DECISION

Fair Work Act 2009
s.739 - Application to deal with a dispute

Peter Charles Willison; Francis Bernard D'Alterio; John Sean Robert Tracey; Justin Michael Barbaro; Michael Tsun-Ho Pau & Dylan Benjamin Dowd

v

Cathay Pacific Airways Limited
(C2021/1803)

COMMISSIONER CAMBRIDGE SYDNEY, 16 JULY 2021

Dispute settlement procedure - dispute about interpretation of clause providing entitlement to long service leave - agreed questions for determination - interpretation made in support of application.

[1] This Decision is made in respect of an application that was taken under s. 739 of the *Fair Work Act 2009* (the Act) for the Fair Work Commission (the Commission) to deal with a dispute in accordance with a Dispute Settlement Procedure (DSP). The application was lodged at Sydney on 31 March 2021, and it was made by six individuals, *Peter Charles Willison, Francis Bernard D'Alterio, John Sean Robert Tracey, Justin Michael Barbaro, Michael Tsun-Ho Pau,* and *Dylan Benjamin Dowd* (the applicants). The application was taken against *Cathay Pacific Airways Limited ABN:57 000 479 514* (Cathay or the employer).

[2] The application was advanced pursuant to a DSP which can be found at clause 24 of the *Cathay Pacific Airways Limited Australian Based Aircrew Enterprise Agreement 2020* (the EA). In accordance with the provisions of clause 24 of the EA, the Commission conducted conciliation proceedings by way of a telephone Conference held on 15 April 2021. During the proceedings held on 15 April 2021, the Commission granted permission pursuant to s. 596 of the Act, for the Parties to be represented by lawyers or paid agents.

[3] The conciliation proceedings did not provide for any resolution of the dispute and the matter has subsequently advanced to arbitration proceedings which involved a Hearing conducted in Sydney on 3 June 2021. Prior to the Hearing, the Parties provided agreed questions for determination, and they filed evidence and submissions in accordance with a timetable established by the Directions of the Commission.

[4] At the Hearing, the applicants were represented by *Mr J Kennedy,* solicitor from *Hall Payne* lawyers, and the employer was represented by *Mr D Perry*, solicitor from *Seyfarth Shaw Australia*. Mr Kennedy introduced evidence by way of witness statements and reply statements from each of the six applicants, with only one of the applicants, Mr Willison, called as a witness for cross-examination. Mr Perry adduced evidence from one witness,

Cathay's Flight Crew Relations Manager, South West Pacific, *Ms Michelle Jane Battersby*. Ms Battersby's evidence was provided remotely as she appeared as a witness via video link from New Zealand, and she was cross-examined by Mr Kennedy.

[5] Mr Kennedy and Mr Perry both made oral submissions in elaboration of documentary material that each had filed on behalf of the respective Parties.

Background

[6] There was little factual contest between the Parties about the circumstances which gave rise to the dispute in this matter. The dispute arose from a decision taken by Cathay to deny the applicants any entitlement to long service leave.

[7] The relevant provisions of the EA relating to an entitlement to long service leave are found at clause 16.10., and the specific terms of clause 16.10 which are the focus of the dispute are clauses 16.10.4. to 16.10.5. which are in the following terms:

> *"16.10.* ***Long Service Leave Scheme***
> *...*
> *16.10.4. Officers will accrue LSL entitlements as follows:*
>
> *16.10.4.1.* *The amount of LSL accrued, the relevant dates of accrual and the specification of the required periods of continuous service will all be determined by the applicable State Legislation.*
>
> *16.10.4.2.* *The applicable State will be determined by the location of the Officer's Permanent Home Base at the time that the LSL is awarded or assigned, not when the LSL is taken. For example, if an Officer completes seven (7) years of service in New South Wales (NSW) and his Home Base then changes to a permanent base in South Australia (SA) for an additional three (3) years, the accrual rate will be as if the entire service was in SA.*
>
> *16.10.4.3.* *For the avoidance of doubt, Preferred Ports, Temporary Bases, Base Swaps, and the Officer's place of residence will not determine which State legislation is applicable.*
>
> *16.10.4.4.* *The determination of continuous service for the purposes of LSL will be in accordance with State legislation; that is, accrual will commence from Date of Joining (DOJ) with any of the Cathay Pacific Airways Ltd. group of companies as long as the requirements under State legislation for determining continuous service are met.*
>
> *16.10.5.* *An Officer will become eligible for LSL when he has completed the appropriate length(s) of continuous service as determined by the State legislation on or before the closing date of the Bid Window as defined in 16.10.6.6."*

[8] Cathay is one of the world's largest international airlines. In 2016, Cathay was assessed to be the world's fifth largest airline measured by sales, and the fourteenth largest measured by market capitalisation. Cathay has headquarters in Hong Kong where most of its employees including pilots are based. However, Cathay chooses to base some of its employees including pilots, at various locations throughout the world including in Australia, Canada, Europe, and the United States. At the time of the Hearing, Cathay had approximately 124 Australian based pilots assigned to (based at) the locations of Sydney, Melbourne, Brisbane, Adelaide, and Perth.

