

SOUTH AUSTRALIAN EMPLOYMENT TRIBUNAL

AUSTRALIAN FEDERATION OF AIR PILOTS

v

CORPORATE AIR CHARTER PTY LTD

JURISDICTION: South Australian Employment Court
Fair Work Act 2009

CASE NO: ET-22-05743

HEARING DATES: 29 May 2023

DECISION OF: His Honour Deputy President Lieschke

DELIVERED ON: 17 July 2023

CATCHWORDS:

*Whether stand-by duty was work under the Air Pilot's Awards – Whether rostered stand-by duty was a duty of employment – If so, whether an entitlement to payment for performing this duty - **Held:** Stand-by duty is work recognised by the Award and contract – Contract subject to Award in any event – Entitlement to payment for stand-by overtime – No averaging of weekly hours of work permitted – Hourly rate of payment is the pro rata amount of the total annual remuneration provided by the Award – Further hearing required to determine quantum*

Air Pilots Award 2010 and 2020

REPRESENTATION:

Applicant: Mr J Marks
Respondent: Mr N Floreani KC & Mr J Ong
Solicitors
Applicant: n/a
Respondent: Employsure Law

- 1 Ms Pulaska was employed as a Pilot between 19 March 2018 and 28 January 2022 by Corporate Air Charter Pty Ltd (CAC).
- 2 The applicant union seeks orders for payment of substantial unpaid wages and consequential entitlements to Ms Pulaska.
- 3 The claim is of payment for performing overtime duties of rostered stand-by. That is, for the work of performing rostered duties at the employer's request beyond 38 hours a week. The claim asserts the paid salary was below the Award minima throughout the period of employment, and so payment is owing for the overtime at ordinary time rates under the Award, in addition to any salary shortfalls.
- 4 The non-payment for these duties is alleged to be in breach of the *Air Pilots Award 2010* and *2020* (the Award) and thereby a contravention of s 323 of the *Fair Work Act 2009*.
- 5 By separate proceedings the applicant seeks the imposition of pecuniary penalties against the respondent and its principal Chris Anglberger for the alleged s 323 contravention. That application has been adjourned until the present application has been determined.
- 6 The claim is that the performance of stand-by duty is expressly recognised by cl 15 of the Award as work, and that it is a contractual duty or function that must be performed when requested.
- 7 The contractual context is a written contract of employment for full-time employment, that required the performance of all "duties and functions"¹ reasonably requested by the employer. The contracted duties and functions were not specified in the contract. All of Ms Pulaska's variable hours of work, including stand-by duty, were "scheduled on a roster".²
- 8 The respondent denies that stand-by duty is recognised by the Award as paid work. It argues the Award does not permit paid overtime because there is no penalty rate for overtime hours and no express provision allowing overtime.
- 9 The respondent both denies that stand-by duty is a contracted work duty or function and accepts it did require stand-by duty to be performed according to its rosters. It accepts that Ms Pulaska at times performed stand-by duties after she had already performed 38 hours of work in a week, in accordance with her contractual obligations. However, it denies that performing rostered stand-by duty after 38 hours of other duties in a week is recognised by the contract as paid work. The respondent does

¹ Cl 5(a)

² Cl 8.1

however accept that performing rostered stand-by hours in the first 38 hours of work each week is paid duty.

