

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 574  
3245100

BETWEEN BRADLEY MARSH  
Applicant

AND JETSTAR AIRWAYS  
LIMITED  
Respondent

Member of Authority: Marija Urlich

Representatives: John Hall, counsel for the Applicant  
Michael O'Brien, counsel for the Respondent

Investigation Meeting: 22 – 24 April 2024

Submissions and further 30 May and 27 June 2024  
information received: 13 June 2024

Determination: 30 September 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Bradley Marsh was employed by Jetstar Airways Limited (Jetstar) as pilot from 13 July 2009 until his dismissal effective 21 January 2022. He says his dismissal was unjustified and Jetstar failed to fairly consider alternatives to dismissal. Mr Marsh also raises a personal grievance for unjustified disadvantage – he says Jetstar unreasonably refused to grant his request for leave without pay as a means of preserving the employment relationship. He seeks remedies in respect of the personal grievances including reinstatement to his position or one no less advantageous, lost wages and compensatory damages. Mr Marsh also seeks a contribution to costs incurred.

[2] Jetstar says Mr Marsh was not unjustifiably disadvantaged in his employment or unjustifiably dismissed and is not entitled to any of the remedies sought. It seeks a contribution to costs incurred.

## **The Authority's investigation**

[3] In the course of investigating this employment relationship problem the Authority heard evidence from Mr Marsh, Nicholas Findlay, in support of Mr Marsh, Shelley Musk, who is the head of Jetstar in New Zealand, Timothy Faulkner, Jetstar's employee relations manager – flying operations and Tony MacDonald, who at the relevant time held the position with Jetstar of senior manager flying operations. A schedule of issues and positions jointly prepared by the parties has assisted the Authority's investigation of this employment relationship problem.

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

## **Issues**

[5] The issues identified for investigation and determination are:

- a) Was Mr Marsh unjustifiably disadvantaged in his employment and/or unjustifiably dismissed on or about 21 January 2022?
- b) If so, is Mr Marsh entitled to a consideration of remedies sought including:
  - i) Reinstatement to a position no less advantageous to that held at date of dismissal;
  - ii) Reimbursement of lost remuneration under s123(1)(b) and 128 of the Act; and
  - iii) Compensation under s123(1)(c)(i) of the Act.
- c) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Marsh which contributed to the circumstances which gave rise to his grievance?
- d) Is either party entitled to an award of costs?

## **Relevant law**

### *The test for justification*

[6] When the Authority considers justification for the actions of Jetstar including the dismissal decision it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of Jetstar and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[7] As part of this process the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. In a dismissal setting these are whether allegations against Mr Marsh were sufficiently investigated, concerns were then raised with him, he had a reasonable opportunity to respond to them and his explanations were considered genuinely by Jetstar before dismissal. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in Mr Marsh being treated unfairly.

[8] Jetstar could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

### *Schedule 3A - Provisions relating to COVID-19 Vaccinations*

[9] In addition to the general statutory obligations in a dismissal setting such as this the schedule 3A Provisions relating to COVID-19 Vaccinations of the Act are applicable:<sup>1</sup>

#### **Termination of employment agreement for failure to comply with relevant duties or determination**

(1) This clause applies to the following employees:

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<sup>1</sup> Schedule 3A was inserted into the Employment Relations Act 2000 on 26 November 2021, by section 22 of the COVID-19 Response (Vaccinations) Legislation Act 2021 (2021 No 51).

(a) an employee who has a duty imposed by or under the COVID-19 Public Health Response Act 2020 not to carry out work (however described) unless they are—

- (i) vaccinated; or
- (ii) required to undergo medical examination or testing for COVID-19; or
- (iii) otherwise permitted to perform the work under a COVID-19 order:

(b) an employee whose employer has determined the employee must be vaccinated to carry out the work of the employee.

(2) For the purposes of subclause (1)(b), the employer must give the employee reasonable written notice specifying the date (the **specified date**) by which the employee must be vaccinated in order to carry out the work of the employee.

(3) If the employee is unable to comply with a duty referred to in subclause (1)(a) or a determination referred to in subclause (1)(b) because they fail to comply with the relevant requirements of the COVID-19 Public Health Response Act 2020 or a COVID-19 order, or they are not vaccinated by the specified date, their employer may terminate the employee's employment agreement by giving the employee the greater of—

- (a) 4 weeks' paid written notice of the termination;
- (b) the paid notice period specified in the employee's terms and conditions of employment relating to termination of the agreement.

(4) Before giving a termination notice under subclause (3), the employer must ensure that all other reasonable alternatives that would not lead to termination of the employee's employment agreement have been exhausted.

(5) A termination notice given under subclause (3) is cancelled and is of no effect if, before the close of the period to which the notice relates, the employee becomes—

- (a) vaccinated; or
- (b) otherwise permitted to perform the work under a COVID-19 order.

(6) Subclause (5) does not apply if cancelling the notice would unreasonably disrupt the employer's business.

