

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 110  
3163821

BETWEEN                      SOPHY CHO  
   Applicant  
  
AND                                AIR NEW ZEALAND  
   LIMITED  
   Respondent

Member of Authority:        Peter Fuiava  
  
Representatives:              John Wood and Max Whitehead, advocates for the  
   Applicant  
   Laura Chapman and Jin Park, counsel for the  
   Respondent  
  
Investigation Meeting:        1-2 December 2022  
  
Submissions Received:        6 December 2022 from the Applicant  
   6 December 2022 from the Respondent  
  
Determination:                7 March 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     This is a sad case involving a longstanding employee of Air New Zealand Sophy Cho whose employment commenced on 24 January 1994 and ended on 6 October 2021. At the time of her dismissal, Ms Cho had worked for Air New Zealand as a flight attendant for the better part of 28 years. Her career ended because of her decision not to be vaccinated with the Pfizer/BioNTech COVID-19 vaccine (Pfizer).

[2]     Ms Cho says that her case is about the requirement of an employer to provide an employee with access to information which in her case was information relating to 10 Air New Zealand pilots who were able to get the Janssen vaccine while performing a tour of duty in Los Angeles. Janssen also marketed as Johnson & Johnson is an

alternative to Pfizer. Ms Cho says that in the absence of that information, she was not able to have a conversation with her employer about alternative proposals that could have saved her employment. Ms Cho further says that had she known from Air New Zealand that Janssen was an option that was available, she would have taken it.

[3] While acknowledging Ms Cho's tenure as an employee, Air New Zealand says that Ms Cho's employment was justifiably terminated because she did not meet the requirements of the COVID-19 Public Health Response (Vaccinations) Order (the Order) that applied at the time of her dismissal on 6 October 2021. At that time the only acceptable vaccine under the Order was Pfizer so even if Ms Cho had communicated an interest in Janssen, which Air New Zealand denies that she did, it would not have been able to support her request as to do so would have breached the Order.

[4] It is to be noted that the Order was subsequently amended on 17 October 2021 at 11.59 pm to include Janssen as an acceptable and recognised vaccine. However, the amendment came too late because by then Ms Cho's employment had ended.

### **The Authority's investigation**

[5] For the Authority's investigation written witness statements were lodged from Ms Cho, her long-time friend and partner John Windsor, and Ms Cho's daughter, Hanna Aung. While Ms Aung was not available to speak to her witness statement, it has been taken into consideration. For Air New Zealand, witness statements from cabin crew manager Kylee Paterson and pilot and B787 senior fleet manager Captain David Wilson were provided. All witnesses answered questions under oath or affirmation from myself and the parties' representatives. The representatives also gave oral closing submissions which they have supplemented with written closing submissions.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

## **The issues**

- [7] The issues requiring investigation and determination are:
- (a) Was Ms Cho's dismissal substantively and procedurally justified?
  - (b) Was Ms Cho unjustifiably disadvantaged by Air New Zealand with respect to being told that the Pfizer vaccine was the only acceptable COVID-19 vaccine?
  - (c) At the material time, was Air New Zealand aware of the potential of other COVID-19 vaccines being made available?
  - (d) Was there a disparity in the way Ms Cho and Air New Zealand's pilots were treated and if so, was this a breach of good faith?
  - (e) Did Ms Cho communicate to Air New Zealand her reasons for not taking the Pfizer vaccine as well as her willingness to take a different COVID-19 vaccine if one was available?
  - (f) What is to be made of Air New Zealand's open offer to Ms Cho of being placed on leave without pay to preserve her position?

## **Background**

[8] Ms Cho was employed by Air New Zealand as an international airline flight attendant and in September 2021 was working on its Boeing 787 aircraft. Both parties were signatories to the Mid Haul Collective Agreement and as a member of E tū, Ms Cho's employment agreement included some terms and conditions that had been grandparented from her earlier employment on the now retired Boeing 777s.