[9] Prior to 2020, the applicants were Hong Kong based pilots who had between 10 to 30 years of service with Cathay. Between 1 April 2020 and 1 July 2020, each of the applicants had their base for employment relocated from Hong Kong to Australia. Five of the applicants were rebased to Melbourne and one was rebased to Brisbane.

[10] The rebasing to Australian ports of inter alia, the applicants, occurred following a process that commenced early in 2019 (the 2019 rebasing) when Cathay announced, through a Flight Crew Notice, that a number of Australian based positions would be available for pilots who wished to rebase to an Australian port. The rebasing process was conducted by Cathay in accordance with a *Permanent Basings Policy Agreement 2006* (the rebasing policy), which established that the selection of successful pilots would be based on seniority as stipulated by the rebasing policy.

[11] In 2019, each of the applicants was advised that they had been successful with their respective bids to be rebased to Australia. However, for a variety of reasons including necessary training and personal circumstances of the applicants, their rebasing was delayed until April through to July 2020. There were other pilots who were successful in the 2019 rebasing to Australia, and those pilots rebased before the applicants.

[12] The delay with the rebasing of the applicants meant that in all but one case, Mr Tracey, the applicants rebasing to Australia occurred on or after 1 May 2020, which was the date when Cathay stood down all of its Australian based pilots in response to the dramatic reductions in international air travel caused by the COVID-19 pandemic. In the case of Mr Tracey, although his rebasing occurred on 1 April 2020, he did not perform any flying duties as a pilot prior to 1 May 2020, when all of Cathay's Australian based pilots were stood down.

[13] Cathay stood down all of its Australian based pilots including the applicants, from 1 May 2020, but it continued to make payment to them, on an ex gratia basis, of at least 50% of their salary under a Salary Reduction Scheme (SRC). The SRC operated from 1 May 2020 until 28 March 2021, after which time the pilots were stood down without pay. Consequently, the applicants are a group of six Cathay pilots who rebased to Australia in 2020, and have not performed any flying duties as a pilot since they were rebased.

[14] On 24 August 2020, Cathay sent an email to all of its Australian based pilots including the applicants, which advised inter alia, of the individual's long service leave balance and the individual's bidding priority order for taking any long service leave. In response to this email, a number of the applicants inquired about aspects of their long service leave entitlement including whether it could be taken at half pay.

[15] The inquiries about details of long service leave, including requests to take long service leave at half pay, were dealt with by Cathay's Flight Crew Relations Manager, Ms

Battersby. Ms Battersby initially provided verbal advice to one of the applicants, Mr D'Alterio, that he was able to take his long service leave at half pay, and on 10 September 2020, this verbal advice was further confirmed when she emailed Mr D'Alterio with information about where to direct leave requests. Similarly, on 14 September 2020, Ms Battersby sent an email to another of the applicants, Mr Tracey, in answer to his particular concerns about when he may be able to take long service leave.

[16] On 9 October 2020, Ms Battersby sent an email to each of the applicants who had made a request to take long service leave, which advised that the request for long service leave had been refused. This email relevantly stated:

> *"Our view is that your service is not sufficiently connected with Victoria for the LSL legislation to apply based on the following factors:*
>
> - *your entire service to date has been outside Victoria; and*
> - *you have not performed any flying from the MEL base.*
>
> *Therefore, until such time as you perform flying duties on the MEL base, we are unable to allocates LSL."*

[17] On 14 December 2020, the applicants commenced a grievance process in accordance with clause 23 of the EA, in which they contested Cathay's refusal to grant them long service leave as had been advised in the email of 9 October 2020. On 22 March 2021, the applicants' grievance process was finalised by way of a letter from Cathay's General Manager Aircrew, *Ms Deborah McConnochie*, which advised that the applicants' internal appeal had been rejected. This letter confirmed Cathay's view that the applicants were not entitled to long service leave because, essentially; "*The absence of any flying duties since being rebased to Australia is clear evidence that your service does not have a substantial connection to New South Wales, Victoria or Queensland.*"

[18] On 31 March 2021, the applicants activated the DSP of clause 24 of the EA and filed the application for these proceedings. On 22 April 2021, Cathay advised all Australian based pilots that they were proposing to close down the Australian bases. On 1 June 2021, Cathay informed all Australian based pilots that it had decided to close the Australian bases, and it outlined options of relocation to Hong Kong or redundancy.