- 10 If stand-by duty is work under the Award, the respondent next submits the paid annual salary still exceeds the additional Award payment for that duty, and the excess can be set-off against the unpaid overtime. On the other hand, the applicant submits the paid salary was below the Award minima in each period and denies a contractual right to any set-off.
- 11 The respondent maintains an argument that it has a right to average all hours of work over 26-week periods, according to the National Employment Standards (NES). It appears this averaging process also includes not recognising 38 hours of work in weeks when stand-by was rostered within the 38 hours, or when no duty was rostered for part of ordinary weekly hours for business reasons. The result of this approach is very little overtime.
- 12 That submission must be rejected as it is plainly incorrect. It has no basis in the NES of the *Fair Work Act 2009*. Section 64 of the Act does permit a genuine written agreement to average the hours of work over a period up to 26 weeks, but only for award free employees. Here the respondent has always correctly accepted that the Award applied, as it stated in its proposed contract of employment. Nor was there any type of written averaging agreement.
- 13 I observe this is a different question to whether the Award permits the averaging of hours of work over more than one week. Clause 15.2 limits the ordinary hours of work to no more than 38 a week on average, subject to certain exceptions. These may include some CASA approved averaging periods, but none applied to this employment. Therefore, the Award limits ordinary hours of work to 38 each week. It also sets 38 as the minimum weekly hours for Ms Pulaska as a full-time employee, irrespective of what duties may have been allocated.
- 14 At the hearing of the claim the parties presented an agreed position of only seeking a ruling on what were described as the 'liability' issues, with quantum issues to be dealt with later if necessary. This approach was unfortunate as important liability issues raised by the respondent's alternate defence were not argued. These included: (a) what was the monetary difference between the salaries paid from time to time and all the corresponding Award entitlements, (b) what hours of stand-by overtime were worked (c) whether there was a contractual obligation to work more than 38 hours for the agreed salary, and (d) whether there was a set-off clause in the contract.
- 15 The issues for present determination are whether the stand-by duty is work recognised by the Award, or a duty of the employment contract. If stand-

by duty is work or duty under either the Award or contract, what is the correct rate of payment for that work.

Circumstances of employment

- 16 In determining the application, I have had regard to the unchallenged factual assertions contained in the affidavits of Ms Pulaska, the respondent's Chief Pilot Stephen Stratford and Chris Anglberger regarding the work arrangements, but not their opinions about the issues raised by the claim. An affidavit from Lachlan Gray was also received, but it did not contain any factual material relevant to the present issues.
- 17 Ms Pulaska was employed in the role of Captain of a Beechcraft King Air B200 twin engine aeroplane in the claim period. It is agreed that under the Award Ms Pulaska was entitled to the minimum salary, annual allowances and conditions for the classification described as Captain Multi engine 5560 kg UTBNI 8500 kg.
- 18 The applicable rates are entitlements provided by Schedule A – Classifications, Minimum Salaries and Additions to Salaries³, cl 20 Allowances, and cl 21 Accident pay. These include the A.1.1 minimum salary and the A.1.3 additions for flying a turbo-prop aircraft and using a Command or Class 1 instrument rating. The annual allowances include loss of license allowance, and an amount for accident insurance. The Award also provides for annual leave loading, which was not paid by the respondent.
- 19 Six weeks into the employment Ms Pulaska was given a written contract to consider and sign. She agreed to its terms. This instructed her to “perform such duties and functions for the Employer as management may reasonably request”,⁴ and to “devote the whole of your time, attention, skills and ability to the performance of your obligations under the Contract whenever you are required to be on duty.”⁵ Clause 5 (f) required her to “comply with all reasonable requests to perform any additional duties.”
- 20 The contract relevantly included cl 8 Hours of Work, which specified that the hours of work will be scheduled on a roster. The rosters included specified periods of stand-by. All rostered duties, including stand-by had to be reported to CASA via an electronic system.
- 21 Ms Pulaska's employment included performing the tasks of “flight planning, checking aircraft airworthiness, ordering fuel, standby,

³ Consistent with the parties' submissions I have adopted the numbering of the 2020 Award, noting the text of the relevant clauses did not change during the claim period.

