the IEA by not providing Mr Greenslade with breaks in accordance with s.69ZD of the Act
- The duty of good faith pursuant to s.4 of the Act.

Relevant Facts

[6] Jetstar is an aviation carrier which operates domestic and trans-Tasman services. As a value based carrier, Jetstar operations are based on a short turnaround time between flights to maximise aircraft utilisation. Jetstar is required to comply with both New Zealand and Australian Civil Aviation laws.

[7] Mr Greenslade, a pilot of 23 years experience, is a Captain A320 with Jetstar, and is employed pursuant to the IEA which he entered into with Jetstar on 28 October 2010, although Mr Greenslade commenced employment with Jetstar on 1 January 2008.

[8] 'Duty Period' is defined in schedule 4 of the IEA as being: *'the continuous period between sign on and sign off when the pilot is required by the company to be on duty whether on the ground or in the air'*.

[9] Mr Greenslade said he flew both domestic and international routes. During these Duty Periods Mr Greenslade said that he was unable to take a break away from his workplace when the aircraft was on the ground during a turn around.

[10] Mark Rindfleish, Chief Pilot of Jetstar, stated that although pilots have flight duties during take-off, climb, descent and landing, there was an opportunity for a rest or meal break during the cruise part of the flight, although he conceded that this would not be possible on the shorter domestic flights.

[11] Mr Greenslade agreed that it would be possible to take a break away from the cockpit during the cruise part on the longer flights; however during the aircraft turnaround period on the ground he would still be prevented from leaving the aircraft to take a break elsewhere.

[12] Mr Greenslade stated that this inability to take breaks during his working day constituted a breach of the statutory requirements of s.69ZD of the Act as set out in clause 19 of the IEA which states:

19 BREAKS

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.

[13] Section 69ZD of the Act states:

69ZD Entitlement to rest breaks and meal breaks

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

(3) *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.*

(4) *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 breaks, and
(b) One 30-minute meal break.

(5) *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

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

[14] Mr Rindfleish explained that Jetstar was subject to mandatory rest break provisions set out under the Civil Aviation Orders (CAO) which are made pursuant to delegated authority under the Australian Civil Aviation Act 1988.

[15] Section 69ZH of the Act is relevant in this situation. Section 69ZH states:

69ZH Relationship between Part and other enactments

(2) *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 entitlement are additional or enhanced breaks.

(3) *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 for under this Part.*

Other enactments applying to Jetstar

[16] Mr Matthew Bell, Manager Flight Operations Resources for Jetstar, explained that Jetstar operated in the New Zealand domestic market pursuant to Part 1A ‘ANZA Mutual Recognition’ of the Civil Aviation Act 1990 (CAA) under a CASA Air Operator’s Certificate (AOC). Mr Bell said the ANZA Mutual Recognition provisions require an Australian operator, conducting air operations in New Zealand, to abide by obligations arising under the CASA AOC.

[17] Mr Bell stated that the Australian Civil Aviation Act 1988 applies to Jetstar in addition to the New Zealand Civil Aviation Act 1990 because it has an Australian AOC. Section 288D of the Australian Civil Aviation Act 1988 states:

(2) *The holder of an AOC must comply with all requirements of this Act, the regulations and the Civil Aviation Orders that apply to the holder;*

(3) *The holder of an Australian AOC with ANZA privileges must comply with all requirements of the Civil Aviation Act 1990 of New Zealand, and of the regulations and rules under that Act, that apply to the holder in relation to the ANZA activities in New Zealand authorised by the AOC.*

[18] CASA Civil Aviation Orders (CAO) require that flight crews (including pilots) take rest breaks between Flight Duty Periods and Duty Periods, and is prescriptive regarding the timing of such breaks. CAO 48, section 48.0, sets out general provisions on flight time limitations and the specific provisions for pilots are set out in CAO 48, 48.1.