The Case for the Applicants

[19] Mr Kennedy, who appeared for the applicants, made oral submissions in amplification of written outline of submission documents respectively dated 30 April and 25 May 2021. The submissions made on behalf of the applicants referred to the three agreed questions for determination which arose from a contest about the operation of clause 16.10. of the EA. The particular issue in contest concerned whether or not the applicants were entitled to long service leave.

[20] Mr Kennedy acknowledged that although there were some minor differences between the circumstances of each of the applicants, relevantly they have each transferred employment to Australia but had then been stood down and had not undertaken any flying duties. However, according to the submissions made by Mr Kennedy, the terms of clause 16.10 of

the EA did not require any of the applicants to actually perform flying duties in order to obtain an entitlement to long service leave.

[21] Mr Kennedy submitted that the terms of clause 16.10.4. of the EA provided an entitlement to long service leave for all pilots including the applicants. Mr Kennedy submitted that clause 16.10.4 referred to relevant State legislation for specific purposes but it would override the usual principles under the relevant State laws about when an employee could be considered eligible for long service leave under that legislation. Consequently, according to the submissions made by Mr Kennedy, the usual principles and authorities which determined the applicability of state long service leave legislation would be overridden because the EA created an entitlement and stipulated which particular State legislation was relevant to that entitlement.

[22] Mr Kennedy submitted that it was the provisions of clause 16.10.4. of the EA which created the connection for the entitlement to be provided and overrode case law principles regarding the concept of substantial connection in respect to various State long service leave legislation. Mr Kennedy said that clause 16.10.4. should be interpreted having regard for the fact that it was providing more beneficial terms than the relevant State legislation, and therefore it was not necessary to consider the substantial connection test at all.

[23] Mr Kennedy also made alternative submissions which asserted that if there was a requirement to meet the substantial connection test, that test was satisfied in respect of each of the applicants. In this regard, Mr Kennedy noted that although none of the applicants had performed any flying duties since they had transferred to Australia, they were required during the time that they were stood down, to complete various training tasks. Further, Mr Kennedy noted that the applicants were being paid 50% of their base remuneration during the period that they were stood down and they did perform some duties once they had been rebased to Australia. Consequently, Mr Kennedy submitted that if the substantial connection test was required there was sufficient service by each of the applicants since their respective transfers to Australia, such that the substantial connection test would be satisfied.

[24] Mr Kennedy made further submissions which challenged Cathay's application of the substantial connection requirement for the applicants. Mr Kennedy said that it made no sense for long service leave entitlement to be conditioned on a requirement for a pilot to perform one flight. Mr Kennedy said that Cathay's position represented an artificial distinction that was not supported by any of the words in the EA. In support of this submission, Mr Kennedy noted that initial communications from Ms Battersby reflected that those applicants that were inquiring about details of their long service leave entitlement did have such an entitlement.

[25] In summary, Mr Kennedy reiterated his primary submission that clause 16.10.4. of the EA established a more beneficial entitlement which recognised each of the applicants' service in Hong Kong once they had transferred to Australia. Mr Kennedy asserted that Cathay had wrongly sought to impose a condition on this entitlement by reference to a statutory test that was not applicable. Further, if a statutory test was applicable, Mr Kennedy submitted that the applicants had established a substantial connection through the performance of training and duties other than flying duties. Consequently, Mr Kennedy urged that the Commission answer the first question for determination by confirming that the applicants were entitled to long service leave in accordance with clause 16.10.4. of the EA.

The Employer's Case

[26] Mr Perry appeared for Cathay, and he made submissions in amplification of the written submissions which had been filed on behalf of the employer.

[27] The submissions made by Mr Perry asserted that the proposition advanced by the applicants was absurd. Mr Perry stated that pilots with anywhere between 10 and 28 years of service who have successfully rebased to Australia, but who never actually started doing their jobs in Australia, could not have their foreign service recognised for long service leave purposes.

[28] Mr Perry submitted that this matter involved a very simple case which turned simply upon the construction of the enterprise agreement. Mr Perry submitted that when properly construed the terms of the enterprise agreement yielded to the applicable State legislation. Consequently, according to the submissions made by Mr Perry, there was a need for an adequate connection between the service of the employee (in this case each of the applicants) and the relevant Australian State jurisdiction.