⁴ Clause 5(a)

⁵ Clause 5(c)

passenger briefing, loading and unloading baggage, cleaning aircraft and administrative duties.”⁶

- 22 Ms Pulaska states the respondent’s requirements for stand-by were that she had to be ready to be called into the workplace, in full uniform, at any time within the rostered period and prepared to undertake a tour of duty. She had to answer her phone while on stand-by to respond to work related calls. She had to arrive at the workplace as soon as possible after being called-out, with a maximum response time of two hours. Ms Pulaska was often encouraged by the respondent’s Operations Manager to, and did, rest as much as possible so she would be fresh and rested in the event of being called-out.
- 23 When performing rostered stand-by Ms Pulaska would commonly receive phone calls from the respondent’s Operations Manager to discuss possible upcoming flights, with instructions for her to check the weather and do flight planning. She would occasionally be called by other staff when on stand-by about payload capacity for particular flights, whether a new route could be serviced, how to conduct a multi-leg charter, about aircraft maintenance or repair issues she had reported, or about the status of fuel and aircraft she last flew.⁷
- 24 Short duration tasks of dealing with these phone calls and preparatory flight planning was not recorded by either party as a ‘duty’ in addition to stand-by, and so was not required to be logged to CASA.
- 25 Stand-by duty significantly impacted on Ms Pulaska, as she had to correspondingly curtail her personal activities.
- 26 Mr Anglberger does not disagree with Ms Pulaska’s description of the stand-by and other duties.⁸
- 27 The respondent’s Chief Pilot is Stephen Stratford. He attests to being aware of the CASA regulation, described as Civil Aviation Order 48.1, that defines stand-by as a period of time in which a flight crew member is required to hold themselves available for performing duties while they have access to suitable sleeping accommodation and are free of all other duties of employment. He agrees all stand-by duty hours are reported to CASA for the purposes of compliance with fatigue management rules. But he does not consider stand-by duty to be duty hours or work when he prepares rosters for the respondent’s staff.⁹

⁶ Applicant’s submissions, [3].

⁷ Affidavit, 14 April 2023, paras 35 & 36.

⁸ Affidavit, 26 April 2023.

⁹ Affidavit, 26 April 2023, para 25.

- 28 Mr Stratford does not disagree with Ms Pulaska's description of the terms of the stand-by duty she performed, or with what she was asked to do, or did while rostered on stand-by.

The Award

- 29 Clause 15 'Hours of work, days off and rest periods', and cl 16 'Rostering', of the 2020 Award at the time of employment are set out below.

15.1 ...

15.2 Hours of work, days off and rest periods will be determined in accordance with the following provided that ordinary hours of work must not average more than 38 per week:

(a) the regulations approved by CASA from time to time;

(b) general or employer-specific exemptions to, or concessions under, the regulations approved by CASA from time to time; or

(c) a Fatigue Risk Management System (FRMS) that has been developed by the employer after consultation with the affected pilots and/or their representatives and approved by CASA to apply to particular employers and employees.

15.3 Where a pilot works in accordance with clause 15.2(a) the following provisions will apply.

(a) A pilot will not fly and the employer will not roster the pilot to fly in excess of 100 hours in 30 consecutive days.

(b) A pilot will not fly and the employer will not roster the pilot to fly as a flight crew member in excess of 900 hours in 365 consecutive days. A pilot engaged in flight instruction will not be required to exceed six hours of flight instructional flight time in any tour of duty.

(c) The flight time in a tour of duty already commenced may be extended to the maximum prescribed by the limitations in CAO 48, CAO 48E, or an approved FRMS.

(d) Where an extension occurs the pilot will receive a rest period on the ground of not less than:

(i) nine consecutive hours which will include the hours between 2200 and 0600 local time, plus one additional hour for each 15

minutes or part thereof by which the pilot's flight time exceeded eight hours; or

(ii) 10 consecutive hours plus one additional hour for each 15 minutes or part thereof by which the flight time exceeded eight hours.

15.4 One or two pilot operation

Clauses 15.6 to 15.7 apply to circumstances where an employer is operating a one or two pilot operation in accordance with clause 15.2(a).