[19] Mr Bell explained that there is a 'Standard Industry exemption' from the flight and duty time limitations set out under CAO 48. Under CAO 48 paragraph 4.1 which states: *CASA may, by instrument in writing, exempt a person from any of the requirements set out in Part 48*, CASA is authorised to issue an instrument in writing to exempt a person from any of the requirements set out in Part 48.

[20] Mr Bell explained that this was permission from CASA for an operator to work to a different set of flight and duty time limitations. Jetstar operates pursuant to a CAO 48 exemption because it operates international and high capacity domestic operations, and schedule 1 to instrument SR 22412 entitled: '*Flight Crew Flight & Duty Limits*' applies to Jetstar.

[21] The CAO 48 exemption requires that flight crew (including pilots) take rest periods between flights and is prescriptive regarding the timings of such rest periods. The mandatory rest break provisions set out in the CAO 48 exemption apply to Jetstar in the New Zealand domestic market.

[22] Paragraph 3.2 of the CAO 48 exemption states:

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.

[23] Paragraph 2.13 of the CAO 48 exemption defines a 'rest period' as:

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.

[24] Paragraph 3.3.1 of the CAO 48 exemption states that:

... 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 ...

[25] The CAO 48 Exemption contains a detailed schedule of roster limits, duty limits, standby and time free of duty. Rest periods are defined with reference to 'Duty Period' and 'Flight Duty Period' in paragraph 2 of the CAO 48 exemption. Duty period is defined as: '*A period which starts when a flight crew member is required by an operator to report for duty, until the flight crew member is free of all duties*'. Flight Duty Period is defined:

A period which starts when a flight crew member is required by an operator to report for a duty period in which flight as an operating crew member is undertaken, and finishes not less than 15 minutes after the end of the block time of the final flight as an operating crew member.

[26] Part 111 of the CAO Exemption is very detailed and sets out how long a pilot's time free of duty (rest break) must be, and sets limits on how long a Flight Duty Period must be.

[27] Mr Bell further explained that Jetstar is required to additionally abide by applicable CAA requirements in addition to the requirements of the CASA AOC, in accordance with s 4 (1) of the CAA which provides:

(2) *...this Act and all regulations and rules made under this Act shall apply to the following:*

...

d. Every foreign registered aircraft operating in New Zealand.

[28] Mr Bell said that the CAA also recognises the requirement of aircraft to comply with the laws of any foreign state and contains exceptions to compliance with the CAA pursuant to s.4 (3) and s.4(4). Mr Bell stated that the CAA provides that rules can be made relating to matters involving aircraft pilots and crew members pursuant to s.30 of the CAA.

[29] In particular, the applicable Civil Aviation Rules (CA Rules) made pursuant to delegated authority under the CAA state that an air operation cannot be performed with an aeroplane unless a scheme has been established for the regulation of flight and duty times, including addressing rest breaks before flight and in-flight relief. Part 121, Subpart K (Fatigue of Flight Crew) of the CA Rules (Subpart K) states:

121.803 Operator responsibilities

- (a) *The operator of an aeroplane must not cause or permit an air operation to be performed with an aeroplane unless –*
 - (1.) *A scheme has been established for the regulation of flight and duty times for every person flying in a flight crew member in the aeroplane ; and*
 - (2.) *The scheme addresses the following factors where appropriate:*
 - (i). *Rest periods before flight;*
 - (xiv). *In-flight relief*

121.805 Flight Crew responsibilities

- (b). *A flight crew member must not perform other hire or reward flight duties while employed, engaged, or contracted by an air operator when such flying in addition to that in an air operation exceeds the flight and duty time limitations prescribed in the scheme required by rule 121.803 (as)(1) relating to the flight crew member.*
- (c). *A person must not act as a flight crew member of an aircraft performing an air operation unless the person has ensured that the limitations prescribed in the scheme required by rule 121.803(a)(1) relating to that person are not exceeded.*

[30] Mr Bell explained that Subpart K applies to any pilots of aircraft which are subject to the CAA requirements. ‘Advisory Circular: Air Operations – Fatigue of Flight Crew Scheme’ provides a mandatory rest and meal break scheme as required by Subpart K of the CAA Rules.

