

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 198  
EMPC 5/2024**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

BETWEEN LEIF FREDRICKSEN  
First Plaintiff

AND WARREN LAWRENCE  
Second Plaintiff

AND AIR NEW ZEALAND LIMITED  
Defendant

**EMPC 16/2024**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

BETWEEN AIR NEW ZEALAND LIMITED  
Plaintiff

AND LEIF FREDRICKSEN  
First Defendant

AND WARREN LAWRENCE  
Second Defendant

Hearing: 8–9 July 2024  
(Heard at Auckland)

Appearances: R McCabe, counsel for Captains Fredricksen and Lawrence  
A Caisley and D E Thomson, counsel for Air New Zealand Ltd

Judgment: 10 October 2024

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**JUDGMENT OF JUDGE M S KING**

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[1] Both parties have challenged a determination of the Employment Relations Authority (the Authority) which found that Captain Fredricsen and Captain Lawrence had been unjustifiably disadvantaged in their employment with Air New Zealand Ltd (Air NZ).<sup>1</sup>

[2] The Authority determined that Air NZ was aware of widespread concerns about the Pfizer vaccine throughout its pilot population and that pilots wanted to access the Janssen vaccine which was only available overseas at that time. It found it was a breach of good faith for Air NZ to assist others, who were also employed in the position of pilot, to obtain the Janssen vaccine in the United States of America (USA) without actively communicating with Captains Fredricsen and Lawrence and giving them an opportunity to comment on why they were not being offered the same assistance.<sup>2</sup>

[3] The Authority determined that Air NZ's failure undermined the employment relationship by undermining both Captains' confidence that they could be treated fairly and reasonably by Air NZ.<sup>3</sup> The Authority ordered Air NZ to pay \$8,000 in compensation to each pilot under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).<sup>4</sup> However, it determined that the situation had changed after 30 September 2021, due to a regulatory change from the Government, so that any disadvantage from that date could not be said to be unjustified. Therefore, no compensation was awarded for any loss arising after that date.<sup>5</sup>

[4] Both Captains filed a non-de novo challenge in relation to the quantum of remedies ordered by the Authority. Air NZ filed a de novo challenge to the Authority's determination. The two challenges were consolidated, and the hearing progressed on a de novo basis.

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<sup>1</sup> *Fredricsen v Air New Zealand Ltd* [2023] NZERA 734 (Member Ulrich).

<sup>2</sup> At [29].

<sup>3</sup> At [29].

<sup>4</sup> At [33].

<sup>5</sup> At [34].

## Issues

[5] The issues in this case are:

- (a) Were the pilots disadvantaged by Air NZ declining to provide familiarisation flights to the USA in September 2021?
- (b) If so, was Air NZ's decision not to provide familiarisation flights unjustified?
- (c) If grievances of unjustified disadvantage are established by either or both of the pilots, what remedies (if any) should be awarded?
- (d) Did Air NZ breach its duty of good faith towards the pilots in connection with their request to travel to the USA to obtain the Janssen vaccine?

## Facts

### *Relevant terms of employment*

[6] Captains Fredricsen and Lawrence are members of the New Zealand Air Line Pilots Association Industrial Union of Workers Inc (NZALPA). Their terms and conditions of employment are set out in the "NZALPA – Air New Zealand Ltd Pilots' Collective Employment Agreement" (CEA). They were employed by Air NZ under the CEA as pilots.

[7] The CEA defines the word 'pilot' as:

**'Pilot'** means and includes duly qualified captains, first officers and second officers of all grades, engaged in flying of commercial aircraft, but shall not include any other members of the aircrew.

[8] The CEA defines the term 'supernumerary crew' as:

**'Supernumerary crew'** means any pilot not rostered as part of the operating crew. Pilots with training or checking responsibilities for a particular flight are not supernumerary.

[9] Section 2 of the CEA defines the area and incidence of a pilot's duty as:

The Company shall employ its pilots and the pilot shall serve the Company in the capacity of pilot whether in New Zealand or any other part of the world where the Company may from time to time be operating, or to or from which the Company may require aircraft to be flown and shall perform such other duties in the air and on the ground relating to their employment as a pilot as the Company may reasonably require.

[10] Captains Fredricsen and Lawrence are long-serving employees of Air NZ; collectively their service with Air NZ spans over 54 years. During this time, they have previously worked as aircrew on Air NZ's Boeing 737, 787, 747 aircraft and the Airbus A320 aircraft. At the material time of this dispute, they both held the role of Captain on Air NZ's A320 Fleet, Captain Lawrence having been down trained from the B787 aircraft to the A320 due to reduced international flying during 2019.

[11] Both Captains Fredricsen and Lawrence had a type rating (a qualification for commercial pilots) that allowed them to operate a B787 aircraft if their type rating was current. However, at the relevant time, neither Captain held a current type rating for the B787 aircraft, and so each was required to undertake training to become current. Importantly, this meant that they could not legally operate the B787 aircraft controls.

*Impact of the COVID-19 pandemic and Government orders*

[12] To prevent or limit the risk of an outbreak or the spread of COVID-19, from 10 April 2020 until 28 February 2022, all arrivals, including New Zealand citizens by air, were required, in accordance with the COVID-19 Public Health Response (Air Border) Order (No 2) 2020 (Air Border Order), to isolate and quarantine in a Government-managed facility (MIQ), unless they were subject to an exemption. The requirement to isolate and quarantine remained in place for the balance of 2020 and throughout 2021. For much of the period during which the restrictions were in place, demand for MIQ outstripped capacity.<sup>6</sup>

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<sup>6</sup> *Grounded Kiwis Group Inc v Minister of Health* [2022] NZHC 832, (2022) 13 HRNZ 362 at [2], [3] and appendix 2.

[13] The Air Border Order provided an exemption for aircrew members. At the relevant times, it defined an aircrew member as a person who:<sup>7</sup>

- (a) is identified as *a crew member on the crew manifest* for the aircraft on which they arrive in New Zealand; or
- (b) is not identified as a crew member on that manifest but is on the aircraft *at the direction of an airline* for which they work as a pilot, co-pilot, or flight attendant.

