

**ATTENTION IS DRAWN TO THE ORDER  
PROHIBITING PUBLICATION OF CERTAIN  
INFORMATION (REFER PARAGRAPHS 4 - 5)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2018] NZERA Auckland 305  
3028117**

BETWEEN

PETER CROSS  
Applicant

AND

AIR NEW ZEALAND LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Richard McCabe, Counsel for Applicant  
Kevin Thompson, Counsel for Respondent

Investigation Meeting: 8 & 9 August 2018 at Auckland

Submissions received: 14 and 17 August 2018 from Applicant  
16 August 2018 from Respondent

Determination: 1 October 2018

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Peter Cross, claims that he was unjustifiably dismissed by the actions of the Applicant, Air New Zealand Limited (Air NZ) in failing to recognise his medical certificate as valid and allowing him to resume his duties.

[2] Mr Cross also claims that he has been unjustifiably disadvantaged by Air NZ denying him access to staff travel.

[3] Mr Cross further claims that he has been treated with disparity by Air NZ in respect of how other pilots have been treated.

[4] Air NZ denies that Mr Cross' employment has been affected to his disadvantage by any unjustifiable action, or that he has been subjected to any disparity of treatment.

## **Prohibition on publication**

[5] I order that the medical records, training files and safety management relating to Mr Peter Cross referred to in this matter are not to be published.

[6] These orders are made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.

## **Note**

[7] During the course of the Investigation Meeting, the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered questions from me and the parties’ representatives. The parties have also submitted closing submissions on the facts and law.

[8] I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s.174 of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on each of the issues necessary to dispose of the matter and specified orders made as a result.

## **Issues**

[9] The issues for determination are whether or not Mr Cross:

- was unjustifiably disadvantaged by Air NZ not regarding the medical certificate as valid so as to enable Mr Cross to return to work as a pilot
- was unjustifiably disadvantaged by Air NZ denying him access to staff travel
- has suffered disparity of treatment

## **Background Facts**

[10] Air NZ is the flag carrier airline of New Zealand, operating scheduled passenger flights to 20 domestic and 31 international destinations.

[11] Mr Cross commenced employment with Air NZ on 25 March 1985 and held various positions; his last position was as Captain of a B777 prior to commencing a period of sick leave in 2015.

### *Pilot Requirements*

[12] There are two essential requirements that pilots must fulfil continuously:

1. The pilot must hold a valid pilot's licence, which is proof of the pilot's technical qualification for the pilot's rank and aircraft fleet, achieved in compliance with Air New Zealand's training standards; and
2. The pilot must hold a valid medical certificate issued by the CAA which enables the pilot to perform a pilot's duties.

[13] These are two independent processes, although the CAA oversees both requirements.

[14] Each of the two requirements is assessed by a person or a function, qualified and approved to do so by the Civil Aviation Authority of New Zealand (the CAA). There must also be independence between the two requirements, so that while the CAA oversees both requirements, the medical and technical requirements are separate.

### *Pilot's Licence*

[15] The Standards and Training function for Air NZ trains and assesses pilots' technical ability against the technical standards and must do so in accordance with CAA approved procedures. The Standards and Training function has no involvement in the medical condition or medical process and does not perform medical assessments or testing.

[16] Mr Michael Dorrian, Senior Manager Standards and Training, said that a pilot is initially trained to achieve the technical standard and then to undertake a series of supervised flights before being cleared to fly unsupervised for the Company as a line pilot.

[17] The pilot is thereafter subject to regular checks at six monthly intervals in simulator sessions to ensure that he or she continues to meet or exceed the required standards.

[18] Mr Bruce Watson, Simulator Flight Examiner, explained that all pilots, having achieved the required standards through simulator training and line checking on operational flights, are required to return to the simulator every six months for a simulator detail known as a "Training Detail and Proficiency Detail" (TDPD).

[19] Once the pilot has completed the training part of the TDPD satisfactorily, proficiency is tested by means of simulated events which could occur on an operational flight. These include engine failures, flight deck equipment malfunctions, navigation hazards, and adverse weather conditions.

[20] All pilots are trained to the same Standard Operating Procedures (SOP) and Mr Watson said it is critical that a pilot's response is consistent with the SOP so that a co-pilot can know what to expect from the pilot-in-charge as a response in a situation.

