DECISION

Fair Work Act 2009
s.505—Right of entry

Australian Licenced Aircraft Engineers Association, The
v
Qantas Airways Limited
(RE2013/1470)

Airline operations

VICE PRESIDENT WATSON SYDNEY, 24 JANUARY 2014

Right of entry dispute - access to records - definition of non-member records or documents - consultation - major change - significant effect - Fair Work Act 2009 ss. 505, 481 and 482(2A).

Introduction

[1] This decision concerns an application under s.505 of the *Fair Work Act 2009* (the Act) regarding a right of entry dispute between the *Australian Licensed Aircraft Engineers Association* (ALAEA) and *Qantas Airways Ltd* (Qantas). The dispute arose over right of entry sought by the ALAEA to access employee records and documents in suspicion of a contravention of the *Licenced Aircraft Engineers (Qantas Airways Limited) Workplace Determination 2012* (the Workplace Determination) in June and July 2013. Qantas provided the ALAEA access to certain records and documents of ALAEA members, but denied access to other documents on the basis that Mr Amos of the ALAEA declined to provide Qantas with any details as to its members affected by the suspected contravention.

[2] When the matter was first listed for hearing the parties submitted that they were fundamentally opposed and the matter would need to be determined by arbitration. Directions were made for the filing of material in advance of the hearing on 22 October 2013. At the hearing Mr S Purvinas appeared for the ALAEA and Mr R Dalton, of Counsel, appeared with permission for Qantas.

Background

[3] Evidence in this matter was given by Mr L Amos on behalf of the ALAEA and Mr C Tobin on behalf of Qantas.

[4] The background to this matter is essentially not in dispute. The dispute has its genesis in two announcements in 2012 of a reduction in the number of line maintenance positions in Sydney in an operations group known as the SAM Maintenance Group. Following the announcements, consultation occurred with the ALAEA, other unions and the affected employees regarding the redundancies and the likely impact on the employees. The consultation concerned the reasons for the redundancies, the selection criteria, the process for implementing the redundancies, and mitigation opportunities.

[5] Prior to the redundancies the SAM Maintenance Group was split into about 35 crews, each of about 10 employees. Each crew comprised Licenced Aircraft Engineers (LAMEs), Aircraft Engineers (AMEs) and one senior LAME as supervisor of the group. Employees from many crews took voluntary redundancy as part of the restructure. By May 2013 the combined number of employees, including apprentices had dropped to 278. By the date of hearing this number had dropped further to 265.

[6] Consequent upon the reduction of crew members, Qantas undertook a process of consolidating the number of crews. Consultation occurred on the process of consolidation with affected employees, and modifications were made to the proposal as a result of that consultation. In May 2013 the crews were consolidated into twenty crews of 11 -13 members. Eight of the twenty crews had two senior LAMEs. Qantas advised that the second senior LAME would relieve the senior LAME on other crews, supervisory responsibilities would be fairly allocated between the senior LAMEs, and the senior LAMEs would not suffer any reduction in pay if they were not exercising supervisory duties.

[7] Qantas did not hold separate consultation sessions with ALAEA officials on the crew consolidation process and it appears that the employees did not request ALAEA officials to be involved in the consultation process.

[8] On 25 June 2013, Mr Purvinas of the ALAEA met with Mr Tobin and Ms Bussell of Qantas to discuss some concerns that the ALAEA wished to raise about the crew consolidation. Mr Purvinas inquired whether it was made clear during the consultation process leading to the consolidation, that there would be less opportunity for LAMEs to act in supervisory roles under the new arrangements. Mr Tobin told Mr Purvinas that he did not state that specifically.

[9] On about 1 July 2013 Mr Purvinas served Qantas with a right of entry notice. It alleged a suspected contravention of clause 47.2 of the Workplace Determination for failing to consult with employees about the changes to crew structures and the diminished opportunities of senior LAMEs to exercise supervisory functions.