[29] Mr Perry referred to the provisions of ss. 26, 27 and 113 of the Act, which he said established that the Federal statute did not exclude or affect in any way the operation of State long service leave laws, and therefore the terms of an enterprise agreement made under the Act simply could not exclude the relevant State long service leave laws. In this context, according to the submissions made by Mr Perry, consideration of the terms in the EA involved application of the relevant State legislation such that it recognised the relevant State law as the source of entitlement, and then dealt with details around how the entitlement was to be managed. Mr Perry submitted that when consideration was approached in this manner, there was no independent right or entitlement to long service leave established in the EA.

[30] The submissions made by Mr Perry then referred to various authorities which had considered the operation of State legislation which provided for long service leave entitlements. Mr Perry submitted that the authorities had clearly established that consideration of any entitlement required identification of triggering events such as the completion of a qualifying period of service, or the termination of employment. The triggering events were according to the submissions made by Mr Perry, important to establishing sufficient connection for the service to enliven an entitlement to long service leave.

[31] Mr Perry referred to the particular circumstances in a number of cases which had dealt with the question of whether service of an individual was sufficiently connected for the purposes of an entitlement to long service leave. Mr Perry said that an examination of the various authorities established that there were limits to the extent to which overseas service would be treated as service for the purposes of long service leave legislation. Further, Mr Perry submitted that in order to obtain an entitlement to long service leave it was clear that at the time of the relevant triggering event, there needed to be a substantial connection between the whole of the service of the employee and the State concerned.

[32] Mr. Perry made further submissions which referred to the particular circumstances of each of the applicants, which he said revealed that the only service that could be pointed to was the conduct of a limited number of online training modules during the period that the applicants had been stood down. Mr Perry said that the core purpose of the role of each of the applicants was to fly aircraft, which was a highly skilled, safety critical, and highly paid occupation. However, the limited amount of training and other minor duties that the

applicants had performed in Australia was, according to Mr Perry, really not enough to establish a substantial connection with service for the purposes of the relevant State long service leave legislation.

[33] In further submissions, Mr Perry asserted that the applicants were being opportunistic because they had arrived in Australia and had not performed any meaningful work, yet they sought for their whole employment to be considered as service of the relevant State. Mr Perry submitted that there needed to be a substantial connection at the time of the triggering event between the whole of the person's service and the relevant Australian jurisdiction. Mr Perry said that in no case had the applicants had any substantial connection with the Australian jurisdiction at the time of any of the relevant triggering events.

[34] In summary, Mr Perry asserted that the terms of the enterprise agreement simply yielded to the relevant State legislation in order to provide basis for any entitlement to long service leave and that meant that for the purposes of the State legislation, a substantial connection needed to be made between the service of the applicants and an Australian State. Mr Perry said that clearly there was no substantial connection and therefore the entitlement to long service leave could not be established by the applicants.

Consideration

[35] The dispute in this instance has arisen from the decision of Cathay to refuse to provide the applicants with any entitlement to long service leave. The Parties agreed upon the following questions for arbitration:

> *"1. Are the applicant employees of the respondent presently (as at the date of the application) entitled to take long service leave in accordance with clause 16.10.4 of the agreement?*
>
> *2. If the answer to question 1 is no for any applicant employee, when will the employee becomes so entitled (if ever)?*
>
> *3. Will the applicant employees of the respondent be entitled to any payments in respect of long service leave on termination of their employment?"*

[36] The agreed questions for determination must logically be addressed sequentially, if the answer to question 1 is yes, then question 2 would become otiose, and question 3 must follow any affirmative outcome provided for question 1. Of course if the answer to question 1 is no, then questions 2 and 3 would require answers.

[37] The determination of question 1 involves an analysis of the words contained in clause 16.10.4. of the EA in order to provide the correct construction or interpretation that is to be given to those terms. The task for the Commission therefore involves a reasonably straightforward contested construction determination. Any determination of a contested construction question should appropriately attract, with necessary modification, the application of the principles relevant to the task of construing an enterprise agreement. Those principles, as most recently modified, are set out at paragraph [114] of the Full Bench Decision in *AMWU v Berri* [1] (the Berri principles) and are in the following terms:

"1. The construction of an enterprise agreement, like that of a statute or contract, begins with a consideration of the ordinary meaning of the relevant words. The resolution of a disputed construction of an agreement will turn on the language of the agreement having regard to its context and purpose. Context might appear from:

> *(i) the text of the agreement viewed as a whole;*
> *(ii) the disputed provision's place and arrangement in the agreement;*
> *(iii) the legislative context under which the agreement was made and in which it operates.*

2. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties.

3. The common intention of the parties is sought to be identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement, without regard to the subjective intentions or expectations of the parties.

4. The fact that the instrument being construed is an enterprise agreement made pursuant to Part 2-4 of the FW Act is itself an important contextual consideration. It may be inferred that such agreements are intended to establish binding obligations.