[9] In late February 2020, the first community case of COVID-19 in New Zealand was reported. Shortly afterwards, the country moved to Alert Level 4 where it remained for several weeks. In response to the pandemic, the COVID-19 Public Health Response Act 2020 was enacted which enabled the Minister of Health (or the Director-General of Health in specified circumstances) to make vaccination orders. The COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order) came into effect on 30 April 2021 and its purpose was to prevent and limit the risk of COVID-19 spreading through the community by requiring work at certain places to be carried out by "affected persons" who were vaccinated.<sup>1</sup>

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<sup>1</sup> COVID-19 Public Health Response (Vaccinations) Order 2021, cl 3 and cl 7.

[10] The Order covered aircrew members and it is not in dispute that as a flight attendant Ms Cho was an “affected person” who needed to be vaccinated to carry out her work. The vaccination requirements meant that she needed to have received her first Pfizer vaccine by 30 September 2021 and a second vaccination within 35 days. The Order made it an infringement offence for an employer to allow any unvaccinated person to perform an “affected person” role unless a medical exemption under cl 7A was obtained.

[11] From 1 July 2021, Air New Zealand attempted to meet with Ms Cho to discuss the impact and effect of the Order on her employment, but she declined to meet. On 25 August 2021, Air New Zealand wrote to Ms Cho to advise her, among other things, the background and requirements of the Order; its view that her role was covered by the Order; inviting her to a meeting to discuss her vaccination status and whether there were any barriers to her becoming vaccinated that Air New Zealand could assist her with; and set out the potential consequences for her employment from the process.

[12] An attempt by Air New Zealand to meet with Ms Cho on 3 September was postponed at her request to 10 September so that her support person could be present. However, before that meeting could take place, Ms Cho and nine other flight attendants had engaged their now former lawyer who advised Air New Zealand by letter of 6 September 2021 that they did not wish to meet with management individually but as a group and with their lawyer present.

[13] Air New Zealand engaged its own legal counsel who in a letter dated 9 September 2021 expressed his disappointment that that the company was not able to have direct discussions with Ms Cho and her colleagues which would have been a more effective way to respond to their questions and concerns.

[14] Ms Cho’s lawyer raised questions and requested information from Air New Zealand’s counsel which were responded to.

[15] On 28 September 2021, Air New Zealand wrote to Ms Cho care of her lawyer to invite her to a meeting to discuss her vaccination status and possible termination of her employment. The letter included a summary of the vaccination requirements, potential redeployment options and an offer for Ms Cho to observe a period of leave.

The letter foreshadowed that if no redeployment opportunities were identified, and if Ms Cho did not wish to observe a period of leave, then termination with notice was a possibility for her because she would no longer be able to legally fulfil her role.

[16] The letter also recorded that throughout the process, Ms Cho had made it clear that she either did not intend to be vaccinated with Pfizer or that she was not willing to state that she had been vaccinated in accordance with the Order. However, she was advised that Air New Zealand was not lawfully permitted to let affected persons to work unless they were fully vaccinated. Despite this, there remained the option of leave without pay (LWOP) for Ms Cho which would commence once she had exhausted all of her leave entitlements.

[17] On 30 September 2021, Ms Cho had not received her Pfizer injection and consequently under the Order, Air New Zealand could not be permit her to work in her role as a flight attendant.

[18] On 4 October 2021, a meeting between Air New Zealand and Ms Cho, her co-workers, and their lawyer took place via Zoom. The meeting was transcribed into a 17-page document. During the meeting, Ms Cho's lawyer commented that there had been an extension to the vaccination date of 30 September 2021 for some employees and that some pilots had been allowed to fly overseas to receive an alternative vaccine (Janssen). Ms Paterson who attended the meeting stated that anyone working on an aircraft was required to meet the new vaccination deadline of 4 October 2021. There was no further discussion about the pilots and the meeting carried on.

[19] One of Ms Cho's colleagues raised a question during the Zoom meeting stating that she was keen on going on LWOP but wanted to know that if she did so whether some priority would be afforded to her when work became available. She also mentioned in passing that she was keen on an alternative vaccine to Pfizer like Novavax when it too became available. Ms Paterson responded by encouraging the colleague to reach out to her once she had become vaccinated and met the requirements of the Order.

[20] The meeting ended with a discussion around the group coming back with a final decision around LWOP. By letter of 6 October 2021, the group's lawyer advised that, with the exception of the abovementioned colleague (who subsequently did get

vaccinated with Pfizer) Ms Cho and her remaining co-workers would not be taking up the offer of LWOP.