[31] Mr Bell said that subpart K did not apply to Jetstar by virtue of rule 121.15 CA Rules which states:

The following rules do not apply in the case of air operations conducted in New Zealand under an Australian AOC with ANZA privileges:

(7) 121.803 (Subpart K)

Mr Bell explained that this was on the basis that Jetstar is subject to the mandatory rest provisions provided for under the CAO 48 exemption.

Meal breaks

[32] As Jetstar only operates multi crew operations, Mr Bell said that the meal break is able to be facilitated within the practical constraints of the airline operation, one pilot being able to control the aeroplane whilst the other has a toilet break or a meal.

[33] Mr Bell explained that Jetstar provides meals to pilots. As Jetstar is unable to guarantee a period free of duty during the working day, meals are provided to pilots during the flight in accordance with clause 21 of the IEA which states:

21.1 The parties agree that Pilots should be able to receive adequate and appropriate food at appropriate times during periods of duty and periods where the Pilot is away from home.

21.2 *In-Flight Sustenance:*

21.2.1 *Where, in flight a Pilot works for 30 minutes or more in a meal period specified in the chart below, the Company will provide the Pilot with a meal, which will be taken during the flight.*

[34] Mr Bell explained that meals are taken during the flight by the pilot seating at his or her seat with the control of the aeroplane handed to the other pilot during this time.

Rest breaks

[35] As regards rest breaks, Mr Bell said that because there is no set time for a rest or meal break during a pilot's Flight Duty Period, rest breaks are factored into the mandatory rest breaks as provided for by the CAO 48 exemption. Mr Bell explained that the mandatory CAO 48 exemption rest breaks are much longer than the rest breaks provided in accordance with s.69ZD of the Act given the importance of ensuring a pilot is well-rested before completing a further shift.

[36] Mr Bell stated that the consequence of Jetstar failing to comply with both the applicable provisions in the CASA CAOs and the CAA could be the loss of its AOC.

Determination

Did Jetstar act in breach of Part 6D of the Act by not providing Mr Greenslade with breaks in accordance with s.69ZD of the Act?

[37] Jetstar is required to comply with the mandatory rest break requirements set out in the CAO. The 'Standard Industry Exemption' from the flight and duty time limitations set out under CAO 48 constitutes permission from CASA for an operator to work to a different set of flight and duty time limitations. Mr Greenslade is required to take rest breaks in accordance with the provisions in the CAO 48 Exemption.

[38] I observe that while s.69ZH(1) of the Act provides that rest and meal breaks provided under Part 6D of the Act do not apply to employees who are covered by other legislative or regulatory rest and meal breaks where these are enhanced or additional entitlements, this requirement is not applicable under s.69ZH(2).

[39] Pursuant to s.69ZH(2) of the Act the rest breaks and meal breaks provided under Part 6D of the Act do not apply to those employees who are required to take a rest break by, or under, another enactment. In that situation, it is the requirement for a rest break in

accordance with that particular enactment that applies in place of those provided for under Part 6D of the Act.

[40] For the sake of clarity I observe in this respect that whilst s.69ZD of the Act refers to both *rest breaks and meal breaks*, s.69ZH (2) of the Act states that in the case of a person required to take a *rest break* under another enactment, that enactment applies “*instead of the provisions or entitlements for rest breaks or meal breaks provided under this Part*”.

[41] I find that the requirement under s.69ZH of the Act is a specific provision in that it applies only to those employees to whom other legislative or regulatory rest and meal breaks apply, whereas s.69ZD is a general provision applying to employees who are not covered by other legislative or regulatory rest and meal breaks.