[14] The term “crew member” is not defined by the Air Border Order. However, the Civil Aviation Rules provide a definition which essentially refers to the crew member being assigned to perform a duty associated with the operation of the flight or aircraft or being carried for the sole purpose of undergoing instruction for such a duty.<sup>8</sup> Therefore, a pilot rostered on as a supernumerary crew member would not meet the Air Border Order exemption in [13](a) above. A supernumerary crew member would only qualify for an Air Border Order exemption if they fell within [13](b) above, being on the aircraft at the direction of Air NZ.

[15] The Air Border Order exemption effectively enabled Air NZ to secure MIQ bookings for its aircrew, by bypassing the public MIQ wait lists, and it shortened the isolation period for aircrew. The exemption was necessary so that airlines could continue to operate and provide air transport services during this time.

[16] However, in July 2021, the Government amended the COVID-19 Public Health Response (Vaccinations) Order 2021 (Vaccinations Order) to include all aircrew members (other than cabin crew) who:<sup>9</sup>

- (a) were ordinarily resident in New Zealand; and
- (b) were *identified as crew members on a crew manifest* for an affected aircraft that travelled internationally on or after 15 July 2021; and
- (c) had an international layover during the travel.

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<sup>7</sup> COVID-19 Public Health Response (Air Border) Order (No 2) 2020, cl 4 (emphasis added).

<sup>8</sup> Civil Aviation Rules, pt 1 (as at 1 December 2021).

<sup>9</sup> COVID-19 Public Health Response (Vaccinations) Order 2021, cl 4 (emphasis added).

[17] The effect of the amendment was that all workers who fell within the definition of aircrew under the Vaccination Order were required from 30 September 2021 to have received one dose of the Pfizer vaccine and a second within 35 days of the first dose.<sup>10</sup> A pilot who received the Janssen vaccine was not recognised as being vaccinated under the Vaccinations Order.<sup>11</sup>

[18] Air NZ considered that all pilots operating a B787 aircraft were covered by the terms of the Vaccinations Order, as the aircraft flew long haul international flights. At this time Captains Fredricsen and Lawrence were not covered by the Vaccinations Order as they operated an A320 aircraft which flew domestically and in and around Australia and the Pacific Islands, which were outside the requirements of the Vaccinations Order.

[19] Around the end of July 2021, Australia lost its designation as a quarantine-free travel destination. Air NZ considered that the Vaccinations Order now covered pilots who operated its A320 aircraft, but it could accommodate any non-vaccinated pilots on its domestic network. It therefore did not immediately require all A320 pilots to become vaccinated as a result of the Vaccinations Order.

[20] On or around 1 September 2021, Air NZ began consulting with affected employees and its unions about a proposal to introduce a vaccination policy that would require all pilots to be vaccinated against COVID-19.

[21] On 27 September 2021, following a health and safety risk assessment and consultation with unions and staff, Air NZ advised that it would introduce a vaccination policy which would require all pilots to have received their first vaccination by 14 November 2021. Any COVID-19 vaccination that was approved by Medsafe in New Zealand and/or Air NZ's Aviation and Occupational Health Unit would be accepted under the policy. In July 2021, the Janssen vaccine was given

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<sup>10</sup> Schedule 1 cl 3.

<sup>11</sup> Clause 4.

provisional approval by Medsafe New Zealand.<sup>12</sup> In October 2021, the Vaccinations Order was amended to recognise the Janssen vaccine.<sup>13</sup>

*Facilitation of vaccination for other pilots*

[22] On 9 September 2021, a B787 pilot obtained the Janssen vaccine at a hospital in the USA after he suffered an unrelated medical event. Air NZ then became aware of other pilots becoming vaccinated with the Janssen vaccine in Los Angeles, USA during layovers. Air NZ investigated, and it was satisfied that the process undertaken by pilots, where a doctor entered the pilot's hotel room briefly, in full PPE, to administer the COVID-19 vaccination was not in breach of its key safety standards. On that basis, it took a position where it did not request pilots to get vaccinated, but it did not take any steps to prevent them choosing to take this approach, and in fact it actively facilitated certain pilots to do so.

[23] Prior to 30 September 2021, Air NZ facilitated at least eight pilots who were current on the B787 aircraft to receive the Janssen vaccine. Facilitation involved Air NZ arranging for pilots' rosters to be swapped so that they were rostered to fly a tour of duty to the USA and could access the Janssen vaccine. On at least one occasion, Air NZ increased the number of pilots rostered to fly on a tour of duty to the USA from a three-pilot crew, to a four-pilot crew, to facilitate two current B787 pilots to travel to the USA to receive the Janssen vaccine. Air NZ also provided pilots with the details of a pilot, who could assist them to make arrangements to receive the Janssen vaccine; it then left the pilots to make their own arrangements to receive the vaccine during their layover in the USA.

[24] In addition to the current B787 pilots, Air NZ also facilitated Captain Lawson to receive the Janssen vaccine in Los Angeles, USA. Captain Lawson had been away from work on long-term sick leave. He had previously flown the B777 aircraft but had never flown a B787 aircraft. Captain Lawson was not current or even type-rated on the B787. In May 2021, he returned to work, and Air NZ rostered him to begin

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<sup>12</sup> "Provisional Consent to the Distribution of a New Medicine" (7 July 2021) *New Zealand Gazette* No 2021-go2704.

<sup>13</sup> Schedule 3 of the COVID-19 Public Health Response (Vaccinations) Order was amended by cl 11 of the COVID-19 Public Health Response (Vaccinations) Amendment Order (No2) 2021.

training on the B787 in October 2021. Captain Lawson could not legally operate the controls of a B787 aircraft until he had completed training, passed all checks and obtained a current type rating for the B787.

[25] In early September 2021, Captain Lawson became concerned with the impact of the Vaccinations Order and his ability to fly to the USA and receive the Janssen vaccine. On 6 September 2021, he emailed Air NZ and requested that it facilitate him and other pilots to travel to Los Angeles, USA to enable them to receive the Janssen vaccine prior to the 30 September 2021 Vaccinations Order changes taking effect. Captain Lawson advised that he had investigated and discovered that Los Angeles airport had a specific COVID-19 vaccination centre which allowed pilots to be vaccinated with the Janssen vaccine in accordance with Government key safety standards during a layover. Captain Lawson requested that Air NZ allow or direct him, and other willing pilots, to travel as operating crew, supernumerary crew or passengers to Los Angeles to receive the Janssen vaccine. Captain Lawson advised that he and the other pilots who accepted Air NZ facilitating them to receive the Janssen vaccine were prepared to contribute full or partial costs for Air NZ's expenses in doing so.