[21] During the proficiency part of the TDPD pilots are briefed on the general nature of what may occur but there will usually be a choice of events which will trigger the need for the pilot to respond.

[22] Pilots who have become 'uncurrent' in that they have not maintained recent flying experience, may be able to undertake a requalification matrix.

#### *Medical Certificates*

[23] The pilot is solely responsible for maintaining a valid medical certificate from the CAA, using the pilot's nominated and authorised medical examiner (ME).

[24] Medical certificates are issued by doctors who receive a delegated authority from the Director of the CAA to issue them (ME).

[25] A CAA medical certificate is issued to a pilot in the form of a wallet-sized two-sided plastic-laminated document. It may include conditions, restrictions, or endorsements that are usually specified on the reverse, or back, side of the document. In some cases, like that of Mr Cross, the medical certificate document carries a reference to another document and the other document contains additional conditions, restrictions, or endorsements.

[26] The incorporated documents become part of the medical certificate and constitute an integral part of the medical certificate provided that the plastic-laminated document contains an explicit reference to that other document.

#### *Operational Incidents involving Mr Cross*

[27] During Mr Cross' employment with Air NZ there had been four incidents which had given rise to concern regarding Mr Cross' performance in circumstances of stress. These were:

##### *(i) December 2003*

[28] During an operational A230 flight in which Mr Cross was the pilot-in-charge, there was an unstable ILS approach which had given rise to a Safety Investigation Report.

*(ii) May 2014*

[29] During an operational flight from Perth to Auckland during which Mr Cross was the pilot-in-charge, the First Officer was unable to regain access to the flight deck from the cabin as a result of Mr Cross not unlocking the door.

[30] Subsequently Mr Cross was referred to a Clinical Psychologist to assess his emotional/adjustment abilities.

*(iii) October 2014*

[31] Mr Watson said that he was undertaking a six-monthly TDPD for Mr Cross on 12 October 2014, in which 'windshear' was selected as a simulated event on take-off. Windshear is a serious weather-related event which could possibly create a crash situation.

[32] Mr Watson explained that during the windshear event a loud alarm sounds "WINDSHEAR, WINDSHEAR" and flight deck screens flash red.

[33] Mr Watson said that when the windshear alert sounded on take-off Mr Cross did not react and appeared not to have recognised the windshear simulation but instead flew through the windshear incident.

[34] The windshear incident stimulated on landing should have triggered an immediate response from Mr Cross to perform the 'Windshear Escape Manoeuvre' however he appeared not to respond to the windshear warnings and instead performed a 'Go Around Manoeuvre'.

[35] The simulator exercise had been marked as a '2' in terms of the assessment and Mr Cross was required to re-fly and did so to a satisfactory standard.

*(ii) March 2015*

[36] Mr Cross' next TDPD was on 23 and 24 March 2015. Mr Watson said that during that simulator exercise an autopilot failure at an altitude of 200 feet had been selected and was simulated. Again, significant alarm sounds and messages were displayed to indicate that the autopilot had disconnected.

[37] However, rather than Mr Cross taking manual control of the aircraft as should have occurred because this was the proficiency being tested, Mr Watson had observed him turning to concentrate on trimming the rudder trim with no hands on the control wheel. As this manoeuvre required Mr Cross to look backwards and downwards, he had no visual contact on the instruments or what was occurring at the flight deck windows.

[38] Mr Watson said that at a late stage Mr Cross appeared to have some recognition that things were very wrong and tried to take control, however this was not successful and the simulator had crashed.

[39] This was a significant event and Mr Cross' proficiency was marked '1', which was a full failure. There were no re-flies in that situation and following this incident Mr Cross was stood down from flying duties.

[40] The CAA declined to renew Mr Cross' medical certificate in June 2015 which Mr Cross understood to be related to the Air NZ simulator incident.

#### *Requalification*

[41] Mr Cross' period of sick leave became unpaid sick leave on 20 October 2016.

[42] Mr Dorrian said that Mr Cross had become 'uncurrent' and as a B777 pilot he would be required to meet the full type rating syllabus requirements for requalification.

[43] He explained that requalification commences with study and a ground course, followed by simulator training and proficiency testing. Once the simulator flight training is completed, which occurs in the ground based flight simulators, the pilot moves into an operational flight role, performing the tasks appropriate to the pilot's rank on board the appropriate aircraft and as part of a revenue flight.