15.5 Reserve time

(a) A pilot on reserve or stand-by duty will be contactable within any scheduled reserve duty period and will report for the appointed duty no later than two hours after being contacted. The employer will specify reserve duty period commencement and finishing times which will be as agreed between the employer and the majority of pilots but the duration of such reserve duty periods will not exceed 11 hours.

(b) On any day a rostered tour of duty will not be immediately preceded by or immediately followed by a period of reserve duty.

15.6 Periods of duty

The weekly duty period will normally consist of five days' duty and two consecutive days free from all duty. By mutual agreement between the pilot and the employer one day free of duty can be deferred. Where a day has been deferred a substitute day will be granted and taken within 28 days unless further deferred by mutual agreement in writing. For the purpose of rotating the roster one two day period may be reduced to single days in each 28 day cycle.

15.7 Periods free of duty

(a) When a pilot completes the maximum permissible flying or duty hours prescribed in CAO 48 the employer will not require the pilot to perform any further duties whatsoever for the remainder of the relevant period.

(b) The employer will ensure that a pilot is rostered at least one weekend off in each 28 day cycle, where practical.

(c) A pilot on a temporary assignment away from home base may elect to defer duty-free days. The pilot will receive the deferred days off immediately upon return to home base.

(d) A pilot will not be rostered for a tour of duty terminating after 2200 hours on the day preceding the rostered day or days free of duty and will not be rostered to commence duty prior to 0600 hours on the day following the day or days free of duty.

(e) Where a tour of duty, rostered to terminate before 2200 hours on the day preceding the day or days rostered free of duty, is extended by delays so that it terminates after 2200 hours, the pilot will be regarded as having worked on a day off. In those circumstances clause 15.7(h) applies, except where a pilot receives six or more calendar days free of duty in any fortnight standing alone.

(f) Where a tour of duty is cancelled and the pilot has been notified of the cancellation by 1900 hours on the preceding day, then the day of the cancellation may be regarded as a day off.

(g) If a tour of duty scheduled to commence after 1200 hours is cancelled, and the pilot has been notified of the cancellation by 2000 hours on the preceding day, then the day of the cancellation may be regarded as a day off.

(h) A pilot will not be required to work on a rostered duty-free day. In the event of unforeseen circumstances an employer may request a pilot to work on a rostered duty-free day. If a pilot agrees to work:

(i) a substitute duty-free day will be arranged within a month of the day worked; and

(ii) the pilot will receive an additional amount of 12.4% of the [standard rate](#) for each day worked.

(i) When a pilot on assignment away from home base is not required for duty on any rostered duty day, such day will not be deemed to be a day off.

(j) A tour of duty or period of reserve time at home will be preceded by a rest period on the ground of at least:

(i) nine consecutive hours embracing the hours between 2200 and 0600 local time; or

(ii) 10 consecutive hours.

(k) When an aircraft is scheduled to arrive at such a time that the pilots would be free of duty not later than 2200 hours local time and the aircraft is delayed beyond that time, the nine hour rest period prescribed may be commenced up to 2300 hours local time, provided the succeeding tour of duty does not exceed six hours.

(l) An employer will not roster a pilot for a tour of duty in excess of 11 hours. Where a tour of duty has commenced it may be extended to 12 hours.

(m) Where an extension occurs the pilot will receive a rest period on the ground of not less than:

(i) nine consecutive hours which will include the hours between 2200 and 0600 local time, plus one additional hour for each 15 minutes or part thereof by which the tour of duty time exceeds 11 hours; or

(ii) 10 consecutive hours plus one additional hour for each 15 minutes or part thereof by which the tour of duty time exceeded 11 hours.

(n) Where a tour of duty already commenced exceeds 12 hours or the flight time exceeds nine hours the pilot will have, at the completion of the tour of duty, a rest period of at least 24 consecutive hours.