[10] Clause 47 of the Workplace Determination provides:

> **"Introduction of Change**
>
> **47.1 Qantas' duty to notify**

47.1.1 Where Qantas has made a definite decision to introduce major changes, including changes in minor ports, production, program, organisation, structure or technology that are likely to have significant effects on employees, Qantas shall notify the employee who may be affected by the proposed changes and at the request of the affected employee(s) the Association.

47.1.2 "Significant Effects" include termination of employment, major changes in the composition, operation or size of Qantas' workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities, or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and restructuring of jobs. Provided that where this Workplace Determination makes provision for alteration of any of the matters referred to herein an alteration shall be deemed not to have significant effects.

47.2 Qantas' duty to consult

47.2.1 Qantas shall consult with the employees affected and at the request of the affected employee(s) the Association or other employee representative, inter alia, the introduction of the changes referred to in clause 47.1, the effects the changes are likely to have on employees, measures to avert or mitigate the adverse effects of such changes on employees and shall give prompt consideration to matters raised by the employees and/or their union or other employee representative in relation to the changes.

47.2.2 The consultation shall commence as early as practicable after a firm decision has been made by Qantas to make the changes referred to in clause 47.1.

47.2.3 For the purpose of such consultation, Qantas shall provide to the employee's concerned and at the request of the affected employee(s) the Association or other employee representative, all relevant information about the changes including the nature of the changes proposed; the expected effects of the changes on employees and any other matters likely to affect employees provided that Qantas shall not be required to disclose confidential information the disclosure of which would be inimical to his/her interests."

[11] On 4 July 2013, Qantas provided Mr Purvinas access to its site and he was provided access to documentation concerning communications to SAM Maintenance Group employees regarding the changes to crew composition and various worksheets and rosters regarding the crew consolidation. By letter dated 5 July 2013, the ALAEA sought access to further categories of documents. In a response dated 18 July 2013, Mr Brown of Qantas declined access to some categories of documents and gave conditional approval of access to other categories if ALAEA could provide a list of members it was entitled to represent relevant to the documentation.

[12] On 25 July 2013 Qantas allowed Mr Amos of the ALAEA access to the site. Mr Amos requested access to the following categories of documents:

> "(a) Documents or records which formed part of the notification to, and consultation with, the affected staff including responses Qantas provided to any questions employees raised and a [sic] document or record recording how Qantas notified and consulted with each affected staff member;
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> (b) Weekly rosters and daily workload sheets of affected staff for the previous 12 month period;
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> (c) Any documents or records demonstrating a risk assessment of the changes to crew structures; and
>
> (d) Any document or record attributing an accident, incident or maintenance error to a lack of supervision within the last two years."

[13] Mr Amos did not agree to provide a list of ALAEA members. Qantas essentially reiterated its position in its correspondence of 18 July 2013 and declined to provide access to the documents in question.

[14] The right of entry dispute concerns the denial of access to the specified categories of documents. In its final submissions the ALAEA sought access to a more extensive list of documents, expressed in the form of proposed orders as follows:

> "1. The Respondent adhere to Division 2, Part 3-4 of the Fair Work Act 2009 (Cth) in relation to the permit holder's right of entry and right to inspect, and make copies of any record or document (other than a non-member record or document) that is directly relevant to the suspected contravention of clause 47 of the Licenced Aircraft Engineers (Qantas Airways Limited) Workplace Determination 2012.
>
> 2. Access is to be granted to the following records or documents directly relevant to the changes to the number of crews in the Sydney Aircraft Maintenance Group:
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> 3. Documents or records notifying affected staff of the changes and the likely effects of the changes.
>
> 4. Documents or records which record any verbal discussions or briefings in which affected staff and/or the Applicant were notified of the changes and the likely effects of the changes.
>
> 5. Documents or records demonstrating consultation over the likely effects of the changes with affected staff and/or the Applicant including, but not limited to, minutes of meetings or email responses to queries raised in relation to the changes and/or their likely effects.
>
> 6. Weekly rosters of affected staff in the Sydney Aircraft Maintenance Group from the 12 month period preceding Mr Amos' exercise of right of entry.