[44] This is carried out under the supervision of a Flight Instructor, Check Captain or Training Captain, which is intended to be in 'calm' sectors. No testing is planned for this stage because this would be contrary to aviation safety.

[45] However the pilot would only be able to do requalification if he or she held a valid medical certificate.

#### *Status of Mr Cross' medical Certificate*

[46] In accordance with s 27B of the Civil Aviation Act 1990, the Director of the CAA will issue a medical certificate if satisfied that the pilot meets the prescribed medical rules.

[47] In the event that the Director of the CAA has reasonable grounds to believe that an applicant for a medical certificate has any characteristic which may interfere with aviation safety, a medical certificate may be issued which is endorsed with conditions or restrictions.

[48] An ME who has concerns that a pilot can fulfil the medical requirements may apply to the CAA for an Accredited Medical Conclusions (AMC). AMCs are conclusions reached by 1 or more medical experts acceptable to the Director of the CAA.

[49] Pursuant to s 27B of the Civil Aviation Act 1990 a Director may issue a medical certificate relying on flexibility if certain conditions are fulfilled:

- (a) An accredited medical conclusion indicates that in special circumstances the applicant's failure to meet any medical standard prescribed in the rules is such that the exercise of the privileges to which a medical certificate relates is not likely to jeopardise aviation safety; and
- (b) The relevant ability, skill, and experiences of the applicant and operational conditions have been given due consideration; and
- (c) The medical certificate is endorsed with any conditions, restrictions, or endorsements when the safe performance of the applicant's duties is dependent on compliance with those conditions, restrictions, or endorsements.

[50] Dr Tim Sprott was the Air NZ Medical Officer during 2016 and Mr Cross' ME during the early part of 2017. He was sent a copy of an Accredited Medical Conclusion (the First AMC) dated 31 March 2016 by Dr Rajib Ghosh, Senior Medical Officer at the CAA.

[51] The First AMC report concluded:

**Class 1 and 2 Medical Certificate:** This Accredited Medical conclusion is unable to indicate that in special circumstances the applicant's failure to meet any medical standard prescribed in the rules is such that the exercise of the privileges to which a medical certificate relates is not likely to jeopardise aviation safety.

[52] The AMC concluded that Mr Cross might wish to re-apply for a medical certificate after the successful completion of the recommended psychotherapeutic interventions and subsequent review.

[53] Dr Ben Johnston succeeded Dr Tim Sprott as Air NZ Medical Officer. He was contacted by Dr Ghosh in early February 2017 who advised him that the CAA was completing a further AMC for Mr Cross and it was exploring if Air NZ was able to accommodate the proposed restrictions within a return to work plan for Mr Cross.

[54] Dr Johnston said he reviewed a report from Dr Kenedi, CAA Consultant Psychiatrist. The report made the recommendation that Mr Cross be returned to flying duties but with recommendations/restrictions imposed that included Mr Cross:

- having extensive simulator testing; and

- being reviewed by Air NZ operational staff with initial flights being reviewed by a supervising senior pilot; and
- working with the psychotherapist Ms Batenburg or another suitable therapist.

[55] Dr Johnston said he had discussed the possible restrictions with Mr Dorrian, and Mr Ron Woodward, Senior Fleet Manager, whose role provided a core pillar of support for pilots alongside Standards and Training and Medical B777.

#### *Simulator Time Request*

[56] Mr McCabe, Legal Counsel for the New Zealand Air Line Pilots' Association and Mr Cross' representative, had also written to Dr Johnston and Mr Woodward by email on 17 May 2017. In the email Mr McCabe referred to a report from Dr Kenedi to the CAA in which Dr Kenedi had recommended that Mr Cross be provided with: "*extensive simulator training as a condition of his certificates*".

[57] In his email Mr McCabe stated: "*As you will be aware, CAA is keen progress reinstatement of Peters Class 1 Medical and the final step comprises Air NZ simulator time.*" Mr McCabe concluded by asking if a meeting could be arranged in order that they could facilitate this.

[58] Dr Johnston responded that Air NZ was in discussion with the CAA and not able to meet.

[59] Mr McCabe replied asking when Mr Cross would commence simulator sessions, however Dr Johnston did not respond to this question directly.