[21] On 6 October 2021, Air New Zealand advised Ms Cho in writing that, in all the circumstances, the appropriate outcome was to terminate her employment. Her employment ended in accordance with the Mid Haul Collective Agreement in place between the parties.

**Was Ms Cho's dismissal substantively and procedurally justified?**

[22] When the Authority considers justification of Air New Zealand's decision to dismiss Ms Cho from employment it does so by applying the test of justification in s 103A of the Act. In determining justification of actions or of a dismissal, the Authority does not consider what it may have done in the circumstances but considers on an objective basis whether the actions of the employer were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[23] As part of this process the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. In a dismissal setting these are whether having regard to the resources available to the employer: the allegations against the employee were sufficiently investigated; whether the employer raised the concerns with the employee before taking action; whether the employer gave the employee a reasonable opportunity to respond to the concerns before taking action; and whether the employer genuinely considered the employee's explanations before dismissing or taking action against the employee. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of minor defects in the process that did not result in the employee being treated unfairly.

[24] Ms Cho does not challenge Air New Zealand's ability to require that a person in her role be vaccinated because this was set by the Order which Air New Zealand was obliged to follow. However, Ms Cho challenges Air New Zealand's process in that it never inquired whether she was prepared to take any other vaccine. If it had engaged in such a conversation with her, Mr Wood submits that it may have learnt about Ms Cho's vaccination history and her reluctance to take the Pfizer vaccine.

[25] Upon questioning Ms Cho, I discovered that she remains unvaccinated against COVID-19 which on its face seems incongruous given that she also claims she would have taken Janssen had she known about it. However, she went on to explain that she does not often leave her home so her risk profile to COVID-19 is substantially lower. For this reason, she appears not to have taken any alternative COVID-19 vaccine to Pfizer and Janssen such as Novavax and AstraZeneca.

[26] During the investigation meeting, Ms Cho stated that as a flight attendant she is vaccinated against other diseases and that she is not “anti-vax”. From her own research she has come to conclude that Janssen is more reliable than Pfizer because it uses more traditional DNA technology rather than the mRNA-based Pfizer vaccine which is relatively new by comparison.

[27] I note that neither Ms Cho nor her former lawyer shared any of this information regarding her concerns with Pfizer with Air New Zealand. Parties to an employment relationship have an obligation to deal with each other in good faith and this includes being responsive and communicative.<sup>2</sup> Ms Cho did not engage with Air New Zealand regarding her COVID-19 vaccination status or her reasons for choosing not to be vaccinated. More importantly, she did not inform Air New Zealand that she would consider an alternative vaccination to Pfizer and neither did she request any further information from Air New Zealand about the possibility of alternative vaccines.

[28] There is a temporal aspect to the s 103A test in that the fairness of an employer’s actions in terminating an employee’s employment must be assessed at the time the termination took place and not at some later point in time and with the benefit of hindsight. As an aircrew member, Ms Cho could not work in her role unless she was vaccinated against COVID-19. Air New Zealand would have committed an infringement offence if it allowed her to work without her being vaccinated. When it became apparent that Ms Cho would not be vaccinated with Pfizer which was the only acceptable vaccine under the Order at the time and that she had declined the offer of LWOP, the only remaining option for Air New Zealand was termination of her employment.

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<sup>2</sup> Employment Relations Act 2000, s 4(1A)(b).

[29] As a matter of process, the correspondence from Air New Zealand's lawyer to Ms Cho and her lawyer was detailed, informative and comprehensive. While Ms Cho says that Air New Zealand could have engaged in a conversation with her about her vaccination status, the assertion is not supported by the documents which show that she was not communicative and responsive concerning her desire to have the Janssen vaccine or a discourse regarding alternative vaccines.