[42] I observe that the significance of this is to be ascertained from the fact that it is a fundamental keystone of statutory interpretation that the specific overrides the general: *generalia specialibus non derogant*. In *Marac Life Assurance Ltd v Commissioner of Inland Revenue*¹ Cooke J observed:

Nevertheless, it is long established as part and parcel of a special legislative pattern. In my view the case falls within the spirit of the principle that general provisions do not override special ones.

[43] In submissions Mr O’Brien identified the genesis of s.69ZH (2) of the Act as a legislative and statutory recognition of industry specific breaks, specifically being a response to submissions of the Bus and Coach Association of New Zealand that the Employment Relations (Breaks and Infant Feeding) Amendment Bill (the Bill) would have imposed requirements on bus drivers in addition to those already stipulated under the Work Time and Logbook Rule (made pursuant to the Land Transport Act 1998).

[44] The Bus and Coach Association of New Zealand submitted that the additional requirements as initially drafted would have meant that unless the mandatory breaks provided for in the Work Time and Logbook Rules were additional or enhanced breaks, the Act would have trumped the breaks provided for in the Work Time and Logbook Rules.

[45] The outcome of this would be that if s.69ZD of the Act were to be applied rather than the breaks provided for in the Work Time and Logbook Rules, this would fail to account for the way in which bus and coach operations were run, and if implemented would have had serious and detrimental effects on the bus and coach industry at large.

¹ [1986] 1 NZLR 694, at 702

[46] Mr O'Brien submitted that as a result of the Bus and Coach Association of New Zealand case, Parliament had in mind the recognition of industry specific breaks, which if the general meal and rest breaks provisions set out in s.69ZD of the Act were implemented, might prove unworkable for some industries. As a consequence, Parliament specifically legislated s.69ZH (2) to apply to this situation, and this in turn would supplant the provisions of s.69ZD of the Act.

[47] Mr Bell explained that the mandatory rest breaks and flight limitations under the aviation legislation (CAO 48 exemption) were tailored to the specific nature of the aviation industry, being designed to ensure pilots were adequately rested, and to take into account the practical operating realities of the aviation industry.

[48] Mr Bell said that the general provisions under s.69ZD of the Act fail to account for the way in which the commercial aviation operations are run. Mr Bell stated that if the aviation industry did not have provisions for mandatory rest breaks, and s.69ZD requirements applied to commercial aviation operations, it would have serious and detrimental effects on the commercial aviation industry at large, including significant commercial on-flow effect and requiring a review of the entire commercial schedule.

[49] Mr Bell explained that in respect of Jetstar, revamping the entire commercial schedule would involve:

- rescheduling flight times for nine aircraft operating in New Zealand, and rosters for approximately 90 pilots and 200 cabin crew;
- creating inefficiencies in the commercial aviation industry;
- decreasing pilots' productivity; and
- potentially stymieing future and commercial growth with the possible consequence that Jetstar, a low cost airline, be unable to continue to operate in some New Zealand and trans-Tasman sectors.

[50] I consider that these implications for Jetstar in particular, and the aviation industry in general, are analogous to the factors which had been considered by Parliament in the Bus and Coach Association of New Zealand, and which resulted in s.69ZH of the Act.

[51] Examining the provisions of Part 6D of the Act, I note that in *Barker v Edgar*² it was stated:

When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly.

[52] I find that in reference to s 69ZH of the Act, Parliament had considered all the circumstances and made specific provision for a particular case, such that s.69ZH (2) overrides the general requirement in s.69ZD for employees to take rest and meal breaks, but only in the case of employees to whom other legislative or regulatory rest and meal breaks apply.

[53] I find support for this view in consideration of the principles of statutory interpretation. Section 5 of the Interpretation Act 1999 sets out the principles of statutory interpretation as:

1. *The meaning of an enactment must be ascertained from its text and in light of its purpose.*
2. *The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.*

[54] In *Gibbs v Crest Commercial Cleaning*³ the Employment Court in considering the question of statutory interpretation stated:⁴

Where Parliament's intention is clearly expressed in the statutory words, the Court must give effect to this intention and to the legislative scheme so expressed. If the statute is apparently ambiguous or deficient, the Court may have recourse to the background material relied on by the proponents of the legislation and by Parliament to attempt to discern what may have been its intention.