5. The FW Act does not speak in terms of the 'parties' to enterprise agreements made pursuant to Part 2-4 agreements, rather it refers to the persons and organisations who are 'covered by' such agreements. Relevantly s.172(2)(a) provides that an employer may make an enterprise agreement 'with the employees who are employed at the time the agreement is made and who will be covered by the agreement'. Section 182(1) provides that an agreement is 'made' if the employees to be covered by the agreement 'have been asked to approve the agreement and a majority of those employees who cast a valid vote approve the agreement'. This is so because an enterprise agreement is 'made' when a majority of the employees asked to approve the agreement cast a valid vote to approve the agreement.

6. Enterprise agreements are not instruments to which the Acts Interpretation Act 1901 (Cth) applies, however the modes of textual analysis developed in the general law may assist in the interpretation of enterprise agreements. An overly technical approach to interpretation should be avoided and consequently some general principles of statutory construction may have less force in the context of construing an enterprise agreement.

7. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or it is ambiguous or susceptible of more than one meaning.

8. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.

9. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.

10. If the language of the agreement is ambiguous or susceptible of more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation of the agreement.

11. The admissibility of evidence of the surrounding circumstances is limited to evidence tending to establish objective background facts which were known to both parties which inform and the subject matter of the agreement. Evidence of such objective facts is to be distinguished from evidence of the subjective intentions of the parties, such as statements and actions of the parties which are reflective of their actual intentions and expectations.

12. Evidence of objective background facts will include:

> *(i) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;*
> *(ii) notorious facts of which knowledge is to be presumed; and*
> *(iii) evidence of matters in common contemplation and constituting a common assumption.*

13. The diversity of interests involved in the negotiation and making of enterprise agreements (see point 4 above) warrants the adoption of a cautious approach to the admission and reliance upon the evidence of prior negotiations and the positions advanced during the negotiation process. Evidence as to what the employees covered by the agreement were told (either during the course of the negotiations or pursuant to s.180(5) of the FW Act) may be of more assistance than evidence of the bargaining positions taken by the employer or a bargaining representative during the negotiation of the agreement.

14. Admissible extrinsic material may be used to aid the interpretation of a provision in an enterprise agreement with a disputed meaning, but it cannot be used to disregard or rewrite the provision in order to give effect to an externally derived conception of what the parties' intention or purpose was.

15. In the industrial context it has been accepted that, in some circumstances, subsequent conduct may be relevant to the interpretation of an industrial instrument. But such post-agreement conduct must be such as to show that there has been a meeting of minds, a consensus. Post-agreement conduct which amounts to little more than the absence of a complaint or common inadvertence is insufficient to establish a common understanding."

[38] Consideration of the contested construction for clause 16.10.4. of the EA has involved the application of the Berri principles and therefore, the approach commences with a consideration of the ordinary meaning of the relevant words involving what is primarily a text-based analysis. In this instance, it is relevant to recognise that at the time that the terms of clause 16.10.4. were negotiated and agreed upon, there could have been no contemplation of the unusual circumstances that have been created by the COVID-19 pandemic. In simple terms, there would have been no contemplation that pilots (or "Officers" using the terminology of clause 16.10.4.) who were rebased to Australia would not undertake any flying

duties following their rebasing, but instead, be stood down from their employment, as has occurred for each of the applicants.

[39] In order to undertake the approach contemplated by the Berri principles involving an initial analysis of the ordinary meaning to be given to the relevant text, it is helpful to again reproduce clause 16.10.4. and then, having guarded against any potential rewriting of the terms to achieve what might be regarded as a fair and just outcome, identification is made of any objectively determined common intention of the Parties. This approach is assisted by examination of each of the subclauses contained within clause 16.10.4., and when this detailed text is considered in context, any objective common intention can be properly discerned.

[40] By way of this approach, subclause 16.10.4.1. has firstly been examined. Subclause 16.10.4.1. is in the following terms:

> *"16.10.4.1. The amount of LSL accrued, the relevant dates of accrual and the specification of the required periods of continuous service will all be determined by the applicable State Legislation."* [emphasis added]

[41] The significant operative words of subclause 16.10.4.1. are the opening words of "*The amount*". This subclause is clearly directed at establishing that the amount of long service leave will be determined by the relevant State legislation. When read and understood in context, particularly having regard for the next subclause (16.10.4.2.), the clear objective intention of subclause 16.10.4.1. is to recognise that the different State long service leave Acts provide for different amounts of long service leave relevant to a specified length of service. Thus, the opening subclause establishes that the amount of long service leave is directly linked to a particular State's long service leave legislation (as opposed to any other prescription), and the next subclause clarifies which particular State is to apply.