[60] Having discussed the situation whether or not Air NZ was able to accommodate the restrictions proposed by Dr Kenedi within a return to work with conditions imposed on his medical certificate with Mr Dorrian and Mr Woodward, Dr Johnston responded to Dr Ghosh on 30 May 2017 stating:

The question has been discussed with Fleet Management and with Standards and Training. At the present time the airline does not feel confident it could successfully incorporate the recommended operational assessments within a return to work program. ... The airline does not feel confident that could accurately simulate the circumstances and pressure necessary to assess the issues outlined in the report. ...

I would welcome the opportunity to discuss these concerns further before a final decision is made.

[61] Dr Johnston said he had heard nothing further from Dr Ghosh other than a polite acknowledgement of his email.

#### *Simulator Training Request September 2017*

[62] During September 2017 Mr McCabe had pursued the access to Air NZ simulator sessions. He emailed Mr Woodward on 22 September 2017 stating that he had been advised by an Air NZ employee that: *“after having a discussion with you, Air NZ is now willing to provide simulator and instructor facilities to Peter to enable him to regain his medical. .... Ron, I trust you will appreciate how important it is for Pater to regain his medical and ask that this be fast tracked to enable that. ...”*

[63] Mr Woodward responded to Mr McCabe on 26 September 2017 stating that there appeared to be some confusion about the issue and stating: *“I have given no undertaking at this stage to facilitate such an assessment using Company resources or personnel.”*

[64] Mr Woodward said that although Mr McCabe had requested that Air NZ provide simulator dates to Mr Cross, it had not done so as it was not party to the discussions with the CAA. Further that in the absence of a medical certificate, there was a potential for wasted time and costs in performing simulator exercises and training if Mr Cross' medical certificate did not allow Air NZ to return Mr Cross to an operational flight environment.

[65] Mr Cross subsequently had simulator sessions provided by using the resources of a company he operated privately.

#### *The Second AMC and 020 Restriction*

[66] On or about early 2017 Mr Cross changed his ME from Dr Sprott to Dr Anton Wiles.

[67] Dr Wiles explained that in his role as a ME he examined a pilot and if there were no matters of concern, he would proceed with issuing a medical certificate in line with the CAA general requirements for doing so.

[68] Following his examination of Mr Cross his view was that the issues were not straightforward and he had applied to the CAA for an AMC before he proceeded to issue a medical certificate.

[69] Dr Wiles received the AMC dated 28 September 2017 (the Second AMC) and accordingly issued Mr Cross with a medical certificate on 16 October 2017. The medical certificate was restricted with a 020 restriction (the 020 Restriction) which stated that the

medical certificate was “*restricted in accordance with medical directions in a letter dated 16th October 2017*”.

[70] Dr Wiles said the 020 Restriction consisted of wording contained in the Second AMC. The 020 Restriction stated:

**This is the 020 special letter/surveillance letter referred to in your medical certificate.**

This relates to concerns raised over past performance and distress.

You are required to have your initial flights with a senior, supervising pilot, who evaluates you not only on routine procedures, but also challenges you to talk through how you would respond to a variety of scenarios, including some of conflicting information from instruments, from ATC or the crew. If possible this period of evaluation will include several different supervising pilots to assess how you manage different personalities and feedback styles. You are required to submit reports from the airline’s Chief pilot at three monthly intervals, to CAA and your ME.

You are required to continue to work with Miss Batenburg, or another therapist deemed suitable to the CAA, on at least a twice monthly basis, on issues of operational and crisis communication.

The requirement to provide for the above is up to you, with no onus on CAA or your medical examiner to remind you. Failure to provide such at that time will mean that your medical certificate will be considered suspended until this requirement has been met.

[71] Following the issuing of the medical certificate, Mr McCabe wrote to Mr Woodward on 18 October 2017 asking that since Mr Cross’ medical certificate had been restored with conditions, Mr Cross be restored to the Air NZ payroll from the date of the medical certificate, and that Air NZ: “*Provide a training plan to enable Peter to return to flying*”.

[72] Mr Dorrian and Mr Woodward had considered the medical certificate and 020 Restriction.

[73] Mr Dorrian said his concern was that in Mr Cross’ case, satisfactorily meeting the requirements in Mr Cross’ restriction was necessary as a prerequisite to a managed and safe return to full flying duties, however a return to flying duties was required before the restriction conditions could be met.

[74] His concerns were that the underlying medical situation had not been resolved as it required on-going work with medical specialists and assessment by multiple ‘senior, supervising pilots’.