[55] I find in accordance with the principles of statutory interpretation as applied to Part 6D of the Act, considered in light of the purpose and legislative history of s.69ZH, together with the mandatory rest breaks provided in other legislative or regulatory requirements, in particular the mandatory rest break provisions set out under the CAO

² (1898) NZPCC 422, at 427

³ [2005] ERNZ 399

⁴ Ibid at para [72]

made pursuant to delegated authority under the Australian Civil Aviation Act 1988, that it is s.69ZH which applies to Jetstar, and not s.69ZD of the Act.

[56] I determine that Jetstar did not act in breach of Part 6D of the Act by not providing Mr Greenslade with breaks in accordance with s.69ZD of the Act

Did Jetstar act in breach of clause 19 of the IEA by not providing Mr Greenslade with breaks in accordance with s. 69ZD of the Act?

[57] Sections 69ZD and 69ZH of the Act were inserted on 1 April 2009 by section 6 of the Employment Relations (Breaks, Infant Feeding, and Other matters) Amendment Act 2008 (2008 No 58) and thus preceded the IEA terms governing Mr Greenslade's employment with Jetstar which was entered into on 28 October 2010.

[58] Clause 19 of Mr Greenslade's IEA states:

19 Breaks

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 those breaks to be taken in accordance with operational requirements.

[59] Although Jetstar would have been aware of s.69ZH (2) of the Act at the time of entering into the IEA, there is no reference to s.69ZH of the Act within the IEA.

[60] Mr McCabe submits that it is a well settled principle of construction that where there is a claimed ambiguity in a document, that will be construed against the party that created it. Accordingly, since Jetstar created the IEA which made no reference to s.69ZH of the Act, it is now prohibited from relying upon it.

[61] Mr O'Brien submits that even though Mr Greenslade's IEA refers to s.69ZD of the Act, this does not preclude s.69ZH (2) of the Act applying. Mr O'Brien submits that the words: *in accordance with this Part* in s.69ZD(1) of the Act refers to Part 6D of the Act, accordingly the words *in accordance with this Part* also refer to s.69ZH of the Act, which is a subpart of Part 6D of the Act.

[62] Mr O'Brien further submits that Jetstar cannot, pursuant to s.238 of the Act which states: *The provisions of this Act have effect despite any provisions to the contrary in any contract or agreement*, contract out of the Act.

[63] I have found that it is s.69ZH which applies to Jetstar and not the rest and meal breaks as set out in s.69ZD of the Act. I accept that it is not possible for Jetstar to contract out of the provisions of the Act pursuant to s.238 of the Act.

[64] I observe that the mandatory CAO 48 exemption rest breaks are much longer than the rest breaks provided for by s.69ZD of the Act, and that there is no argument that Mr Greenslade is not provided with *adequate food and appropriate food at appropriate times during periods of duty* in accordance with s.21 of the IEA.

[65] I find that given the specific wording of clause 19 Jetstar and providing that there were no other provisions affecting this clause; Jetstar would be in breach of clause 19 of the IEA. However I accept that the reference in s.69ZD to: "*in accordance with this Part*" does not preclude s.69ZH applying. I am supported in this conclusion by the preliminary notation to Part 6D of the Act which includes sub-parts s.69ZD and s.69ZH, and states:

Part 6D: inserted on 1 April 2009, by section 6 of the Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008 (2008 No 58)

[66] I further consider that the IEA must be taken as a whole document, in which case clause 16.1 is also relevant to this issue. Clause 16.1 of the IEA states:

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 Operators Certificate (AOC) at that time.

[67] Whilst I have noted that Jetstar would be in breach of clause 19 of the IEA if it were to be taken in isolation, I observe that Jetstar is not able to contract out of the provisions of Part 6D of the Act in its entirety which includes the provisions of s.69ZH, which applies to Mr Greenslade's employment rather than the provisions of s.69ZD of the Act. Further I conclude that clause 16.1 of the IEA effectively nullifies clause 19 of the IEA.