[30] The detailed communications from Air New Zealand to Ms Cho's lawyer make clear that it had considered redeployment opportunities for her but there were none which I find was due to the financial impact of the pandemic on Air New Zealand's business. I was advised by Mr Wilson during his evidence that the company had to park some of its planes in a desert. The option of LWOP was clearly communicated to Ms Cho and was still available to her on 4 October 2021 after the due date of 30 September 2021 for the first vaccination of Pfizer had lapsed. Ms Cho chose not to take up that option and consequently her employment came to an end as she could no longer perform her role because of her unvaccinated status. For these reasons, I find Air New Zealand's decision to dismiss Ms Cho from her employment to be both substantively and procedurally correct.

**Was Ms Cho unjustifiably disadvantaged by Air New Zealand with respect to being told that the Pfizer vaccine was the only acceptable COVID-19 vaccine?**

[31] Ms Cho was not unjustifiably disadvantaged because at the time of her dismissal on 6 October 2021 the Pfizer vaccine was the only acceptable vaccine available under the Order. Air New Zealand was correct in its advice to Ms Cho. It would have been misleading for it to suggest an alternative vaccine to Pfizer because there was no other acceptable vaccine at the material time. As noted above, Janssen was not included under the Order as an acceptable vaccine until 18 October 2021 by which time Ms Cho's employment had ended and with it any good faith obligations her former employer may have had towards her.

**At the material time, was Air New Zealand aware of the potential of other COVID-19 vaccines being made available?**

[32] This issue concerns 10 Air New Zealand pilots who had undertaken amongst themselves to receive the Janssen vaccine during their tour of duty (TOD) to Los Angeles (LA). Mr Wood submitted that in early September 2021, Air New Zealand had learnt some of its pilots were flying to LA to obtain Janssen. Also occurring about

this time were discussions between pilots and the New Zealand Airline Pilots' Association (NZALPA) and the formation of a working group to lobby the Government to change the Order to include Janssen. It was submitted that had Ms Cho been told about these measures that this would have resulted in alternative proposals being made for her.

[33] Air New Zealand does not deny that in or around mid-September, it became aware of some of its B787 pilots while on a TOD to LA had chosen to be vaccinated with Janssen. It was Mr Wilson's evidence that Ms Cho had misunderstood the circumstances in how it was that 10 pilots managed to receive Janssen. Mr Wilson stated that it began with one pilot (Pilot A) who suffered an unrelated medical incident in LA which required him to leave his hotel and visit a hospital. It is understood that it was during Pilot A's hospital visit that he was vaccinated with either Janssen or Moderna and that he had done so in the hope that he would not have to isolate in New Zealand for 14 days upon his return. However, it is understood that the pilot was still required to isolate upon re-entry.

[34] There was another unnamed pilot (not Pilot A) who Mr Wilson described as "very proactive" and who had a United States-based friend who practiced medicine. Because the proactive pilot knew a doctor who could access Janssen, the pilot was able to facilitate the vaccine for those Air New Zealand pilots with whom he worked who desired for their own reasons to be vaccinated with Janssen.

[35] It has not been established that what these pilots were doing was formally supported or sanctioned by Air New Zealand. I accept Mr Wilson's evidence that Air New Zealand took a neutral position in relation to some of its pilots getting Janssen which meant that the company neither encouraged them nor took steps to prevent them from doing so. It was Ms Paterson's evidence that Air New Zealand could not stop staff from being vaccinated with an alternative to Pfizer if that was their preference. However, on 30 September 2021, the 10 pilots in question were removed from their flight duties because none of them satisfied the requirements of the Order which at that time recognised only one acceptable vaccine – Pfizer.

[36] Mr Wood submitted that by allowing pilots to swap TODs that Air New Zealand had endorsed what the 10 pilots were doing. I disagree. It was Mr Wilson's evidence

that the swapping of TODs happened all the time, which I find plausible. Individually and collectively, I find that the pilots in question acted on their own accord because of one very proactive pilot who had the right connections in LA to access the Janssen vaccine. What began as a chance event for one pilot who had become unwell while on a TOD to LA appears to have been the catalyst for the very proactive pilot to take action.

[37] It was pleaded in Ms Cho's Statement of Problem that at the 4 October 2021 Zoom meeting Air New Zealand knew there was a high probability that the Government would change the Order to include Janssen. However, I find this not to be the case when the documents show that Air New Zealand had applied for a medical exemption under cl 7A of the Order for its 10 pilots and another three pilots who remained unvaccinated. Mr Wilson stated that Air New Zealand did not want to lose these pilots because the Government had announced it would extend the Maintaining International Air Connectivity (MIAC) scheme to March 2022.