(o) Where a pilot has completed two consecutive tours of duty, the aggregate of which exceeds eight hours flight time or 11 hours duty time, and the intervening rest period is less than:

(i) 12 consecutive hours embracing the hours between 2200 and 0600 local time; or

(ii) 24 consecutive hours, if not embracing the hours between 2200 and 0600 local time, the pilot will have a rest period on the ground of at least 12 consecutive hours embracing the hours between 2200 and 0600 local time or 24 consecutive hours, prior to commencing a further tour of duty.

(p) When an aircraft is scheduled to arrive at such a time that the pilot would be free of duty not later than 2200 hours local time and the aircraft is delayed beyond that time, the 12 hour rest period may be commenced up to 2300 hours provided that the succeeding tour of duty does not exceed six hours.

(q) A pilot will not commence a flight and an employer will not roster the pilot for a flight unless during the seven day period terminating coincident with the termination of the flight the pilot has been relieved from all duty associated with the employment for at least one continuous period embracing the hours between 2200 and 0600 on two consecutive nights.

(r) The employer will not roster a pilot to fly when completion of the flight will result in the pilot exceeding 90 hours of duty of any nature associated with the employment in each fortnight standing alone. For the purpose of this clause, duties associated with a pilot's

employment include reserve time at the airport, tour of duty, deadhead transportation, administrative duties and all forms of ground training. The operator will designate the day on which the first of the fortnightly periods will start.

15.8 Facilitative provision

Clauses 15.3 to 15.7 may be varied by agreement between the employer and a majority of the employees in the workplace or part of it.

16. Rostering

16.1 Clause 16 does not apply to employees engaged in aerial application operations.

16.2 Rosters of pilots will be compiled to cover a minimum 14 day period and published not less than seven days prior to the commencement of the roster period.

16.3 Each roster will specify in detail each pilot's duty days and duty periods, stand-by duty, reserve duty days and periods free of duty and leave periods.

16.4 A pilot's rostered duty-free days may only be altered with the consent of both parties.

16.5 Any alterations to rosters will be advised in writing to the affected pilot(s) as early as practicable.

16.6 A pilot must not be displaced from their rostered duty period except for the following reasons:

- (a) disruptions to service;
- (b) checking and training;
- (c) cancellation of a flight; or
- (d) the pilot has insufficient hours to complete a flight.

16.7 The employer may grant exchange of flying and/or day-to-day flights between pilots upon request of the pilots concerned, provided

that a pilot's ability to complete their subsequent flying within the roster period will not be reduced as a result.

16.8 The employer must make every endeavour to keep a pilot in their (designated) rostered duty period.

Applicant's submissions

- 30 The applicant submits the Award specifically includes and regulates stand-by and reserve duty as a type of work performed by pilots. Stand-by and reserve duty is defined by cl 15.5. The duties have the same conditions, and the terms are interchangeable. The definition is consistent with Ms Pulaska's stand-by obligations and the CASA regulations. Stand-by is clearly distinguished from duty free periods. Rosters must specify stand-by duty as distinct to periods free of duty: cl 16.3. Clauses 15 and 16 together indicate stand-by duty is a type of work included in the Award's concept of 'work'.
- 31 No provision is needed to restate the obvious common law principle that all work performed at an employer's request is to be paid for. That is irrespective of whether it is performed after 38 hours of other work in a week or after an average of 38 hours is worked over a longer period, if averaging is permitted.
- 32 The absence of a penalty rate for overtime means no more than the Award does not require a higher rate of payment for overtime. The fallacy of the respondent's argument is demonstrated by the absence of weekend penalty rates in the Award. If the respondent was correct, the Award would not require payment for any work on a weekend.
- 33 The absence of a specified hourly rate for full-time employees is not a prohibition on working overtime or an indicator it is intended to be unpaid work. An hourly rate can be calculated in direct proportion to the annual salary, and some hourly rates are in fact specified in the Award.
- 34 Further, the Award was varied in March 2023 to include a written form for recording agreement between an employer and employee to take paid time off instead of being paid for worked overtime. This variation did not introduce a new right to payment for overtime, just a form to accurately record agreement to a different form of valuable consideration for performing overtime hours. While this variation was after the claim period, it confirms the Award did not previously prohibit working or being paid for overtime.