7. Daily (day and night shift) workload sheets of the crews of affected staff in the Sydney Aircraft Maintenance Group from the 12 month period preceding Mr Amos' exercise of right of entry.

8. Documents or records containing a risk assessment of the changes to crew structures in the Sydney Aircraft Maintenance Group.

9. Documents or records attributing an accident, incident or maintenance error in whole or in part to a lack of supervision in Qantas Engineering in the in the two year period preceding Mr Amos' exercise of right of entry."

[15] On 2 September 2013, the ALAEA made an application pursuant to s.505 of the Act for an order in relation to a dispute about the operation of Part 3-4 of the Act, which governs right of entry. It seeks an order that Qantas comply with Division 2, Part 3-4 of the Act by allowing Mr Amos access to the categories of documents in dispute.

Relevant Legislation

[16] Section 481 of the Act provides:

"481 Entry to investigate suspected contravention

(1) A permit holder may enter premises and exercise a right under section 482 or 483 for the purpose of investigating a suspected contravention of this Act, or a term of a fair work instrument, that relates to, or affects, a member of the permit holder's organisation:

(a) whose industrial interests the organisation is entitled to represent; and

(b) who performs work on the premises.

Note 1: Particulars of the suspected contravention must be specified in an entry notice or exemption certificate (see subsections 518(2) and 519(2)).

Note 2: The FWC may issue an affected member certificate if it is satisfied that a member referred to in this subsection is on the premises (see subsection 520(1)).

(2) The fair work instrument must apply or have applied to the member.

(3) The permit holder must reasonably suspect that the contravention has occurred, or is occurring. The burden of proving that the suspicion is reasonable lies on the person asserting that fact.

Note: A permit holder who seeks to exercise rights under this Part without reasonably suspecting that a contravention has occurred, or is occurring, is liable to be penalised under subsection 503(1) (which deals with misrepresentations about things authorised by this Part)."

[17] Section 482 of the Act provides:

"482 Rights that may be exercised while on premises

(1) While on the premises, the permit holder may do the following:

(a) inspect any work, process or object relevant to the suspected contravention;

(b) interview any person about the suspected contravention:

(i) who agrees to be interviewed; and

(ii) whose industrial interests the permit holder's organisation is entitled to represent;

(c) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, any record or document (other than a non-member record or document) that is directly relevant to the suspected contravention and that:

(i) is kept on the premises; or

(ii) is accessible from a computer that is kept on the premises.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the Privacy Act 1988.

(1A) However, an occupier or affected employer is not required under paragraph (1)(c) to allow the permit holder to inspect, or make copies of, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

Meaning of affected employer

(2) A person is an affected employer, in relation to an entry onto premises under this Subdivision, if:

(a) the person employs a member of the permit holder's organisation whose industrial interests the organisation is entitled to represent; and

(b) the member performs work on the premises; and

(c) the suspected contravention relates to, or affects, the member.

Meaning of non-member record or document

(2A) A non-member record or document is a record or document that:

(a) relates to the employment of a person who is not a member of the permit holder's organisation; and

(b) does not also substantially relate to the employment of a person who is a member of the permit holder's organisation;

but does not include a record or document that relates only to a person or persons who are not members of the permit holder's organisation if the person or persons have consented in writing to the record or document being inspected or copied by the permit holder.

Occupier and affected employer must not contravene requirement

(3) An occupier or affected employer must not contravene a requirement under paragraph (1)(c)."

[18] Section 505 provides:

"505 FWC may deal with a dispute about the operation of this Part

(1) The FWC may deal with a dispute about the operation of this Part (including a dispute about whether a request under section 491, 492 or 499 is reasonable).
Note: Sections 491, 492 and 499 deal with requests for permit holders to use particular rooms or areas, and comply with occupational health and safety requirements.