(7) Nothing in this clause—

- (a) prevents an employee whose employment agreement is terminated under subclause (3) from bringing a personal grievance or legal proceedings in respect of the dismissal;
- (b) prevents the parties to the employment relationship from mutually agreeing—
  - (i) to terminate the employee's employment agreement; and
  - (ii) that the employer will pay the employee in accordance with subclause (3).

## **The parties' employment agreement and relevant policies and procedures**

[10] Mr Marsh's terms and conditions of employment are contained in an individual employment agreement based on an expired collective employment agreement – Jetstar Airways Limited and NZALPA Jetstar Pilots' Collective Agreement 2017.<sup>2</sup>

[11] During the COVID-19 pandemic period, when Jetstar's usual operations were restricted Jetstar and ALPA entered variations to the collective agreement to address the effects caused to the business by these unique circumstances. Three such variations were entered – 28 March 2020, 1 December 2020 and 1 August 2021. For the purposes of this determination the key amendments to the collective agreement were that all flight crew, which included Mr Marsh, were placed on special leave without pay (SLWOP) from 1 April 2020, any leave balance may be used and annual leave of up to four weeks could be applied for in advance.<sup>3</sup>

[12] Clause 10.8 of the collective agreement provides for leave without pay:

10.8.1 The company and a pilot may agree to the taking of Leave Without Pay (LWOP).

10.8.2 On receiving an application from a pilot for LWOP, the Company shall consider whether the application can be approved. On being advised that the LWOP can be approved, the following shall apply:

(a) The period of absence shall be as agreed between the Company and the pilot.

...

[13] The application of clause 10.8 is guided by the leave without pay policy. This is a detailed document which describes the purpose of leave without pay as follows:

1.1 Leave without pay may be granted when an Employee requires time away from work (often for extended periods)...Leave without pay is only granted at the Company's discretion where there is no adverse effect on the Company's operational or business requirements.

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<sup>2</sup> The term of the collective agreement was 24 March 2017 – 23 March 2020 but remained in force after March 2021 as a consequence of the Epidemic Preparedness (Employment Relations Act 2000 Collective Bargaining) Immediate Modification Order 2020. The 2022 collective agreement was signed on 16 June 2022, after Mr Marsh's employment had ended.

<sup>3</sup> Clauses 3.2, 3.3.1 and appendix B COVID-19 collective agreement variation 28 March 2020 and as mirrored in the two subsequent variation documents.

## **Background**

[14] As stated above Mr Marsh worked for Jetstar from July 2009. He was first employed as a pilot initially as a first officer and in June 2011 he was promoted to captain a position he remained in until his employment ended on 21 January 2022. Jetstar is a wholly owned subsidiary of Jetstar Australia.

[15] Mr Marsh is a very experienced pilot. He is well regarded by his colleagues and dedicated to his role.

[16] During his employment with Jetstar he was required to work on any flights as rostered – these included domestic flights within New Zealand, trans-Tasman flights and Jetstar's Pacific Island routes. All pilots employed by Jetstar fly all routes. There are no pilots employed to only fly domestic routes. About every six months pilots must undertake simulator training and every 12 months, they must complete emergency procedure training. The simulators used for this training are provided to Jetstar by third parties – either Jetstar Australia in Melbourne or Sydney or Air New Zealand in Auckland.

[17] Jetstar accesses the aerodrome controlled by Auckland International Airport Limited. It and its employees must comply with the Auckland Airport – conditions of use.

[18] As a consequence of the significant impact of the COVID-19 pandemic response Jetstar ceased all New Zealand domestic, trans-Tasman and Pacific Island passenger flights on 27 March 2020. There was no work for pilots, including Mr Marsh. The variations to the collective agreement provided for pilots to remain employed by Jetstar but without pay.

[19] From mid-2020 Jetstar was required to implement government mandated processes and procedures relating to the COVID-19 pandemic response which were promulgated by way of Order in Council. It is accepted the requirements were operationally complex and were subject to frequent change often at little notice.

[20] In July 2021 the government vaccination order (the Order) definition of “worker” was amended to include “aircrew members”.<sup>4</sup> The effect of the amendment was that all employees who fell within the definition of “aircrew members” were to have received one dose of the approved vaccine by 30 September 2021 and a second within 35 days of the first dose.

[21] On 4 September 2021 Jetstar wrote to all staff, including Mr Marsh regarding a recent government order that air border workers be vaccinated.<sup>5</sup> This started a process of engaging directly with employees whose vaccination status was unknown.<sup>6</sup> Mr Marsh was one of these employees. He had a particular concern about the Pfizer COVID-19 vaccination, which was the only one then available in New Zealand.

[22] He advised Jetstar he would accept the Novavax vaccine which he understood would be available in New Zealand by February 2022.