[26] On 16 September 2021, Captain Lawson requested a familiarisation flight to Los Angeles on the basis that he had been on sick leave for 27 months and that he had an upcoming B787 type rating training course scheduled for October 2021.

[27] On 19 September 2021, Captain Lawson once again followed up by email on his request for a familiarisation flight. Captain Lawson claimed that Air NZ had an obligation and a duty of care to facilitate his travel to Los Angeles in order to receive the Janssen vaccine to meet the intent and purpose of the Vaccinations Order, before 30 September 2021. He reiterated that he was prepared to pay any expenses that Air NZ considered appropriate if it accepted his request.

[28] On 20 September 2021, Air NZ advised Captain Lawson that it was able to roster him on a familiarisation flight to Los Angeles, departing on 23 September 2021 and returning on 25 September 2021. It advised that there would be a two day lay-over where it required him to stand down for a period of 24 hours after receiving a

COVID-19 vaccination and prior to him being able to operate as aircrew on the return flight to New Zealand. Air NZ advised Captain Lawson that he would not receive any allowances for the familiarisation flight and he would need to pay his own accommodation and MIQ expenses. Captain Lawson accepted the familiarisation flight on the condition that he was first able to confirm the availability of a doctor to administer the Janssen vaccine during his flight layover in Los Angeles.

[29] A “familiarisation flight” is available to a pilot if they are transferring from domestic flying to international flying, or if they have been on long-term sick leave. During the familiarisation flight the pilot familiarises themselves with the aircraft, and it is sometimes undertaken as part of a training course for that aircraft for the pilot to become type-rated or current so that they can lawfully operate a particular aircraft. During a familiarisation flight a pilot will sit in the flight deck and observe the conduct of the other aircrew for the purposes of assimilation of duties and or functions. A pilot on a familiarisation flight is not considered to be an operating crew member but is listed on the crew manifest.

[30] The B787 Fleet Instructional Guide, which forms part of Air NZ’s operating documents, provides that familiarisation flights occur only after a training course has started. However, in practice Air NZ has on occasion allowed some pilots to conduct a familiarisation flight prior to commencing training. Familiarisation flights would normally be conducted by Air NZ across the Tasman, as single duties out and back, which avoided the pilot accruing allowances or any accommodation expenses as part of their training. Air NZ did not require a pilot on a familiarisation flight to forego any allowances or pay their own accommodation and other expenses associated with a familiarisation flight because these would not have normally accrued during a trans-Tasman flight.

[31] Captain Lawson did not consider his 23 September 2021 flight to the USA to receive the Janssen vaccine was consistent with his previous experiences of a familiarisation flight. Captain Lawson spent only half of the flight on the flight deck. The flight was to the USA rather than across the Tasman and included a two-day layover. Air NZ was not initially prepared to pay Captain Lawson’s flight allowances

and accommodation or MIQ expenses as part of his familiarisation flight. It subsequently changed its mind after the flight had occurred.

[32] Air NZ accepted under cross-examination that it had agreed to roster Captain Lawson on a familiarisation flight as a device to enable him to travel to the USA to get the Janssen vaccine.

#### *Other options considered*

[33] Due to the effect of COVID-19 on the business, Air NZ had significantly reduced its passenger and freight capacity. It worked with NZALPA when it began to down-train pilots from the B777 to the B787. It entered into a furlough agreement for pilots, which allowed them to go on leave without pay until those pilots were recalled as capacity increased and border restrictions changed.

[34] Air NZ also explored with NZALPA whether pilots who were reluctant to be vaccinated with the Pfizer vaccine could be flown to the USA where alternative vaccines were readily available. However, on 27 October 2021, Air NZ ultimately determined that it could not legitimately direct its staff onto a flight on which they would not be operating as aircrew. It considered that such a direction would be outside the purpose and intention of the Air Border Order.

#### *Captain Fredricsen*

[35] On 26 September 2021, Captain Fredricsen, in his capacity as a union delegate for NZALPA, emailed Air NZ and requested that it facilitate all pilots to receive a familiarisation flight to the USA in a B787 if that was their choice. This was a day before Air NZ advised that it was implementing a vaccination policy which required all pilots to be vaccinated by 14 November 2021.

[36] On 27 September 2021, Air NZ declined Captain Fredricsen's request. It advised that the pilots who were vaccinated in the USA had been vaccinated on a tour of duty to the USA and had arranged for the vaccination themselves. It also acknowledged that Captain Lawson undertook a familiarisation flight in advance of

commencing his B787 type rating course. It stated that this was “a unique opportunity for those pilots and one that needed to be completed by 30 September” due to the impact of the Vaccinations Order which required pilots to have received the Pfizer vaccine.

[37] On 15 and 26 October and 9 November 2021, Captain Fredricsen met with Air NZ to discuss his vaccination status and the options available to him if he was not vaccinated in accordance with the vaccination policy, which included periods of leave and leave without pay or dismissal. Captain Fredricsen considered Air NZ’s policy and process were materially flawed and that it was unfair for it to facilitate only some pilots to receive the Janssen vaccine in the USA.

[38] Captain Fredricsen signed an agreement to take leave while he awaited the availability of an alternative COVID-19 vaccine. From 4 December 2021, he used 72 days of paid leave. He then went on leave without pay on 22 February 2022 for 53 days. Captain Fredricsen was vaccinated with Novavax on or about 14 April 2022, and he returned to work on 16 April 2022.

#### *Captain Lawrence*

[39] On 24 September 2021, Captain Lawrence emailed Air NZ and requested that he be rostered on a familiarisation flight to Los Angeles to allow him to receive the Janssen vaccine before the Vaccinations Order came into force on 30 September 2021. Captain Lawrence offered to contribute to full or partial costs of such a flight.

[40] Air NZ responded that same day, advising that there were no legitimate grounds on which he would be eligible to be rostered on a familiarisation flight on a B787, given he was “not moving to that fleet at any point in the foreseeable future” and could not have travelled on a B787 as operating crew.