(2) The FWC may deal with the dispute by arbitration, including by making one or more of the following orders:

(a) an order imposing conditions on an entry permit;

(b) an order suspending an entry permit;

(c) an order revoking an entry permit;

(d) an order about the future issue of entry permits to one or more persons;

(e) any other order it considers appropriate.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a
recommendation or expressing an opinion (see subsection 595(2)).

(3) The FWC may deal with the dispute:

(a) on its own initiative; or

(b) on application by any of the following to whom the dispute relates:

(i) a permit holder;

(ii) a permit holder's organisation;

(iii) an employer;

(iv) an occupier of premises.

(4) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

(5) In dealing with the dispute, the FWC must not confer rights on a permit holder that are additional to, or inconsistent with, rights exercisable in accordance with Division 2 or 3 of this Part, unless the dispute is about whether a request under section 491, 492 or 499 is reasonable."

The Issues in Dispute

[19] The ALAEA asserts that its request for access to the specified documents is in accordance with sections 481 and 482 of the Act and it therefore has the right to access the documents.

[20] Qantas contends, in a series of cascading arguments, that the ALAEA has not demonstrated that it had a reasonable suspicion that Qantas had an obligation to consult under clause 47 of the Workplace Determination and has failed to discharge any such obligation because:

- the only major change covered by clause 47 was the reduction in numbers in 2012, not the consolidation of crews in 2013;
- even if the crew consolidation was a major change, it did not have any significant effects on employees;
- even if the crew consolidation was a major change that had significant effects on employees, the ALAEA has not established that it was reasonable to suspect that Qantas had not consulted in relation to the decision;
- the Commission should nevertheless refuse to order the provision of the specified documents for various reasons including the width of the requests, the inclusion of non-member records, relevance, and the broadening of categories since the issuing of the entry notices.

[21] It is convenient to consider these issues by reference to the Qantas arguments.

Was the Consolidation of Crews a Major Change?

[22] Qantas submits that the decision in May 2013 to rebalance the crews was not a major change contemplated by clause 47 of the Workplace Determination. Rather, the rebalancing arose from the 2012 redundancies, (which did involve major change and was subject to extensive consultation). Qantas submits that the rebalancing of crews is properly characterised as the exercise of a right to adjust shifts under clause 24.4.5 of the Workplace Determination.

[23] The ALAEA contends that the changes fall within the description of major changes, although it approaches the matter more on the basis of the composite phrase in the Agreement (major changes that are likely to have significant effects) rather than viewing major change as a discrete requirement for the clause to have operation.

[24] The wording of clause 47.1 invokes the obligations of notification and consultation when Qantas has made a definite decision "to introduce major changes, including changes in minor ports, production, program, organisation, structure or technology that are likely to have significant effects on employees.." The term "significant effects" is then defined, by way of inclusion, by reference to specified effects that include "the elimination or diminution of job opportunities, promotion opportunities or job tenure." At the conclusion of the definition is an exclusion of matters otherwise dealt with in the Workplace Determination.

[25] Clause 47 is a very standard type of clause that has been included in awards and agreements for very many years arising from the 1984 Termination, Change and Redundancy decisions[1] A reading of those decisions discloses that, as originally formulated, the main context of major changes was the introduction of new technology, although it is obviously not confined to that context. In its supplementary decision the Full Bench of the Australian Conciliation and Arbitration Commission said that where an award already makes provision for alteration of any matters, such as changing shift rosters, the existing award provision should prevail and the alteration should not be included in the definition of "significant effects". This notion is reflected in the final sentence of the definition of "significant effects" in the Workplace Determination.

[26] In my view the manner in which clause 47.1 is structured, explained from its origins in a standard award provision, supports an approach to interpretation that encompasses the full expression of "major changes that are likely to have significant effects" rather than breaking it up into discrete elements. The specific reference to organisation and structure implies that any such change will be a major change. However, in my view the better approach to applying the clause is to look at the concepts in a composite manner. I consider that the clause should be interpreted in a practical manner, and not in a narrow technical way, given that it is the trigger for consultation obligations and ought to be interpreted with that context in mind.