Respondent's submissions

- 35 The respondent's primary submission is that performing rostered stand-by duties is neither a duty of the employment contract nor recognised as work under the Award.
- 36 If this submission is incorrect, the respondent next submits there is no contractual or Award entitlement to be paid for any overtime or stand-by because neither the contract nor the Award make express provision for payment for overtime or for working stand-by duty. Ms Pulaska's actual performance of the rostered stand-by obligations is submitted to be irrelevant absent an express payment clause for stand-by duty in the Award, and provided the additional hours are not unreasonable according to s 62.
- 37 The submission of no entitlement to payment for any overtime necessarily applies to all types of duty, including flying and all other duties to be performed on a tour of duty as described by Ms Pulaska.
- 38 The respondent submits that despite the cl 15.2 limit on ordinary hours of work, the minimum salaries for full-time employees under the Award are intended to be the full payment for performing 38 hours plus an unspecified number of additional hours in a week,¹⁰ limited only by those additional hours not being unreasonable or by CASA regulations.
- 39 The respondent submits the position under the contract is the same, namely that the paid salary was intended to cover all duties, including stand-by if it is correctly regarded as a duty of the employment contract. The respondent accepts this submission depends on proving the paid salary at least matched the total corresponding Award remuneration for the full-time position plus the overtime.
- 40 The respondent also points to the uncertainty of how an hourly rate is derived from the Award.

Consideration

- 41 The competing submissions about the sufficiency of the paid salary and the existence of a set-off raise issues related to quantum that are beyond the scope of this determination.
- 42 The first question is does the Award recognise stand-by as paid work, whether performed within ordinary hours or as overtime, and did Ms Pulaska perform it. If so, the contract is subject to the Award payment obligations and the quantum issues become central.

¹⁰ Tr 24

- 43 If the Award does not require payment for this duty, the next question is whether the contract of employment objectively includes the performance of rostered stand-by as a duty of employment.
- 44 The principles for construing awards are not in dispute and so do not need to be summarised.
- 45 Stand-by and stand-by duties are used interchangeably by the parties. Both expressions describe the set of tasks and obligations the respondent asked Ms Pulaska to perform according to its schedule. The respondent does not dispute it is the same concept described in the Award as stand-by duty, or by the CASA regulations as stand-by. There is no significance to whether the word ‘duty’ is added to stand-by. It is the nature of the obligations imposed on the employee by the stand-by that are important.
- 46 I agree that the terms stand-by duty and reserve duty have the same meaning in the Award and are used interchangeably. I infer reserve duty is when a pilot is rostered as a reserve or substitute pilot to be recalled for a tour of duty or other duty if the rostered pilot becomes unavailable. Stand-by is where the employer does not require a reserve pilot but may require a pilot at very short notice, as in the case of urgent organ transplant flights sometimes performed by Ms Pulaska. As there is no reserve duty obligation in the present case I will only refer to stand-by duty.
- 47 The plain meaning of the ‘Reserve time’ provision of the Award is that an employee is performing stand-by duty when they agree to being personally available to report at the workplace within two hours for other duty that may extend beyond the stand-by period. That is the basic stand-by duty.
- 48 The Award uses the term work to generally describe the different types of duty covered by it. Hence the cl 15 heading ‘Hours of work’, and the cl 9.4 requirement for pattern and days of ‘work’ to be agreed for part-time employees.
- 49 The Award includes reference to the following types of work: a tour of duty, flying time, stand-by duty, reserve duty, engineering duties, deadhead transportation, administrative duties, ground training, “duty of any nature associated with the employment” and “reserve time at the airport”¹¹.
- 50 In addition to the Award references submitted by the applicant, it is significant that periods of stand-by duty are limited to 11 hours, and that a rostered tour of duty cannot immediately precede or immediately follow a period of stand-by: cl 15.5. Clause 15.7 includes other regulation of stand-by duty for the purpose of ensuring certain periods are free of all duty,

¹¹ Cl 15.7(r)

likely for fatigue risk management purposes. Examples are subclauses 15(a), (c), (d), (e), (h), (j), (n), (q) and (r).