[41] Captain Lawrence then emailed Air NZ’s Chief People Officer and its Chief Operating Officer, advising that his request for a familiarisation flight had been declined. He believed he was being disadvantaged by Air NZ facilitating a pilot not rated for the B787 to receive the Janssen vaccine via a familiarisation flight (Captain

Lawson) without it offering him the same opportunity. He raised concerns over the impact this would have on his income should alternative vaccines not be available by 14 November 2021.

[42] In October 2021, Air NZ and Captain Lawrence communicated about Air NZ and its unions exploring whether it could access other vaccines approved by Medsafe.

[43] On 21 and 28 October and 10 November 2021, Captain Lawrence met with Air NZ to discuss his vaccination status and his options if he was not vaccinated in accordance with the policy, which included periods of leave and leave without pay. Captain Lawrence reported a medical event that then led to his medical certificate being suspended (which is a requirement for pilots to operate an aircraft). He was placed on sick leave from 10 November 2021 to 28 April 2022 and thereafter received paid leave or full pay. He also received one day of training on the A320 aircraft until he returned to active duty on 4 July 2022.

[44] Captain Lawrence says that from 23 May 2022 until 7 November 2022 (the date he commenced his B787 course), he was bypassed for B787 training due to Air Border Order requirements which restricted his duties to A320 flights.

[45] In October 2022, the Air Border Order was rescinded, and Captain Lawrence was rostered back on the B787 fleet. He did not complete a familiarisation flight before returning as a pilot to the B787 fleet.

#### *Overview of the parties' cases*

[46] Captains Fredricsen and Lawrence have raised unjustified disadvantage grievances, claiming that they have been treated differently to other pilots in similar circumstances, and that this different treatment has unjustifiably disadvantaged them in their employment. The different treatment they point to is Air NZ's refusal to facilitate their travel to the USA to receive the Janssen vaccine. They say Air NZ's actions were unreasonable, unfair and caused them hurt, humiliation and injury to feelings. Captain Fredricsen was obliged to take leave, including leave without pay,

or be dismissed. Captain Lawrence's transfer to the B787 was delayed because he was not vaccinated, which resulted in him receiving a lower rate of pay.

[47] Air NZ does not accept the claims. It says it was not obliged, under the terms of the parties' employment agreement, to facilitate the pilots' flights to the USA to receive their preferred vaccine, and that it was not reasonable to do so in the circumstances. It says there has been no disparity of treatment because the pilots who Air NZ flew to the USA to receive the Janssen vaccine, operated on, or were about to commence operating on, the B787 fleet and were identified as aircrew members on the crew manifest for each flight. Those pilots did not fly in the capacity of supernumerary crew, whereas Captains Fredricsen and Lawrence would have had to have been flying to the USA in a supernumerary capacity, or as passengers under Air NZ's direction. Air NZ did not consider it should or could lawfully direct Captains Fredricsen and Lawrence on a flight to the USA to receive their preferred vaccine. Such a direction was required to enable Captain Fredricsen and Captain Lawrence to fall within the Air Border Order exemption for aircrew.

### **Legal framework**

[48] To establish a grievance under s 103(1)(b) of the Employment Relations Act 2000 (the Act), an employee must prove that their employment, or one or more conditions of their employment, was affected to their disadvantage by some unjustifiable action by the employer.

[49] That provision gives rise to a number of issues:

- (a) What is the action underlying the alleged disadvantage?
- (b) Did the action affect the employee's employment, or terms or conditions of their employment? (If the action affected the terms and conditions of their employment, which terms and conditions?)
- (c) Was the effect disadvantageous to the employee?
- (d) Was the action unjustified?

[50] The word “disadvantage” is a broad term. There is no restriction on the type of disadvantage that may fall for consideration. The Court or Authority considers the actual effect of the decision under challenge on the employment. Whether the employment is affected to the employee’s disadvantage by some unjustifiable action necessarily involves focussing on what has occurred, and then assessing the impact on the employee’s employment.<sup>14</sup>

[51] The terms and conditions of employment in s 103(1)(b) refer to a concept which is wider than the written contractual terms and conditions; they include the rights, benefits and obligations arising out of the relationship<sup>15</sup> as well as conditions which were understood and applied by the parties in practice or habitually.<sup>16</sup> It can also include reasonable expectations.<sup>17</sup>

[52] Further, this Court has found that a failure to comply with good faith obligations can found a disadvantage grievance.<sup>18</sup> Section 4(1) of the Act emphasises that parties to an employment relationship must deal with each other in good faith, and it goes on to state, without limiting that obligation, that parties must not – directly or indirectly – mislead or deceive each other or do anything likely to do so.<sup>19</sup>

[53] Where an action has disadvantaged an employee’s employment, or their terms or conditions of employment, the Court then goes on to consider whether the disadvantage is justified. Broadly, the test as to whether an action is justified is set out in s 103A(2) of the Act, which states:

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.

[54] In considering whether an employer’s decision to dismiss an employee was justified, the Court is often required to consider alleged disparities of treatment.

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<sup>14</sup> *Matthes v New Zealand Post Ltd* [1994] 1 ERNZ 994 (CA) at 997–998; see also *Wiles v Vice-Chancellor of the University of Auckland* [2024] NZEmpC 123 at [98].

<sup>15</sup> *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc)* [1999] 1 ERNZ 460 (CA) at [26].

<sup>16</sup> At [27].

<sup>17</sup> At [27].

<sup>18</sup> *Johnson v Chief of the New Zealand Defence Force* [2019] NZEmpC 192, (2019) 17 NZELR 137 at [79].

<sup>19</sup> At [82] and [83].

Where an employer acts inconsistently between similar situations, that can lead to an issue of whether the actions taken were those available to a fair and reasonable employer. As Judge Colgan noted in *Rapana v Northland Co-Operative Dairy Co Ltd*:<sup>20</sup>

Where, in the course of an inquiry which may lead to dismissal of an employee (or indeed to other disadvantage in employment) a question of parity of treatment of employees is in issue, the reasonable and fair treatment of the employee may involve consideration by the employer of relevant prior incidents and the consequences of them for other employees. A fair and reasonable employer will treat employees in a fair and reasonable manner. Reasonable consistency is one facet of fairness.