[75] Mr Dorrian was concerned that Standards and Training pilots did not have the expertise to make the assessments required in the 020 Restriction which were, moreover, to be undertaken in a live operational flight environment.

[76] Mr Woodward said he was frequently involved in matters which could impact Crew Resource Management (CRM) or human factors. He said there was a direct correlation between good CRM and the maintenance of aviation safety.

[77] He had been aware of the events in which Mr Cross had been involved which concerned a breakdown in crew co-ordination and communication, thereby jeopardising aviation safety either in an operational flight environment or in the simulator environment.

[78] Mr Woodward said his concern had been that the medical process deferred responsibility for testing Mr Cross to senior supervising pilots to develop an assessment framework, then to test Mr Cross against unspecified criteria and assess whether or not there was a continuing safety concern about Mr Cross' performance under stress.

[79] As such, he said he was not prepared to ask a pilot to test Mr Cross in an operational flight taking into account their capability to do so, and the aviation safety consideration.

[80] Mr Woodward said he regarded past and actual events involving Mr Cross as a predictor of future behaviour. Whilst in most cases a medical certificate does enable a return to flying, or can set a manageable surveillance requirement that can enable a return to flying; in some cases the conditions and restrictions that may be imposed on a medical certificate cannot be operationalised by the operator.

[81] In the case of Mr Cross, he considered the testing, monitoring and management of Mr Cross were prerequisites to a managed and safe return to flying and required Mr Cross to be flying before the prerequisites could be met, which he and Air NZ regarded as being in contravention of aviation safety.

[82] Accordingly Mr Woodward replied to Mr McCabe on 3 November 2017 stating:

We confirm that Peter has not yet been restored to the payroll. ... We need to work through the validity of a document said to be a medical certificate, but containing a medical restriction which is seemingly to be addressed outside the medical certification process – and with only the most limited of information. We will be doing this collaboratively with Peter, yourself and the CAA ... At this stage though, we are not able to accept the certificate as a document enabling Peter to be able to return to flying duties.

[83] Dr Ghosh, Senior Medical Advisor, with the CAA, explained at the Investigation Meeting that in regard to the requirement that Mr Cross be evaluated during an operational flight by senior supervising pilots, he believed this assessment of the operational aspects and communication could occur in a simulator and be concluded in test flights. The evaluation and assessment aspects could be completed before or after a flight rather than during it.

[84] Dr Ghosh when questioned about the requirement to see Dr Batenburg on a twice-monthly basis confirmed Mr Cross' evidence that Dr Batenburg had advised that her psychotherapeutic stage could only be completed when Mr Cross had returned to operational flying. Consequently the 020 Restriction that stated Mr Cross had to work with either Dr Batenburg or another therapist on a twice-monthly basis was not correct.

[85] Dr Ghosh conceded during cross-examination that Air NZ was being asked to participate in in-flight scenarios which would inform the therapeutic intervention to be completed, which would in turn inform the medical outcome. Although Dr Ghosh had said when questioned that the evaluations by senior pilots could take place before or after the flight, he agreed that this was not stated in the 020 Restriction.

[86] Dr Johnson had responded to Dr Ghosh by email dated 30 May 2017 stating that Air NZ viewed the recommended assessments as being outside the normal training and checking procedures, and was not confident Air NZ could accurately simulate the circumstances and pressure necessary for the assessment required in the 020 Restriction. Dr Johnston commented: *“Even if the circumstances could be accurately simulated it is not clear what criteria should be applied to assess the performance of the pilot in question.”*

[87] Dr Johnston concluded by inviting a further discussion of Air NZ's concerns, but other than a polite reply, he said he had heard nothing further from Dr Ghosh.

[88] Dr Ghosh said that following the 30 May 2017 email from Dr Johnston, he had heard nothing further from him.

#### *Events post-medical certificate with 020 Restriction*

[89] Following the issuing of the medical certificate Mr McCabe wrote to Mr Ron Woodward, Senior Fleet Manager for Air NZ's B777 aircraft fleet, on 3 November 2017 requesting that Mr Cross was restored to the payroll and that Air NZ provide him with a training plan in order that he could return to flying.