[42] The second subclause, 16.10.4.2. is in the following terms:

> *"16.10.4.2. The applicable State will be determined by the location of the Officer's Permanent Home Base at the time that the LSL is awarded or assigned, not when the LSL is taken. For example, if an Officer completes seven (7) years of service in New South Wales (NSW) and his Home Base then changes to a permanent base in South Australia (SA) for an additional three (3) years, the accrual rate will be as if the entire service was in SA."*

[43] There is some apparent internal contradiction within the first sentence of subclause 16.10.4.2. because the awarding or assignment of long service leave may also coincide with when it is taken. However, the second sentence makes clear that this subclause establishes that the amount of long service leave established by subclause 16.10.4.1., is, in circumstances where an employee rebases within Australia, to be calculated on whatever prescription applies to the rebased location as if all of the employment was served in the State of the rebased location.

[44] The third subclause, 16.10.4.3. is in the following terms:

> *"16.10.4.3. For the avoidance of doubt, Preferred Ports, Temporary Bases, Base Swaps, and the Officer's place of residence will not determine which State legislation is applicable."*

[45] This subclause reinforces that the State that is to be used for the purpose of calculating the amount of long service leave is that of the employee's Home Base. Home Base has a definition found at clause 4.8 of the *Permanent Basings Policy Agreement 2006* which is referenced at clause 19 of the EA. Importantly, the clear, objective common intention of subclause 16.10.4.3. and the two preceding subclauses, 16.10.4.1. and 16.10.4.2., is directed at establishing the amount of long service leave entitlement which is referable to the State of the employee's Home Base at the time at which long service leave is granted.

[46] The fourth and final subclause, 16.10.4.4. is in the following terms:

> *"16.10.4.4. The determination of continuous service for the purposes of LSL will be in accordance with State legislation; that is, accrual will commence from Date of Joining (DOJ) with any of the Cathay Pacific Airways Ltd. group of companies as long as the requirements under State legislation for determining continuous service are met."*

[47] There are two distinct components of subclause 16.10.4.4. The first component deals with the issue of continuous service for the purposes of long service leave, and as with the preceding three subclauses, the identifiable, objective common intention is to have continuous service determined by the relevant State legislation as prescribed by the preceding subclauses. The second component however introduces an entirely different issue about the commencement date that is to be used for the purpose of calculating any long service leave entitlement. Importantly, the words "*accrual will commence from Date of Joining (DOJ) with any of the Cathay Pacific Airways Ltd. group of companies"* introduces an aspect of the basis for calculation of long service leave which confers a benefit which would ordinarily not be provided by any State long service leave legislation.

[48] It is this second component of subclause 16.10.4.4. which provides the critical wording that is at the heart of the contested construction question raised in question 1 of the agreed questions for arbitration. In all other respects, the provisions of the four subclauses contained in clause 16.10.4. of the EA reveal an objective common intention to have the amount of long service leave and the continuous service for the purposes of such leave, to be determined by reference to a particular State's long service leave legislation. The clear, objective common intention of the second component of subclause 16.10.4.4. departs from any connection with State legislation, and instead specifies a commencement date that is to be used for the purpose of calculating the other aspects of any long service leave entitlement which are referable to a particular State's long service leave legislation.

[49] Consequently, a proper analysis of the words that are contained in what can be described as the second component of subclause 16.10.4.4., establishes the unambiguous, objective common intention to specify a commencement date for the purposes of calculating long service leave entitlement, which is outside of and apart from, the operation of any State long service leave legislation. This particular aspect of the provisions of clause 16.10.4. starkly contrasts with those other aspects of the long service leave entitlement which are clearly referable to a particular State's long service leave legislation.

[50] From this analysis, it follows that the established approach to the interpretation of the provisions of a particular State's long service leave legislation which introduces a requirement that there be a significant or substantial connection between an employee's service in that State as a pre-requisite to obtaining the benefit of a long service leave entitlement, has in this instance, been supplanted by the proper construction that must be given to the words of the second component of subclause 16.10.4.4. of the EA. The displacement of any requirement for the significant or substantial connection as would ordinarily apply to the operation of a State's long service leave legislation is further supported by evidence of the practical application adopted by the Parties whereby the commencement date for calculating long service leave entitlement has, in instances other than the applicants, followed the proper construction of the second component of subclause 16.10.4.4. rather than any application of a significant or substantial connection test.