[55] Ultimately, where disparate treatment is alleged in the context of a claim of unjustified disadvantage, the Court must consider three questions:<sup>21</sup>

- (a) Was there disparity of treatment?
- (b) If so, is there an adequate explanation for the disparity?
- (c) If not, is the action causing disadvantage justified, notwithstanding the disparity for which there is no adequate explanation?

[56] If the first question is established by the employee, the onus shifts to the employer to either explain the disparity or else explain why their actions were justified.<sup>22</sup> In respect of the second and third question, the Court of Appeal noted in *Samu v Air New Zealand Ltd*:<sup>23</sup>

... if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an adequate explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is for ever after bound by the mistaken or overgenerous treatment of a particular employee on a particular occasion.

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<sup>20</sup> *Rapana v Northland Co-Operative Dairy Co Ltd* [1998] 2 ERNZ 528 (EmpC) at 537.

<sup>21</sup> *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)* [2005] ERNZ 767 (CA) at [45]; the Supreme Court declined leave to appeal in *Buchanan v Chief Executive of the Department of Inland Revenue* [2006] NZSC 37, [2006] ERNZ 512.

<sup>22</sup> *Rapana*, above n 20, at 537; *Airline Stewards and Hostesses of New Zealand Industrial Union of Workers v Air New Zealand Ltd* [1985] ACJ 952 (CA) at 954; and *Airline Stewards and Hostesses of New Zealand Industrial Union of Workers v Air New Zealand Ltd* [1990] 3 NZLR 549 (CA) at 554–556.

<sup>23</sup> *Samu v Air New Zealand Ltd* [1995] 1 ERNZ 636 (CA) at 639.

## Analysis

*What is the action underlying the alleged disadvantage?*

[57] Captain Fredricsen and Captain Lawrence allege that they were disadvantaged by the refusal of Air NZ to provide them with familiarisation flights to the USA in September 2021.

*Did the action affect the employee's employment, or terms or conditions of their employment?*

[58] There are no express terms or conditions in the applicable CEA that entitled Captain Fredricsen and Captain Lawrence or other pilots employed by Air NZ to be facilitated international travel to receive the Janssen vaccine.

[59] Captain Fredricsen and Captain Lawrence provide two possible grounds for why the refusal of Air NZ affected the terms and conditions of their employment. First, they say that there was a disparity of treatment as some pilots were conferred a benefit but not others. They say that disparity led to disadvantage. Second, they say that Air NZ was obliged to assist the pilots by facilitating travel to the United States to receive the Janssen vaccination.

[60] In relation to the first argument from the pilots, there is no general principle preventing employers from preferring one employee over another. The Act prohibits employers from granting preferences based on whether an employer is or is not a member of a union.<sup>24</sup> The Act prohibits discrimination.<sup>25</sup> The Equal Pay Act 1972 prohibits pay discrimination on the basis of sex.<sup>26</sup> But so long as there is no unlawful discrimination involved, there is generally nothing preventing an employer from offering comparable employees different terms.<sup>27</sup>

[61] However, although an employer is generally free to offer employees varying terms, their duty of good faith will normally require them to act consistently towards

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<sup>24</sup> Employment Relations Act 2000, s 9.

<sup>25</sup> Sections 103(1)(c), 104 and 105.

<sup>26</sup> Equal Pay Act 1972, s 2AAC.

<sup>27</sup> Employment Relations Act, s 161(2)(b).

employees. Where situations, or the terms and conditions of different employees, are alike, an employee will have a heightened obligation to act consistently. For example, an employer that ignores one employee's actions but dismisses another employee for the same behaviour is likely not being active or constructive in establishing and maintaining a productive employment relationship. Such behaviour from an employer is likely to undermine the relationship of trust and confidence between the parties as inconsistency necessarily leads to uncertainty for employees.

[62] Mr McCabe in his submissions emphasised the fact that there is a CEA covering all of the pilots employed by Air NZ under which all pilots are subject to the same terms and conditions. He essentially submitted each pilot has a reasonable expectation that they will be treated with on a consistent basis as compared to any other pilot on the CEA, unless the inconsistency is explainable or justifiable. I accept that Captain Fredricsen and Captain Lawrence had such an expectation and that it forms part of the conditions of the pilots' employment and can be derived, in the present case, from both the statutory duty of good faith and the implied duty of trust and confidence.

[63] In the present case, by the time Captain Fredricsen and Captain Lawrence sought assistance to receive the Janssen vaccination in the USA, it was becoming increasingly clear that pilots who were not vaccinated would no longer be able to fly for Air NZ, either because of Government regulations, Air NZ policy, or airport restrictions. As a result of those requirements, Air NZ had a duty to facilitate the vaccinations of pilots where possible as part of their duty of good faith to be active and constructive in maintaining a productive employment relationship.

[64] It is perhaps arguable whether that duty would generally extend to facilitating a pilot's preferred vaccine; however, it is not necessary to determine that issue for the purposes of this case. It is not necessary to determine because Air NZ went out of its way to facilitate the preferred vaccination for a number of its pilots. Therefore, there was a reasonable expectation created that Air NZ would act on a consistent basis with Captain Fredricsen and Captain Lawrence if reasonably possible.

[65] On the other hand, I do not accept that Air NZ, once it began facilitating pilots to USA, necessarily had a duty to consult with all of its other pilots about its actions prior to any such pilot making a request for facilitation. While Air NZ had a duty to treat employees consistently, that duty, in the present case, was likely only activated where a pilot made a request for facilitation.

[66] I accept that Air NZ acted inconsistently and in a manner which affected Captain Fredricsen and Captain Lawrence as they were treated differently to the other pilots. Whether that inconsistency is explainable or justifiable is discussed in more detail below.

*Was the effect disadvantageous to the employee?*

[67] If Air NZ had treated Captain Fredricsen and Captain Lawrence consistently with the other pilots, they would have been able to obtain the Janssen vaccine. If they had obtained the Janssen vaccine, they would have been free to continue flying for Air NZ domestically, and internationally once the Government amended the Vaccinations Order in October 2021 to include the Janssen vaccine.

*Was the action unjustified?*

Was there a disparity of treatment?