[90] Mr Woodward responded that same day, 3 November 2017, confirming that Mr Cross had not been restored to the payroll and noting Air NZ's concerns with the medical certificate and in particular with the 020 Restriction. Mr Woodward noted that the medical certificate contained: *“a medical restriction which is seemingly to be addressed outside the medical certification process – and with only the most limited of information”*.

[91] Mr Cross filed a Statement of Problem with the Authority on 17 April 2018.

[92] Mr David Morgan, Chief Operational Integrity and Standards Officer/Chief Pilot, wrote to Mr Graeme Harris, Director of the CAA on 18 April 2018 requesting that he authorise or facilitate a three-way dialogue between the CAA, Mr Cross and Air NZ in order to seek a resolution to the matter.

### **Determination**

#### **Has Mr Cross been unjustifiably disadvantaged in respect of Air NZ not regarding the medical certificate as valid so as to enable Mr Cross to return to work as a pilot?**

[93] Mr Cross is claiming unjustifiable disadvantage on the basis of Air NZ not allowing him to be operational after he had been issued with a medical certificate.

[94] I observe that there is no dispute that Mr Cross' medical certificate is valid; the Director of the CAA had exercised flexibility pursuant to s 27B of the Civil Aviation Act 1990 in issuing it.

[95] The pertinent issue is whether or not Air NZ has disadvantaged Mr Cross by not accepting the medical certificate as valid so as to allow Mr Cross to return to work as an operational pilot.

[96] Air NZ and its actions have to be assessed against that of a fair and reasonable employer to determine whether or not how it had acted was how a fair and reasonable employer could have acted in all the circumstances at the relevant time, pursuant to s 103A of the Employment Relations Act 2000 (the Act) which states:

#### **103A Test of justification**

1. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
2. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[97] Air NZ as the operator has a responsibility to ensure that a pilot is technically competent to undertake the role of a pilot, but it is the responsibility of the pilot, in conjunction with his or her ME to hold a valid medical certificate.

[98] Examining all the circumstances at the relevant time I note the following:

- Air NZ is a commercial airline; as such the safety of its passengers is paramount. It has to place safety in a position of prime importance<sup>1</sup>;
- Mr Cross was a commercial airline pilot in which role he had significant responsibility to ensure he fulfilled his role in such a manner as to safeguard, as far as possible, the safety of the passengers on board a flight. This consideration was, and is, of paramount importance to Air NZ as a commercial aircraft operator;<sup>2</sup>
- there had been four serious operational events involving Mr Cross, which affected his performance capability, the last of which had resulted in the withdrawal of Mr Cross' medical certificate; and
- following which Mr Cross had been seen by a significant number of medical professionals, including psychologists, psychiatrists, neuropsychologists.

[99] Disadvantage grievances are assessed in light of s103 (1)(b) of the Act which states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[100] The elements of s103 (1) (b) are twofold:

- An unjustifiable action by the employer, which
- Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[101] Mr Cross must therefore establish that there was some unjustifiable action or actions by Air NZ which affected his terms and conditions of employment to his disadvantage.

(i) *Unjustifiable Action*

[102] Air NZ refused to return Mr Cross to an operational position in light of the medical certificate containing a 020 Restriction which had been issued to him.

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<sup>1</sup> *Samu v Air New Zealand* [1995] 1 ERNZ 93 at 95

<sup>2</sup> *Samu v Air New Zealand* [1995] 1 ERNZ 93 at 95

[103] As the operator, Air NZ was responsible for assessing Mr Cross' technical ability as competent to fulfil his role. It was not responsible for ensuring Mr Cross was medically competent, that was the responsibility of Mr Cross and his ME.

[104] Mr Cross, seeking to obtain a valid medical certificate, consulted Dr Wiles as his ME. Dr Wiles had concerns in relation to Mr Cross' medical situation which he regarded as not being straightforward, and he had asked the CAA for an AMC.

[105] The 020 Restriction dated 16 October 2017 which formed part of the medical certificate was taken directly from the wording in the AMC.

[106] It stated initially that it related to concerns about Mr Cross' past performance. The evidence indicates that the concerns were Mr Cross' performance in situations involving stress and conflict management. It proceeded to set out the requirements with which Mr Cross had to fulfil as part of his certification.

[107] These were the requirement that Mr Cross had operational flights with senior supervising pilots who would challenge him to talk through how he would respond to a variety of scenarios including conflicting information from ATC, instruments or the crew, and how Mr Cross managed different personalities and feedback styles.