[51] In this case, the evidence of Ms Battersby confirmed that there were a number of pilots who were part of the 2019 rebasing who rebased to Australia shortly before the applicants. The pilots other than the applicants, who rebased to Australia as part of the 2019 rebasing, have not been denied their long service leave entitlement, as the following evidence from Ms Battersby confirmed:

> *"Yes. So there'd be other individuals who essentially responded to the same period of offer around about March, early 2019, got back to Australia before COVID was even really heard about and started flying?--- Yes.*
>
> *So what distinguishes the applicants from your perspective is the fact that by the time they eventually got here the stand downs had actually commenced?--- Yes. So they hadn't performed any flying duties.*
>
> *Right?--- Yes.*
>
> *So do I sort of extract from that that that's all that's really needed is to just do a flight and then it's okay, you get your long service leave?--- Well, yes, to be sufficiently connected there needs to be some flying duties performed from the base.*
>
> *One? Just one would be enough?--- At least one. At least one.*
>
> *Right. So if we actually did a search we would find other individuals who weren't delayed, got back here and probably, depending on when they got here, maybe only performed a handful of flights before the stand down?--- Yes. But going - just going back to your prior question or comment, the delay was as a result of the pilots asking for that delay, like you said for taxation - excuse me - reasons, and the company allowed that delay or granted them that delay."*[2] [emphasis added]

[52] This evidence reveals that Cathay has misapplied what Ms Battersby referred to as the sufficiently connected test. The pilots other than the applicants who rebased to Australia as part of the 2019 rebasing would have only performed a handful of flights before they were stood down. A proper application of the significant or substantial connection test, as would be relevant to the operation of State long service leave legislation, would not have been satisfied by the short service periods of these pilots who performed only a handful of flights.

[53] In reality, Cathay introduced an unstated qualification to the application of the second component of subclause 16.10.4.4. of the EA, which it selectively imposed upon the applicants. Cathay then sought to characterise the selective imposition of the unstated qualification which required a rebased pilot to perform at least one flight, as an application of the significant or substantial connection test that would ordinarily apply in respect to the operation of a State's long service leave legislation.

[54] It was fundamentally wrong for Cathay to selectively apply the second component of subclause 16.10.4.4. of the EA such that those pilots who rebased as part of the 2019 rebasing and managed to undertake a small number of flights before being stood down, were granted long service leave yet it refused the applicants' long service leave on the specious assertion that they had not established a significant or substantial connection with the relevant State's long service leave legislation. The significant or substantial connection test was not applicable to any of the rebased pilots, all of whom were entitled to the benefit conferred by the second component of subclause 16.10.4.4. of the EA, irrespective of whether they performed a handful of flights or no flying duties at all.

[55] Further, it is relevant to soundly disqualify the proposition that "service", particularly in respect to continuous service for the purposes of long service leave, requires actual performance of duties, in this case, actual flying of an aircraft, as was erroneously advanced by Cathay. The relevant provisions of the long service leave legislation for Victoria assist in clarifying this issue. Section 12 of the *Long Service Leave Act 2018* (Vic) is in the following terms:

> ***"12 Meaning of continuous employment***
>
> *(1) This section sets out several situations in which an employee is taken, for the purposes of this Act, to be continuously employed.*
>
> *(2) An employee's employment is taken to be continuous despite an absence from work caused by the employee taking—*
>
> *(a) annual leave; or*
> *(b) long service leave; or*
> *(c) paid or unpaid parental leave (other than in the case of a casual or seasonal employee); or*
> *(d) in the case of a casual or seasonal employee, paid or unpaid parental leave that is not longer than 104 weeks; or*
> *(e) carer's leave; or*
> *(f) leave on account of illness or injury; or*
> *(g) any other form of leave not referred to in this subsection that is provided for under the relevant employment agreement.*
>
> *(3) A casual or seasonal employee's employment is taken to be continuous despite an absence from work that is longer than 12 weeks, starting at the end of a particular instance of employment and ending at the start of another particular instance of employment if—*
>
> *(a) the casual or seasonal employee and the employer so agree before the start of the absence; or*

(b) the absence is due to the terms of engagement of the casual or seasonal employee; or

(c) the absence is caused by seasonal factors; or

(d) the employee has been employed by the employer on a regular and systematic basis and the employee has a reasonable expectation of being re-engaged by the employer.

(4) An employee's employment is taken to be continuous despite an absence from work caused by the employer terminating or interrupting the employment with the intention of avoiding an obligation in relation to long service leave.

(5) An employee's employment is taken to be continuous despite an absence arising solely from the transfer of assets from one employer to another, if the employee usually performs duties which are connected with those assets.