- 51 In contrast to the various duties, the Award describes rest periods as ‘days free from all duty’, periods of no ‘further duties whatsoever’, ‘duty free days’, ‘day off’, ‘rest period on the ground’, or ‘leave’.
- 52 While there are some subtleties to the rules for rest periods associated with some duties, the Award clearly describes stand-by duty as a work duty performed by pilots.
- 53 Further support for the applicant’s construction derives from the CASA flying time restriction of 100 flying hours in 30 days. This necessarily means other types of duty are intended to be rostered to make up the 152 ordinary hours over 28 days. The Award inclusion of duties other than flying time in this context implies those duties may constitute part of the ordinary full-time hours in addition to flying time.
- 54 I find Ms Pulaska performed the basic stand-by duty as well as additional work tasks during the rostered period, as described above. The additional duties put beyond any doubt that she was performing stand-by duty for the whole time she was complying with the rosters. I observe that these extra duties were not necessary for the rostered periods to qualify as stand-by duty under the Award.
- 55 I agree that the absence of a clause providing a penalty rate for working overtime hours does not show an intention to prohibit paid overtime. Not all awards include a penalty rate for overtime. It only means that the minimum rates of pay for overtime are no more than the ordinary minimum rates of pay. I find there is no basis to the respondent’s construction.
- 56 Further, I agree with the applicant’s submission that the Award clearly contemplates paid overtime can be worked. In addition to the new time off in lieu form, cl 5.1 includes ‘overtime rates’ as a topic of ‘individual flexibility agreements’, and a new Schedule E.7.2 does include overtime penalty rates for helicopter aircrew conducting helicopter operations.
- 57 The Award provisions for casual employees are also inconsistent with the respondent’s general submissions. Clause 11.3(e) expressly recognises stand-by duty as part of a period of duty. It treats that duty in the same way as all other non-flying duties. While payment is not made for all hours of stand-by or any other duty besides flying, that is due to use of the much higher casual rate for flying duties, being one eight hundredth of the annual salary.

- 58 As stand-by duty is unambiguously identified as one of a pilot's duties of employment the Award does not need to duplicate its Sch A.1.1 direction that "Full-time pilots ... must be paid at least the following minimum annual salaries." All stand-by duty is paid work under the Award.
- 59 No finding is required about whether the contractual duties included stand-by because the Award prevails over the contract. But I will rule on this point in the event my primary conclusion is incorrect, and this issue become relevant.
- 60 In my view the evidence is incapable of supporting the respondent's submission, and instead fully supports the claim. By performing the rostered stand-by at management's request, and relevantly with full attention, skills and ability, Ms Pulaska was performing a duty or function for the respondent and was thereby fulfilling the work obligations of the contract. It must follow that her stand-by duty was a duty of the employment, for which valuable consideration was promised.
- 61 In my view the hourly rate for stand-by overtime is set in the same manner as for part-time employees. That is to identify "on a pro rata basis" the "equivalent pay and conditions to those of full-time employees: cl 9.3.
- 62 I conclude Ms Pulaska performed rostered stand-by duty that is covered by the Award's minimum pay rates. As the Award salary for Ms Pulaska could not include payment for stand-by duty performed after already working 38 hours of all duty, including stand-by, in a week, she is entitled to payment for the stand-by overtime.
- 63 The dispute will be listed for further hearing of the remaining issues.