[38] The MIAC scheme involved additional cargo flights (largely of perishable goods such as seafood and fruit). Mr Wilson stated that Air New Zealand had been awarded MIAC contracts for the Government and for Qantas and it was this work that financially sustained Air New Zealand at that time. As such, it needed all of its pilots including the 10 pilots that received Janssen and who were subsequently grounded for not meeting the requirements of the Order.

[39] Air New Zealand sought medical exemptions for these pilots on the basis that there would be a disruption to the country's supply chain if they were not able to fly and transport cargo. Mr Wilson's witness statement records that the applications for exemption were all made during the week of 4 October 2021 which was the same day as Ms Cho's Zoom meeting. If Air New Zealand had advance knowledge that the Order would be amended to include Janssen, I find it unlikely that it would have gone through the time, effort and resources to apply for an exemption in the first place.

[40] While NZALPA had been lobbying the Government to change the Order to include Janssen, there was no guarantee that those efforts would have succeeded and it would have been incorrect of Air New Zealand to have had discussions with Ms Cho about Janssen when Pfizer was the only acceptable vaccine in New Zealand and when there was no reasonable expectation of Janssen's inclusion. It was Mr Wilson's

evidence that Air New Zealand was first informed of the amendment being made to the Order to include Janssen on the morning of Saturday 16 October 2021. Given the sequence of events, it has not been demonstrated that Air New Zealand knew with a high probability that the Order would be changed. To impute knowledge on the organisation now with the benefit of hindsight is neither fair nor reasonable.

**Was there a disparity in the way Ms Cho and Air New Zealand’s pilots were treated and if so, was this a breach of good faith?**

[41] It was submitted that there was a disparity in treatment in the way Air New Zealand treated its cabin crew staff and how it treated its pilots, for example the 10 pilots who received Janssen were able to do so by swapping TODs to LA which Mr Wood submits something similar could have been put in place for Ms Cho so that she could receive the Janssen vaccine before the due date of 30 September or 4 October 2021.

[42] The leading decision on disparity treatment is the Court of Appeal decision in *Chief Executive of the Department of Inland Revenue v Buchanan (No.2)* in which it was held that the following questions ought to be considered in relation to claims of unjustified disparity of treatment:<sup>3</sup>

- a. was there disparity of treatment;
- b. if so, was there an adequate explanation for the disparity; and
- c. if not, was the dismissal justified, despite the disparity for which there was no explanation?

[43] In reality, it was not possible for Air New Zealand to have placed Ms Cho on a flight to LA because as an unvaccinated flight attendant she could only work on “green” flights. LA was a “red flight” area because the COVID-19 pandemic was prevalent there. It would have been unconscionable and in breach of its own health and safety policy for Air New Zealand to have allowed Ms Cho to fly to LA as a member of its cabin crew.

[44] The swapping of TODs for the 10 pilots in question is not of itself evidence of a disparity of treatment when this happened all the time among pilots and is common practice. I note that the roles of pilot and flight attendant do not substantially match

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<sup>3</sup> [2005] 1 ERNZ 767.

and the risk of exposure to COVID-19 between the two are materially different. Such a view is supported by Ms Paterson and Mr Wilson's evidence. I also find it intuitive that because of their close proximity and frequent interaction with passengers, flight attendants were more likely to be infected with COVID-19 than a pilot whose interaction with passengers was limited. I note also Mr Wilson's evidence that the cockpit has its own separate air conditioning system which may explain why the rate of infection for flight attendants was "miles high" compared to pilots.

[45] The Employment Court in *Sutherland v Air New Zealand* considered it not desirable to exhaustively define what was meant by "disparity".<sup>4</sup> However, it confirmed that there must be a sufficient degree of similarity and materiality for a comparison to be made. In my view, a sufficient degree of similarity and materiality between Ms Cho's circumstances and the 10 pilots who received Janssen has not been established. There is no disparity in treatment.