[68] I determine that Jetstar did not breach clause 19 of the IEA.

Did Jetstar act in breach of the duty of good faith pursuant to s.4 of the Act?

[69] Mr Greenslade is a pilot with approximately 23 years' experience. In this capacity it would not be unreasonable to expect Mr Greenslade to be aware of the legislative requirements affecting a commercial airline company, and in fact Mr Greenslade confirmed at the Investigation Meeting that he was aware of the relevant legislation and of the CAO 48 exemption.

[70] Mr Greenslade had been employed by Jetstar since 1 January 2008. Mr Greenslade had been provided with a letter of offer by Jetstar on 14 October 2010 (the Offer Letter). The Offer Letter sought to formalise Mr Greenslade's employment with Jetstar and referred to the: "*the terms set out in this offer and the Individual Employment Agreement (IEA)*". The letter had been signed by two Jetstar executives, and also by Mr Greenslade on 28 October 2010, Mr Greenslade's signature coming after the following statement:

I, Richard Greenslade, have read, understood and accept the terms and conditions contained in the Letter of Offer and the attached IEA. I also acknowledge that I was given the opportunity to obtain independent advice about the contents of this offer of employment before I accepted it.

[71] The IEA had been entered into on the same date, 28 October 2010. Clause 47 of the IEA is headed **INDEPENDENT ADVICE** and states:

47.1 The Pilot acknowledges that he or she was provided with a copy of this Agreement and the opportunity and sufficient time to take independent advice in respect of the Agreement before entering into it.

[72] I consider that Mr Greenslade would have been aware, given that he had been employed by Jetstar for almost two years at the time he signed the Offer Letter and entered into the IEA, that rest breaks in Jetstar took place in accordance with the CAO 48 exemption and not s.69ZD of the Act.

[73] Mr Greenslade had the opportunity prior to entering into the IEA to obtain independent advice including the opportunity to gain advice concerning the applicability of both clauses 19 and clause 16.1 of the IEA to the terms and conditions of his employment.

[74] I consider that it would also have been possible for Mr Greenslade to have raised any concerns he may had about the rest and meal breaks issue and clauses 16.1 and 19 of the IEA with Jetstar prior to his entering into the IEA.

[75] The duty of good faith as set out in s.4 of the Act is a two-edged sword; there are reciprocal duties on both parties in an employment relationship to deal with each other in good faith, and to be ‘*responsive and communicative*’. There is however no evidence that Mr Greenslade had raised the rest break issue with Jetstar prior to, or at the time of entering into, the IEA.

[76] Further there is no evidence that Jetstar had deliberately attempted to deceive Mr Greenslade in the matter of rest and meal breaks, especially given that at the time of entering into the IEA, Mr Greenslade was an experienced pilot with full knowledge not only of the industry legislation, but also of the manner in which Jetstar operated in respect of rest breaks.

[77] Having considered this issue, I determine that Jetstar did not act in breach of the duty of good faith towards Mr Greenslade.

Remedies

[78] Mr Greenslade is seeking orders that Jetstar comply with s 69ZD of the Act and clause 19 of the IEA. For the reasons set out above, specifically that I have not found Jetstar to be in breach of Part 6D of the Act, and that in respect of clause 19 of Mr Greenslade’s IEA, Jetstar cannot contract out of the provisions of the Act, I am not granting these orders.

Recommendation

[79] Whilst I have not made the orders requested, I do make a recommendation pursuant to s 123(1) (ca) of the Act, that Jetstar revisit the wording of its employment agreements to ensure that the wording accurately reflects the current requirements of the Act.

Costs

[80] Costs are reserved. I am of a mind that costs should lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any rely submissions by the Applicant to be lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Eleanor Robinson
Member of the Employment Relations Authority