[68] Air NZ facilitated eight pilots who were current on the B787 aircraft to receive the Janssen vaccine. That facilitation involved arranging for these pilots to have their rosters changed so that they were rostered to fly to the USA prior to 30 September 2021. This enabled them to receive the Janssen vaccine. Air NZ also gave the pilots the details of another pilot, who could assist them with making their own arrangements to receive the vaccine during their layover in the USA.<sup>28</sup>

[69] I accept that there is a disparity of treatment between how Air NZ treated the eight current B787 pilots, who were facilitated by Air NZ to receive the Janssen vaccine in the USA, and its treatment of Captain Fredricsen and Captain Lawrence,

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<sup>28</sup> See above at [23].

who were also employed by Air NZ in the position of pilot but did not receive the same facilitation from Air NZ.

[70] In addition to the eight current B787 pilots, Air NZ also facilitated Captain Lawson to receive the Janssen vaccine. Captain Lawson did not have a type rating to fly the B787 aircraft and could not lawfully operate the controls of the B787 until he had completed training, passed all checks and obtained a current type rating for the B787 aircraft. Captain Lawson was not scheduled to begin training on the B787 aircraft until October 2024.<sup>29</sup>

[71] Captain Lawson requested Air NZ to facilitate him and other pilots to travel to the USA to enable them to receive the Janssen vaccine prior to 30 September 2021. After some back and forth, Air NZ agreed to roster Captain Lawson on a familiarisation flight to the USA to facilitate him to receive the Janssen vaccine before 30 September 2021.

[72] I accept that there is a disparity between Air NZ's treatment of Captain Lawson, who it rostered on to a familiarisation flight so as to facilitate him receiving the Janssen vaccine in the USA, and its treatment of Captain Fredricsen and Captain Lawrence, who were denied that same opportunity, even though they were employed in the same position as Captain Lawson.

Was there an adequate explanation for the disparity?

[73] I find that Air NZ had an adequate explanation for why it treated Captain Fredricsen and Captain Lawrence differently to the eight B787 pilots. Air NZ's ability to lawfully change the rosters of pilots, to enable them to be rostered on to pilot a B787 tour of duty to the USA so they could receive the Janssen vaccine, was an opportunity that could only be lawfully offered to current B787 pilots.

[74] By way of comparison, at the relevant time, neither Captain Fredricsen nor Captain Lawrence were current on the B787 aircraft. They could not lawfully operate the controls of the B787 aircraft. I accept that Air NZ could not lawfully facilitate

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<sup>29</sup> See above at [24]–[32].

Captains Fredricsen and Lawrence to obtain the Janssen vaccine in the same way as the current B787 pilots, as it could not lawfully roster them on a tour of duty as pilots on a B787 aircraft to the USA.<sup>30</sup>

[75] Turning to consider the disparity between Captain Lawson and Captains Fredricsen and Lawrence, Air NZ's explanation for that disparity was based on Captain Lawson being scheduled to receive training in October 2021 on the B787 aircraft. Air NZ considered that it could not offer Captain Fredricsen and Captain Lawrence familiarisation flights because neither of them were scheduled to receive training in the foreseeable future on the B787 aircraft. Without scheduled training on a B787 aircraft, Air NZ did not consider there were any operational reasons to roster either Captain Fredricsen or Captain Lawrence on a familiarisation flight for the B787 aircraft. Without an operational reason for either Captain being on board the B787 aircraft, Air NZ did not consider it could record them as a crew member on the crew manifest, as that would be in breach of the Air Border Order or at least the intention of the order.

[76] Air NZ also stated that it did not consider it should or could have "directed" Captains Fredricsen and Lawrence onto a flight to the USA for the sole purpose of facilitating them to obtain their preferred vaccine. Air NZ raised concerns of what would happen if they had had an adverse reaction to the vaccination while in a foreign port or travelling back to New Zealand. It submitted that such a flight needed to be entirely voluntary, not at its direction. Air NZ also considered that it was not a reasonable use of its discretion under the Air Border Order to direct aircrew onto a flight to enable them to obtain a vaccine that is not available in New Zealand, so as to allow them to take advantage of the Air Border Order exemption for aircrew, which gave them priority access to MIQ facilities (even for a short period). This was particularly the case in the circumstances at the time, when MIQ facilities were extremely limited and the demand for MIQ facilities was exceptionally high, with many people waiting months to enter New Zealand. There were also reasonable alternatives available, such as the Pfizer vaccine, and Air NZ anticipated other vaccines would become available in the near future.

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<sup>30</sup> This issue is discussed in more detail below in relation to whether Air NZ's actions were justified.

[77] Air NZ's explanation on its face provides an adequate explanation for treating Captain Lawson differently to Captains Fredricsen and Lawrence, who were not scheduled to begin training to fly the B787 aircraft in the foreseeable future and did not have the same operational reason as Captain Lawson for being rostered on a familiarisation flight on a B787 aircraft.

[78] However, the evidence and submissions presented to the Court identified the following rather unusual features of Captain Lawson's familiarisation flight, which raised questions over whether Captain Lawson's flight was genuinely for operational reasons:

- (a) The flight was not conducted in accordance with Air NZ's B787 Fleet Instructional Guide (the Guide), which provides that a familiarisation flight occurs after a training course has started, whereas Captain Lawson had his flight prior to his course beginning. While Air NZ had previously allowed pilots to have a familiarisation flight prior to commencing training, this practice is inconsistent with the Guide. The Guide is part of the suite of documents that form Air NZ's operating documents and these are considered by the Civil Aviation Authority when permitting Air NZ a license to operate as an airline.
- (b) Air NZ's familiarisation flights for a B787 aircraft are ordinarily a trans-Tasman flight which does not require a layover. It was extraordinary for Air NZ to offer a familiarisation flight to the USA with a two-day international layover that would involve additional accommodation expenses and pilot allowances. The familiarisation flight destination was not requested for training reasons, but rather, for the primary purpose of allowing Captain Lawson to fly to Los Angeles airport to facilitate him being vaccinated with the Janssen vaccine in accordance with Government key safety standards.<sup>31</sup> The two day layover was required due to Air NZ requiring its pilots to stand down for

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<sup>31</sup> See sch 2 to the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020, which sets out the key safety standards aircrew had to comply with when getting vaccinated.

a period of 24 hours after receiving a COVID-19 vaccination prior to them being able to operate as aircrew on a flight.