**Did Ms Cho communicate to Air New Zealand her reasons for not taking the Pfizer vaccine as well as her willingness to take a different COVID-19 vaccine if one was available?**

[46] In the event that I am wrong and that there has been a disparity of treatment it remains that Ms Cho needed to communicate or express to Air New Zealand a willingness to have Janssen, but she did not. As stated above, she did not engage with Air New Zealand concerning the reasons why she did not wish to take the Pfizer vaccine which if she had may have resulted in another conversation about alternative options for her. However, that never occurred because Ms Cho's preference was for Air New Zealand to communicate with her via her lawyer and neither of them expressed a willingness to have some kind of conversation about the matter.

[47] It is acknowledged that during a Zoom meeting on 4 October 2021, Ms Cho's lawyer had given Air New Zealand new information that a number of pilots had flown to LA to be vaccinated. However, having considered the transcript, I find this was a passing comment by the lawyer who went no further with it. It may be that at the time of the meeting Ms Cho may have wondered why she had not been given the same opportunity to fly to LA like the pilots. However, even so, Ms Cho would have appreciated that for an unvaccinated flight attendant such as herself, this was a "red

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<sup>4</sup> [1993] 2 ERNZ 386.

flight” for her and that Air New Zealand could not have facilitated such an arrangement without putting her at risk. I find that if Ms Cho wanted to discuss the issue of Janssen with Air New Zealand, she could have done so herself or have instructed her lawyer to be more explicit about it in subsequent correspondence with the airline but that did not happen.

[48] The transcript shows that Ms Cho remained silent throughout the meeting in which redeployment and LWOP were primarily discussed and the issue of Janssen and the pilots were mentioned in passing. It would neither be fair nor reasonable to cherry pick the transcript now and to give a gloss to words long after they had been spoken. Given the more substantive matters that preoccupied the discussion and the meeting, I do not find it reasonable to expect Air New Zealand to have pieced together an inferred and uncommunicated willingness on the part of Ms Cho to engage in a conversation about the Janssen vaccine as an alternative to Pfizer.

[49] Even if things had played out differently and Ms Cho had made it known to Air New Zealand that she wished to be vaccinated with an alternative vaccine, it was a request with which her employer could not have complied because Pfizer was the only acceptable vaccine at the time. In addition, Ms Cho could not have worked on a flight to LA to receive Janssen because of her unvaccinated status and finally, as it turns out, had Ms Cho received her Janssen vaccination, she would not have been able to get a booster for Janssen as the only approved booster vaccinations in New Zealand were Pfizer and AstraZeneca, neither of which Ms Cho is unlikely to have had. As such, she would most likely have found herself in the same position sometime in early 2022.

**What is to be made of Air New Zealand’s open offer to Ms Cho of being placed on leave without pay to preserve her position?**

[50] The LWOP option had it been adopted by Ms Cho would have preserved her employment with Air New Zealand especially her more favourable grand parented terms and conditions from working on the B777s. While Ms Cho states that going on LWOP would not have guaranteed her future employment, she would have been in a far better position than having the employment relationship end altogether. It was Ms Paterson’s evidence that she was surprised that Ms Cho had not taken up the option of LWOP which would have preserved her ties with Air New Zealand especially when business would start “ramping up.”

## **Conclusion**

[51] This is a sad case because Ms Cho has been a long-standing employee for Air New Zealand. During her 28 years of loyal service, she has never once been subject to any disciplinary action. The present proceedings have caused her to suffer physically which I need not detail here but she is emotionally supported by her partner and daughter. The statutory test of justification is a temporal assessment and requires the Authority to consider the employer's decision at the time the dismissal or action occurred. For the reasons given above, I find Ms Cho was not responsive and communicative with Air New Zealand concerning Janssen. I further find that the company could not have reasonably anticipated her willingness to have a conversation with it about the same. Ms Cho's claims for unjustified dismissal and unjustified disadvantage are declined.

## **Costs**

[52] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. I would impress on Ms Chapman to convey my comments concerning Ms Cho's long service and employment record to Air New Zealand. However, if the parties cannot agree on costs and a costs determination is required, Air New Zealand may lodge a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Ms Cho would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[53] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>5</sup>

Peter Fuiava  
Member of the Employment Relations Authority

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<sup>5</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108]. See also [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).