[108] Air NZ regarded this as a medical assessment.

[109] In considering whether or not Air NZ was acting as a reasonable and fair employer could do in this situation, I note the evidence of Dr Wiles who said during cross examination that, for the purposes of the medical certificate, the behavioural issues to be assessed in relation to Mr Cross were medical issues.

[110] Dr Ghosh also confirmed that Mr Cross was undergoing psychotherapeutic intervention in which a non-medical senior supervising pilot of Air NZ was required to be a participant.

[111] Furthermore Dr Ghosh in his evidence acknowledged that the 020 medical restriction was the prerequisite to a safe and managed return to flying, therefore it was possible for there to be a valid medical certificate but not for it to be operationally safe for the pilot to return to flying.

[112] Air NZ had to ensure as a matter of paramount importance, the safety of its passengers. It had a concern in respect of Mr Cross' previous operational issues, that there would be a risk to aviation safety if he was permitted to resume flying duties.

[113] Whilst the Director of the CAA had exercised flexibility in issuing Mr Cross with a medical certificate, it regarded the 020 Restrictions as requiring it to undertake medical assessments which it was not competent to do.

[114] In addition, in accordance with the 020 Restriction, Mr Cross was required to submit reports from Air NZ's Chief Pilot at 3-monthly intervals and to work with Dr Batenburg or another therapist at least twice-monthly. These requirements had not been met which, as stated on the 020 Restriction, the effect of suspending the medical certificate.<sup>3</sup>

[115] Further because Dr Batenburg had suspended the psychotherapeutic analysis pending the evaluations to be carried out by Air NZ pilots, there was no psychotherapeutic conclusion in respect of Mr Cross' fitness as a pilot.

[116] Given that Mr Cross had a history with Air NZ of incidents in which there had been performance affected by stress; Air NZ took the view that it would not be appropriate to test Mr Cross' response in circumstances of stress during an operational flight.

[117] I find this to have been a justifiable concern, especially from an employer with a responsibility for ensuring passenger safety during commercial flights.

[118] I find that Air NZ acted as a fair and reasonable employer could have acted in regard to the assessment requirement and that this was not in itself an unjustifiable action. As a result I find that Mr Cross had not been unjustifiably disadvantaged in respect of Air NZ not regarding the medical certificate as valid so as to enable him to return to work as a pilot.

[119] However turning to consider whether or not Air NZ acted as a fair and reasonable employer could have acted in respect to how it engaged with this issue, I note that the further requirements in the 020 Restriction were that Mr Cross submitted 3-monthly reports from the Chief Pilot to the CAA, which was dependent on the fulfilment of the first condition. The further requirement that Mr Cross worked with Dr Batenburg was similarly dependent on the first.

[120] Due to the refusal of Air NZ to allow him to return to operational flying, neither condition could be fulfilled by Mr Cross. As a result Mr Cross was placed in an invidious position.

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<sup>3</sup> Civil Aviation Rule 61.35.

[121] Mr Cross was an Air NZ senior pilot with over 30 years service. Prior to 2015 there had been no issues affecting his performance. As such I find Air NZ as a fair and reasonable employer could be expected to do all it could to assist Mr Cross in the situation in which he found himself.

[122] Despite a medical recommendation that Mr Cross have simulator training with Air NZ, Air NZ did not facilitate this on the basis of Mr Woodward's evidence that this would be time-consuming and costly with no guarantee that Mr Cross would be enabled thereby to return to operational status.

[123] I accept that that it is not possible for Air NZ to ascertain what impact this provision of simulator time may have had on the 020 Restrictions, however the result was that Mr Cross as its employee was forced to provide simulator time himself.

[124] I consider that this was not the action of an employer acting in good faith towards a long-serving employee.

[125] More significantly I turn to consider Air NZ's interactions with the CAA in respect of Mr Cross.

[126] Dr Johnston had written to Dr Ghosh on 30 May 2017 requesting an opportunity to discuss Air NZ's concern regarding the 020 Restriction. Apart from a brief acknowledgement of his email by Dr Ghosh, Dr Johnston did not hear anything further from Dr Ghosh.

[127] There is no evidence that Air NZ sought actively to engage with the CAA on Mr Cross' behalf about its concerns after that date until the letter from Mr Morgan, Air NZ, to Mr Harris, CAA, asking that a dialogue take place between the CAA, Mr Cross and Air NZ with a view to seeking a resolution to the situation.