Did the Consolidation of Crews have a Significant Effect on Employees?

[27] I approach this question with reference to the composite requirement of major changes that are likely to have significant effects on employees. Qantas submits that the consolidation of crews is integrated with the allocation of shifts and is governed by clause 24.4.5, and in any event, the effects on employees are not significant. The ALAEA submits that the reduction in the number of crews and the increase in size of crews have had the clear effect of decreasing

the number of permanent senior LAME roles - thereby eliminating or diminishing opportunities for these roles permanently.

[28] In my view there is an element of artificiality in the notion that the changes in composition of the crews arose from the redundancies but were not part of the decision to make the redundancies. A more realistic view is that the changes in composition of crews was a likely consequence of the redundancies themselves that should have been contemplated when the redundancies were being considered and discussed through the redundancy consultation process. The ALAEA contends that the redundancy consultation process is still ongoing. Qantas says that it was concluded and the redundancy decision has been implemented. In my view, and the consequences of the redundancies are not confined to the employees who leave the organisation. Crew consolidations were not discussed during this phase, but with the benefit of hindsight, they appear to be a consequence of the redundancies.

[29] If the decision to consolidate crews is viewed as a subsequent decision, and applying a practical approach to the phrase in the Workplace Determination, I consider that the changes in the structure and size of crews fall within the description of "major changes..including changes in ...organisation, structure ... that are likely to have significant effects on employees." Although there will not be a reduction in entitlements of senior LAMEs, the lesser utilisation of their supervisory roles and the reduced opportunity for promotion into such roles is not an insignificant matter for the employees concerned. I am therefore of the view that an obligation to consult with employees was triggered by the decision to consolidate the crews.

Was it Reasonable to Suspect that Qantas did not comply with its Consultation Obligations?

[30] This requirement arises from the terms of the right of entry provisions of the Act. The party that asserts that the permit holder reasonably suspects that a contravention occurred has the burden of proving that the suspicion was reasonable.[2]

[31] The ALAEA approaches this matter by reference to the consultation obligations that arose from the decision to implement redundancies in 2012 and that consultation about the redundancies and their effects was ongoing at the time of this dispute. As I have indicated above I have difficulty with this view as I consider that there must be a logical process whereby consultation is triggered by a definite decision and concludes when the decision is confirmed, modified or abandoned. On any view the decision to make redundancies was confirmed and implemented in 2012 or in early 2013 at the latest. The May 2013 decision to consolidate crews, including the method by which this was to be done, was a subsequent decision.

[32] In relation to this subsequent decision the ALAEA states that as a party to the redundancy consultations, and as the crew consolidation arose from the redundancies, Qantas was under an obligation to consult with the ALAEA. Further, it submits that in consulting with employees about the crew consolidation, it appears that employees were not notified of the reduction in promotional opportunities inherent in the proposal.

[33] Qantas submits that the circumstances do not support a conclusion that there were facts in existence to induce the relevant state of mind of a suspected breach in a reasonable person. It submits that it could only put proposed crew changes to employees once the redundancy process was complete and it did so in a series of emails from May 2013. It submits that the likelihood of a reduction in opportunities for LAMEs to act in supervisory roles was an obvious effect that did not need to be made explicit.

[34] Again it is necessary to adopt a practical approach to this criterion. When the ALAEA learned of the effect of reduced promotional opportunities arising from the crew consolidation, probably at the meeting between Mr Purvinas, Mr Tobin and Ms Bussell on 25 June 2013, it appears to have viewed this information with an element of surprise. That it was not made aware during the redundancy consultation process or by way of specific advice after the crew consolidation decision was announced in May 2013, obviously caused some concern to Mr. Purvinas. In my view the circumstances did give rise to a reasonable suspicion that a contravention in the consultation obligations had occurred, and therefore did provide a foundation for exercising a right of entry to inspect documents regarding the consultation processes. That is not to say that the allegation of contravention is a strong one. The right of entry arises from a subjective view of reasonable suspicion of contravention and in my view that threshold was reached in this case.