- (c) Captain Lawson only accepted Air NZ's offer to roster him on a familiarisation flight to Los Angeles on the condition he was able to confirm the availability of a doctor to administer the Janssen vaccine during his layover for the familiarisation flight.
- (d) During a familiarisation flight a training pilot sits in the flight deck and observes the conduct of the aircrew for the purposes of assimilation of duties and or functions. Captain Lawson's evidence was that he only spent half of his time on the flight deck observing.
- (e) Ordinarily, Air NZ would pay pilots allowances and all accommodation and other expenses associated with training. Inconsistent with this, Air NZ initially indicated it would not pay Captain Lawson any allowances and that it would recoup his accommodation and MIQ expenses for his familiarisation flight to Los Angeles. Air NZ subsequently decided that it did not require Captain Lawson to pay any costs associated with this familiarisation flight.

[79] It was submitted that when Air NZ first declined Captain Lawson's request for facilitation to Los Angeles to receive the Janssen vaccine, it was not persuaded it could "stretch the definition of training sufficiently to make it legitimate" for Captain Lawson to be rostered on a familiarisation flight on the B787 to the USA. However, after discussions with Captain Lawson, Air NZ's view had changed and it "was willing to push the boundaries of the Air Border Order somewhat, but fundamentally... this was a 'famil flight' for a proper reason in a normal circumstance."

[80] Air NZ relied on the evidence of its Fleet Manager, Captain Wilson, when it submitted that it believed that: "it was not the intent of the Air Border Order to confer on [it] a discretion to fly people to the United States solely to receive their preferred form of vaccination." However, it was Captain Wilson who advised Captain Lawson that Air NZ had approved his request for a familiarisation flight to the USA, and

Captain Wilson accepted under cross-examination that the familiarisation flight was a device to enable Captain Lawson to travel to the USA to receive the Janssen vaccine.

[81] While I consider that Air NZ could have legitimately rostered a pilot that was returning from long term sick leave and was scheduled to receive training on the B787 aircraft on a familiarisation flight for genuine operational reasons, given the evidence before me, I find that Air NZ's decision to roster Captain Lawson on a familiarisation flight was not for training or operational reasons, but rather, it was primarily a device to ensure Captain Lawson could receive the Janssen vaccine in the USA (that is, his preferred form of the COVID-19 vaccination) before the 30 September 2021 changes to the Vaccinations Order took effect.

[82] If Captain Lawson's flight was not for legitimate operational or training purposes, the distinction drawn by Air NZ between him and Captains Fredricsen and Lawrence collapses. Therefore, in the absence of any other explanation of the disparity in treatment, I find that Air NZ has not adequately explained the disparity in treatment between Captain Lawson and Captains Fredricsen and Lawrence.

Was the disparity justified in any case?

[83] I accept that Captain Fredricsen and Captain Lawrence held a reasonable expectation of consistent treatment from Air NZ in comparison to Captain Lawson. However, they could not reasonably expect Air NZ to break the rules for them. If Air NZ had previously broken the rules for Captain Lawson, Captains Fredricsen and Lawrence could not reasonably expect Air NZ to do the same for them. As the Court of Appeal held in *Samu*, there is no requirement that an employer is forever bound by the mistaken overgenerous treatment of a particular employee.

[84] It is not necessary to determine whether Air NZ broke the rules for Captain Lawson; however, I find that Air NZ's treatment of Captain Lawson was overly generous; it stretched the definition of training and the intention of the Air Border Order in an effort to legitimately roster Captain Lawson on a familiarisation flight to the USA to facilitate him receiving the Janssen vaccine.

[85] Ultimately, irrespective of whether the arrangements with Captain Lawson were lawful, the question for the Court to determine is whether Air NZ had reasonable grounds to believe that it was not able to facilitate the request from Captains Lawrence and Fredricsen for familiarisation flights.

[86] As noted above, neither Captain Fredricsen nor Captain Lawrence were current on the B787 aircraft. They could not lawfully operate the controls of the B787 aircraft. Therefore, they could not be rostered on a tour of duty to the USA. Further, unlike Captain Lawson, neither of them were due for training on the B787 aircraft, so there was no legitimate reason for them to be given a familiarisation flight. This meant that there was no way for them to be identified as a crew member on the crew manifest.

[87] The only other way that they could have been on a flight to the USA (without being subject to the ordinary MIQ requirements) was if Air NZ had directed them onto a flight under the Air Border Order. However, I accept Air NZ's submission that it could not direct the two pilots onto a flight under the Air Border Order for the sole purpose of receiving their preferred vaccination.

[88] The Air Border Order allowed some exemptions to the general rules for aircrew. However, those exemptions must be interpreted in light of their purpose, which was self-evidently to facilitate the operations of Air NZ and other airlines. Although Air NZ could direct staff onto a flight even if they were not aircrew serving on that flight, that power was included to allow it to reposition staff, such as to provide aircrew in event of staff sickness, and to fly staff internationally for the purposes of training. In respect of training, both cl 23 of the Air Border Order and sch 2 of the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020 explicitly acknowledged simulator training as being a legitimate purpose for travel for aircrew.

[89] Counsel for Captains Fredricsen and Lawrence submitted that they could have been directed onto the flight as supernumerary crew. However, it is not clear how the rules for supernumerary crew work; the evidence on that matter did not assist the Court. There is no evidence before the Court indicating that either pilot could or should have been directed to board a flight on a B787 as supernumerary crew. Further, Air NZ's ability under the CEA to permit pilots to fly as supernumerary crew needs to

be read subject to the Air Border Order. Even if under normal circumstances pilots could fly as supernumerary crew on aircraft for which they were not type-rated, a proposition for which there is no evidence, the situation was necessarily more restricted during the COVID-19 pandemic.

[90] There is no indication that the power to direct staff onto a flight included a power to direct staff onto a flight for healthcare needs. Putting aside the vaccination issue for a moment, if a pilot was unable to get medical clearance to fly as a result of some specific medical issue, such as an eye-sight problem, that could not be treated in New Zealand, it seems clear that Air NZ could not have directed them under the Air Border Order onto a flight to the USA to get the necessary treatment. As submitted by Air NZ, in such circumstances they would essentially have been a passenger, and it would have been artificial to direct them onto the flight. I consider the same principles applies to vaccinations against COVID-19.