(6) An employee's employment is taken to be continuous despite an absence from work caused by the termination of the employee's employment—

(a) at the initiative of the employer or the employee, if the employee is re-employed by the employer within 12 weeks after the termination; or

(b) because of the expiration of a specified term of an employment contract, if the employee is re-employed by the employer within 12 weeks after the expiration; or

(c) because the employee's apprenticeship to an employer is completed, if the employee is re-employed by the employer within 52 weeks after the end of the apprenticeship.

(7) An employee's employment is taken to be continuous despite the employer standing down the employee—

(a) during industrial action if the employee cannot be usefully employed because of the industrial action; or

(b) because of a breakdown of machinery or equipment for which the employer cannot reasonably be held responsible if the employee cannot be usefully employed because of the breakdown; or

(c) because of a stoppage of work for any cause for which the employer cannot reasonably be held responsible if the employee cannot be usefully employed because of the stoppage.

(8) An employee's employment is taken to be continuous despite any interruption arising directly or indirectly from an industrial dispute." [emphasis added]

[56] In respect to Queensland, s. 134 of the *Industrial Relations Act 2016* (Qld) includes subsection (7) which is in the following terms:

"(7) An employee's continuity of service is not broken if –

(a) the employee's employment is interrupted or terminated by the employer because of slackness of trade or business; and

(b) the employer re-employs the employee."

[57] In respect to New South Wales, s. 4 of the *Long Service Leave Act 1955* (NSW) contains subsection (11) which includes the following terms:

"(a1) the service of a worker with an employer shall be deemed to be continuous notwithstanding that the service has been broken by reason only of an interruption or determination thereof—

...
(v) made by the employer by reason of slackness of trade,
..."

[58] The economic impacts of the COVID-19 pandemic have caused widespread stand downs from employment throughout Australia. In general, such stand down from employment will not break the service of employees for the purposes of long service leave. However, in many jurisdictions, the period of the stand down may not be counted for the purposes of calculation of the amount of the individual's long service leave entitlement.

[59] Consequently, Cathay's Australian based pilots who were stood down from employment on 1 May 2020, would not have their continuity of employment disturbed by the stand down. A glaring inequity would arise if pilots who rebased to Australia in 2019 shortly before the applicants, had the period during which they were stood down recognised as continuous service for the purposes of inter alia, long service leave, whilst during the same period of stand down, the applicants were considered to have not been performing any service for the purposes of long service leave. Irrespective of whether individuals performed some online training or other activities, whether undertaken at the directive of Cathay or otherwise, whilst they were stood down from flying duties their employment and their continuity of service was maintained.

[60] Finally, in respect to the application of other aspects of the Berri Principles, the construction that has emerged from the identification of the objective common intention of the Parties does not lead to an interpretation made by way of an overly technical approach. Indeed, the outcome could be described as an approach that involved fundamental fairness and industrial common sense. Further, the other aspects identified in the Berri principles have, to the extent that they are applicable, provided further support for the contested construction question to be resolved in accordance with the objective common intention of the Parties that has been identified, particularly in respect to the second component of subclause 16.10.4.4. of the EA.

Conclusion

[61] In this case the Commission has been required to determine a contested construction question regarding the terms contained in clause 16.10.4. of the EA. Specifically, the Parties have proposed the primary question for determination as:

> *"Are the applicant employees of the respondent presently (as at the date of the application) entitled to take long service leave in accordance with clause 16.10.4 of the agreement?"*

[62] In respect to this primary question, having regard for all of the evidence that was presented, and by application of the principles relevant to the task of construing contested terms such as those under examination in this instance, the Commission determines that the answer to question 1 is: yes.

[63] The answer to question 1 has substantially resulted from an analysis that identified the objective common intention of clause 16.10.4., and, in particular, the terminology of the second component of subclause 16.10.4.4. Essentially, there was no foundation upon which to establish Cathay's assertion that the commencement date for the purposes of calculation of long service leave entitlement, as stipulated in subclause 16.10.4.4., required, as a precondition, that an individual had to have performed flying duties from their rebased location.

[64] Given that the primary question, question 1, has been resolved in the affirmative and that the construction to be given to the contested terms of clause 16.10.4. of the EA provides the applicants with an entitlement to long service leave, it is unnecessary to provide any answer to question 2, and the answer to question 3 must logically be yes, following the answer to question 1.

[65] Consequently, the dispute has been determined broadly in accordance with the position advanced on behalf of the applicants. The application is concluded accordingly.

COMMISSIONER

Appearances:

Mr J Kennedy, Solicitor from Hall Payne Lawyers appeared for the Applicants.

Mr D Perry, Solicitor from Seyfarth Shaw Australia appeared for the employer.

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[1] Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited [2017] FWCFB 3005, Ross P, Gooley DP and Hunt C.

[2] Transcript @ PN380 – PN385.