Long service leave win for stood down pilots at Cathay Pacific

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Hall Payne Lawyers recently won a case for pilots at Cathay Pacific Airways, with the Fair Work Commission deeming it "*fundamentally wrong*" for Cathay Pacific to selectively apply the terms of the enterprise agreement, "*Cathay Pacific Airways Limited Australian Based Aircrew EA 2020"* (**EA**) and deny recently transferred pilots their long service leave entitlements.

Background

Prior to 2020, the applicants were Hong Kong based pilots who had between 10 to 30 years of service with Cathay Pacific. Between 1 April 2020 and 1 July 2020, on successful application, each of the applicants transferred their home base from Hong Kong to Australia. Due to the emerging COVID-19 pandemic and drastically reduced international travel, the applicant pilots were stood down upon transfer to Australia.

What was in dispute?

The dispute arose when Cathay Pacific withdrew their offer for the applicant pilots to take long service leave to supplement their income whilst stood down.

Cathay Pacific argued that the pilots' service was not sufficiently connected to their home base state (as required by state legislation) and they were therefore not entitled to long service leave under the EA. In reaching this view Cathay Pacific relied on the following factors:

- the applicant pilots entire service to date had been outside of their relevant home base state; and
- they had not performed any flying from their Australian home base.

Cathay Pacific advised the pilots that they would be unable to access long service leave until they performed flying duties.

The pilots disputed Cathay Pacific's view that they had to perform flying duties in order to be entitled to long service leave and argued that the terms of the EA provided a more beneficial entitlement to long service leave (than the respective state legislation) and overrode the principles of the substantial connection test in the respective state legislation.

The Cathay Pacific EA relevantly states (emphasis added):

16.10. Long Service Leave Scheme

…

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.

The pilots sought to resolve the dispute through the EA's dispute resolution procedure with Cathay Pacific, without success. During that process they engaged Hall Payne to argue the case before Commissioner Cambridge of the Fair Work Commission.

Decision

Commissioner Cambridge considered the *Berri* principles which govern the interpretation of enterprise agreements and found that the words "*accrual will commence from Date of Joining (DOJ) with any of the Cathay Pacific Airways Ltd. group of companies"* conferred a benefit for the calculation of long service leave which would ordinarily not be provided by any State long service leave legislation.

Whilst the four preceding clauses of the EA referred to the amount of long service leave and continuous service being determined by the relevant State's long service leave legislation, Commissioner Cambridge found that the intention of the second component of subclause 16.10.4.4 departed from any connection with State legislation, and instead specified a commencement date with any of the Cathay Pacific Airways group of companies be used for the purpose of calculating the long service leave entitlement.

Commissioner Cambridge rejected Cathay Pacific's argument that the pilots needed to establish a significant or substantial connection between their service and home base state to be entitled to long service leave and found that the significant or substantial connection principle had been supplanted by subclause 16.10.4.4. of the EA.

The Commissioner found that his interpretation of the EA was consistent with Cathay Pacific calculating the long service leave entitlements of pilots who had rebased to Australia prior to the COVID related standdown, using their commencement date with Cathay Pacific Hong Kong.

The Commissioner concluded that Cathay Pacific had adopted a “fundamentally wrong” and “selective” approach to the clause:

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.

You can read the full judgment here.

Get help from an employment lawyer

Hall Payne has a wealth of experience advising employees and unions in disputes about leave entitlements, including under enterprise agreements. If you require assistance with a breach of enterprise agreement or access to your long service leave entitlement, please do not hesitate to contact Hall Payne.

You can contact us by phone or email to arrange your consultation; either face-to-face at one of our offices, by telephone or by videoconference consultation.

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