[128] Moreover this letter post-dated the filing of the Statement of Problem by Mr Cross.

[129] I find that Air NZ, acting as a fair and reasonable employer, could have taken more pro-active steps in resolving Mr Cross' situation by engaging positively with the simulator request, and more importantly, by engaging earlier and more assertively with the CAA in order to explain its difficulties with the 020 Restriction.

[130] Employers are expected to behave in good faith towards their employees as set out in s 4 of the Act. The duty of good faith requires that the parties to an employment relationship:

... to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative ...<sup>4</sup>

[131] I find that Air NZ did not act in good faith in trying to assist Mr Cross resolve the situation in which he was placed by not offering simulator time and not engaging more actively with the CAA in order to facilitate Mr Cross' return to active flying duties, and this had the effect of unjustifiably disadvantaging Mr Cross.

[132] I determine that these actions on the part of Air NZ unjustifiably disadvantaged Mr Cross.

**Was Mr Cross unjustifiably disadvantaged as a result of Air NZ denying him access to staff travel?**

[133] Air NZ employees have access to staff travel privileges. Staff privileges are not part of an employee's employment agreement and are governed by Air NZ's staff travel policy.

[134] The policy provides that if an employee is on sick leave, including long term unpaid sick leave like Mr Cross, access to privileges is suspended and would need to be approved by the employee's manager. The appropriate manager for Mr Cross was Mr Woodward.

[135] The staff travel policy states:

1. Staff Travel is not available to you, or your nominee, dependent children and/or buddies if you are on sick leave or ACC, unless approved by the appropriate GM or GM HR. For the avoidance of any doubt, this applies to all employees who are on sick leave, whether they are travelling on their own staff travel or as the beneficiary of another staff member or retired staff member.

[136] After the commencement of his sick leave Mr Cross had applied to Mr Woodward for staff travel approval and this had been granted. However when Mr Cross applied for staff travel to support his son and daughter-in-law with their new baby on 15 May 2018, Mr Woodward had responded:

Can you please shed more light on what level of support is required? I'm not interested in specific details and certainly don't wish to breach any confidentiality issues but I do need to understand if there is a diagnosed medical condition.

As I read the policy document I believe that the intent is to provide support to those requiring medical attention, whether that is the employee or their family.

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<sup>4</sup> Section 4 (1A)(b) of the Act

[137] Mr Cross responded that his son and daughter-in-law required his assistance, and as such he believed there were compassionate grounds for granting approval. Mr Woodward's evidence was that he regarded management discretion to grant staff travel in such circumstances would be based on medical considerations, however in this case there were none.

[138] I find that the Air NZ staff travel policy gave Mr Woodward discretion which he was to apply appropriately. In this situation I find that he had applied his discretion regarding Mr Cross' request in line with the policy and reasonably.

[139] I determine that Mr Cross was not unjustifiably disadvantaged as a result of Air NZ denying him access to staff travel

### **Has Mr Cross suffered disparity of treatment?**

[140] Mr Cross provided no evidence of disparity of treatment other than a general opinion that he had not been treated in a similar manner to other pilots who hold medical certificates with conditions or restrictions.

[141] There is no evidence of a pilot with a medical certificate carrying similar restrictions to those of Mr Cross being treated differently to Mr Cross. I am therefore unable to find any evidence of disparity of treatment.

[142] I determine that Mr Cross has not suffered disparity of treatment.

### **Remedies**

[143] I have determined that Air NZ did not act unjustifiably in not returning Mr Cross to operational status as a pilot. Consequently there is no order that he be restored to the payroll.

[144] However I have found that Mr Cross has been unjustifiably disadvantaged by the actions of Air NZ in not treating him in good faith.

[145] Mr Cross has been placed in a most difficult situation which has caused him significant distress and upset, in addition to having to resource his own simulator sessions.

[146] Accordingly I find that Mr Cross is entitled to compensation.

[147] Considering the range of awards in cases of this kind I order Air NZ to pay Mr Cross the sum of \$20,000.00 pursuant to s 123 (1)(c )(i) of the Act.

#### *Contribution*

[148] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[149] Mr Cross did not contribute to the situation in which he found himself and I order no reduction to the amount of compensation awarded.

#### **Costs**

[150] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[151] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**