[91] Further, even if Air NZ could have directed its pilots onto flights to get treatment relevant to their ability to fly, which I do not accept, that power would have to be interpreted restrictively given the purpose of the Air Border Order.<sup>32</sup>

The purpose of this order is to prevent, and limit the risk of, the outbreak or spread of COVID-19 by imposing certain requirements in relation to persons arriving in New Zealand by air (including medical examination and testing for COVID-19, and commencement of isolation or quarantining, as soon as practicable after arriving in New Zealand).

[92] In light of that purpose, any such power would certainly not permit Air NZ to direct staff onto a flight for medical treatment where suitable treatment was available in New Zealand. In this case, suitable treatment was available in New Zealand – the Pfizer vaccine. It may not have been a treatment that Captain Fredricsen and Captain Lawrence were willing to consider, but in light of that available alternative, they could not reasonably argue that it would be necessary for Air NZ to direct them onto a flight.

[93] Ultimately, the interpretation adopted by Air NZ, that it could not lawfully direct Captains Fredricsen and Lawrence onto a flight, was an interpretation which was open to it as a reasonable employer. In fact, it was likely the only interpretation

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<sup>32</sup> COVID-19 Public Health Response (Air Border) Order (No 2), cl 3.

available to it, meaning that a reasonable employer could not have lawfully acceded to the two pilots' request.

[94] Therefore, notwithstanding the disparity of treatment for which there is no adequate explanation, Air NZ's refusal to facilitate familiarisation flights for Captain Fredricsen and Captain Lawrence to the USA to receive the Janssen vaccine was nevertheless justified in the circumstances.

*Was there a breach of good faith?*

[95] However, while Air NZ's refusal may have been justified, I also find that Air NZ's conduct towards Captain Fredricsen and Captain Lawrence when engaging with them on its explanation for treating them disparately to Captain Lawson was not compliant with its good faith obligations.

[96] The Court held in *Johnson v Chief of Defence Force* that:<sup>33</sup>

... the statutory duty of good faith involves a broad and flexible concept, but it manifests in a standard which must be complied with. Honesty and transparency in communications between parties to an employment relationship are obligations which may fall for consideration.

[97] I find that the steps taken by Air NZ when communicating with Captains Fredricsen and Lawrence about its reasons for declining their requests for facilitation, in the face of its disparate treatment of Captain Lawson, did not provide sufficient regard to Air NZ's obligation to not do anything directly or indirectly to mislead or deceive either Captain.

[98] Nor were the communications active and constructive in establishing and maintaining a productive employment relationship. Air NZ's failure to engage constructively with Captains Fredricsen and Lawrence on the reasons for them being treated differently to Captain Lawson, including fairly explaining its interpretation of the Air Border Order, undermined the employment relationship, by undermining Captain Fredricsen and Lawrence's confidence that they would be treated fairly by Air NZ.

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<sup>33</sup> *Johnson*, above n 18, at [87].

[99] I am satisfied that Air NZ's conduct was not conduct which a fair and reasonable employer could have adopted in the circumstances. Therefore, I find that Captains Fredricsen and Lawrence have been unjustifiably disadvantaged under s 103(1)(b) of the Act and are entitled to remedies.

## **Remedies**

[100] Captains Fredricsen and Lawrence gave evidence of the negative impact their grievances had on them both financially and mentally. They did not accept the reasons Air NZ gave were fair or reasonable for treating them disparately to Captain Lawson. This caused them to feel stress and upset at the disparity in treatment.

[101] However, I do not accept that fair communication could have been expected to change the outcome for Captains Fredricsen and Lawrence. If, objectively considered, they were not lawfully entitled to fly to the USA, no amount of consultation could change that fact. As Captains Fredricsen and Lawrence did not have any entitlement to be facilitated to travel to the USA to receive the Janssen vaccine, their claim for compensation for lost benefits is not made out.

[102] A compensatory award under s 123(1)(c)(i) is directed to assessing the amount of emotional harm suffered as a result of the employer's breaches. Given the nature of Air NZ's breach of good faith and the level of humiliation, loss of dignity and injured feelings that could be attributed to this breach, I consider that a reasonable starting point would be an award that falls within the lowest band referred to in *Waikato District Health Board v Archibald*,<sup>34</sup> which were increased in 2023 to take inflation into account in *GF v Comptroller of Customs*.<sup>35</sup> In the Authority, Captains Fredricsen and Lawrence were awarded \$8,000 each as compensation for humiliation, indignity and injury to feelings. I consider the Authority award is appropriate given the evidence and that there is no reason to depart from the Authority's award, which is now confirmed.<sup>36</sup>

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<sup>34</sup> *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791 at [62]; and *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [67].

<sup>35</sup> *GF v Comptroller, New Zealand Customs Service* [2023] NZEmpC 101, [2023] ERNZ 409 at [162].

<sup>36</sup> *Fredricsen*, above n 1, at [37].

[103] I confirm the Authority's finding that there are no deductions from the monetary remedies for reasons of contribution.<sup>37</sup> Captains Fredricsen and Lawrence engaged in good faith with Air NZ when requesting Air NZ to facilitate travel for them to the USA to receive the Janssen vaccine. This was an incredibly difficult and uncertain time for all parties as they tried to navigate the COVID-19 pandemic and rapidly changing Government regulations on travel.

[104] While I have found that Air NZ breached its statutory duty of good faith, I do not find that it was a breach to which s 4A of the Act applies; it was not deliberate, serious, and sustained, or intended to undermine the employment relationship. In any event penalties for breaches of good faith have not been sought by Captain Fredricsen and Captain Lawrence.

### **Costs are reserved**

[105] The parties are encouraged to agree on costs, but if that is not possible and an order is sought from the Court, then an application may be filed and served within 28 days of the date of this judgment. Any response is to be filed and served within a further 21 days, with any reply to be filed and served within a further seven days.

M S King  
Judge

Judgment signed at 11.45am on 10 October 2024

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<sup>37</sup> At [36]; and Employment Relations Act, s 124.