Should Qantas be ordered to provide the ALAEA Access to the Disputed Documents?

[35] Having found that a right of entry to access relevant documents arose in the circumstances, I turn to consider whether the documents sought by the ALAEA were required to be produced. I do this by reference to the classes of documents in the right of entry request.

[36] The first category was: "Documents or records which formed part of the notification to, and consultation with, the affected staff including responses Qantas provided to any questions employees raised and a [sic] document or record recording how Qantas notified and consulted with each affected staff member." Qantas submits that it has provided the ALAEA with some documents, other documents include correspondence regarding personal circumstances, but it is willing to provide records with respect to ALAEA members if a list of such members is provided. The ALAEA submits that the records are relevant even though they may apply to persons who are not members and fall outside the category of non member records because the documents substantially relate to members, even though they may relate to non-members as well.

[37] Section 482 of the Act does not entitle access to non-member records or documents as defined in subsection (2A). The basic definition requires satisfaction of two elements. An additional exception to the definition of non-member records is documents that a non-member consents to being provided to the permit holder. It is difficult to determine whether a particular document falls within the definition without viewing it specifically. The notion advanced by Qantas that a document can be provided if the ALAEA shows that it relates to an employee who is a member suggests that there are documents that are confined to particular individuals. I propose on an interim basis that Qantas provide documents falling within this category with respect to employees on a list to be provided by the ALAEA of employees who are either members of the ALAEA or who have consented to the documents being provided to the permit holder. I reserve the right of the ALAEA to renew its request for additional

documents after the documents I propose to be provided are provided in accordance with this decision.

[38] The second category is "weekly rosters and daily workload sheets of affected staff for the previous 12 month period." Qantas provided worksheets for a 3 month period in 2013, and submits that no reason is advanced for providing further documents for the previous 12 months. It submits that worksheets cover employees covered by different instruments and needs to address privacy issues but it is prepared to provide long term rosters for ALAEA members if a list of members is provided by the ALAEA. The ALAEA submits that it seeks this information to ascertain the number of senior LAME positions in the relevant periods. I propose to adopt the same approach as the first category. Rosters are to be provided with respect to employees who are either members of the ALAEA or have consented to the information being provided to the permit holder on a list to be provided by the ALAEA. If this information is insufficient I reserve the right of the ALAEA to renew its request for any additional documents.

[39] The third category is "any documents or records demonstrating a risk assessment of the changes to crew structures." Qantas submits that any such documents are not relevant to the purpose of the request. I consider that given the conclusions I have reached above, if any such documents do exist, they are capable of being relevant and should be provided.

[40] The final category is "any document or record attributing an accident, incident or maintenance error to a lack of supervision within the last two years." Qantas submits that such a category is not relevant to the purpose of the request. I disagree. The changes regarding crew sizes relate generally to supervision and could relate to the appropriateness of consultation over these issues. I consider that any documents in this category should be provided.

[41] As to additional documents identified in the final order, I consider that the ALAEA should follow appropriate processes before seeking orders with respect to such documents.

Conclusions

[42] For the above reasons I believe that certain documents sought by the ALAEA via its right of entry notices should be provided by Qantas subject to some limitations identified in the decision. I ask that the ALAEA submit a draft order to reflect the conclusions reached in this decision. I reserve the right of the ALAEA to seek further documents sought in its final proposed orders following appropriate steps under the right of entry processes.

VICE PRESIDENT WATSON

Appearances:

Mr S Purvinas on behalf of the Australian Licensed Aircraft Engineers Association.

Mr R Dalton of Counsel and *Ms T Lumsdaine* on behalf of Qantas Airways Limited.

Hearing details:

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Final written submissions:

Mr L Amos, 5 and 26 November 2013.
Mr R Dalton, 19 November 2013.

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[1] [1984] 8 IR 34; [1984] 9 IR 115.

[2] s.481(3).