[23] On 16 September Ms Musk wrote to Mr Marsh:

- (i) he was covered by the COVID-19 Public Health Response (Air Border) Order;
- (ii) the purpose of the Order was expressed as to prevent and limit the risk of the outbreak and spread of COVID-19 by requiring certain work to be carried out by persons who are vaccinated;
- (iii) Jetstar expected to start operating international services by the December roster period and needed to know if he was vaccinated to determine whether he could operate international services in that period;
- (iv) if that date changed he would be advised;
- (v) he would have to be vaccinated against COVID-19 to perform his role;
- (vi) the Order came into effect on 29 October 2021 which was the effective date for him to be vaccinated; and
- (vii) if he did not receive the vaccination Jetstar would meet with him to discuss the implications after 21 October 2021.

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<sup>4</sup> COVID-19 Public Health Response (Vaccinations) Order 2021.

<sup>5</sup> This requirement was a consequence of the COVID-19 Public Health Response (Air Border) Order (No 2) 2020.

<sup>6</sup> Though it is noted Jetstar had communicated with staff, including Mr Marsh regarding vaccination availability from February 2021 and offered the opportunity to discuss any concerns regarding the available vaccinations with relevant agencies.

[24] On 28 September Mr Marsh, along with his representative, met with Mr MacDonald and Mr Faulkner. Mr Faulkner took minutes of the meeting. The parties discussed if it was possible for Mr Marsh to be rostered international flights which did not require a layover and no Pacific Island flights (Rarotonga and Fiji), how any disruption to such a flight could be dealt with, steps taken by Air New Zealand to access different vaccines and to seek exemptions, along with his union NZALPA, from the Order for effected employees, steps Mr Marsh may be able to take independently to access an alternative, approved vaccine, Mr Marsh's concerns about the available, approved vaccine and information Jetstar could provide about the vaccine. Mr Marsh asked if a risk assessment had been taken by Jetstar in relation to the order and made clear his concerns about the approved, available vaccine including the potential risk to his health and effect this may have on his livelihood. The parties stated their wish to work together to find a solution.

[25] Jetstar facilitated a meeting with a doctor to discuss Mr Marsh's concerns about the vaccine regime.

[26] On 28 October Jetstar wrote to Mr Marsh including:

- (i) a summary of the meeting on 28 September;
- (ii) provided further information in response to issues raised by Mr Marsh including matters he had raised concerning coverage by ACC or insurance if he were to have an adverse reaction to the Pfizer vaccination;
- (iii) Jetstar had no obligation to undertake a risk assessment for positions covered by the Order;
- (iv) Mr Marsh may wish to explore alternative vaccines;
- (v) confirmed Jetstar's understanding Mr Marsh remained unvaccinated for COVID-19;
- (vi) restated the deadline for which he had to advise Jetstar he was vaccinated was 29 October 2021; and
- (vii) proposed a meeting to discuss next steps in the event Mr Marsh remained unvaccinated.

[27] The information provided did not address Mr Marsh's concerns. At the deadline date he remained unvaccinated for COVID-19.

[28] On 8 November Auckland Airport published the outcome of consultation it had undertaken regarding airport workers and COVID-19 requirements. Jetstar was one of the parties with whom Auckland Airport undertook consultation. The outcome was an amendment to the airport workers rules which required all workers with access to airside areas and landside workers in customer facing roles to have a first dose of a New Zealand government approved COVID-19 vaccine by 6 December 2021 and a second dose by 10 January 2022. Mr Marsh's role fell within the scope of the rules because during the course of his duties he would have access to airside areas.

[29] On 9 November Mr Marsh made a leave without pay request. He applied to opt out of the then published December roster and apply for leave without pay until "a proven safe vaccination with normal liability protection was available". He provided examples of vaccinations which fell into that category. His request in full follows:

Under the current FFA and SLWOP arrangement I would like to opt out of the December roster.

I would also like to apply to take Leave Without Pay on compassionate grounds until a proven safe vaccination with normal liability protection such as Novavax, Valneva 2001 or most preferentially COVX19 from Australia is available.

In fact almost any non-mRNA would most likely suffice as it is ONLY my concerns around the safety of the mRNA therapy and the unmitigated risk to my health and consequently Aviation Medical that prevents me being vaccinated per your direction.

Novavax may become available in Aussie before NZ so to that purpose I would ask that the Company assist in expeditious delivery of Novavax should it become available in Australia prior to its general release here in NZ. I am aware that the NZ government has already contracted for 10.7 million doses of Novavax.

[30] On 10 November a further meeting was held. Mr Marsh attended with his representative. Ms Musk, Mr Faulkner and Mr MacDonald attended for Jetstar. Notes of the meeting were taken by Mr Faulkner. The Jetstar representatives acknowledged Mr Marsh's email opting out of the December roster and the application for leave without pay. Mr MacDonald is noted as saying factors relevant to the consideration of the leave without pay request include "Will come down to the resource piece. Seeing

what is happening in Aus. We do have the right numbers to operate our schedule as it would normally be. Will get back to you on that when it can be.” Ms Musk stated Mr Marsh was one of a number of pilots who had made a similar request and that Jetstar had asked the Ministry of Health about a timeline for the alternative vaccines which had indicated it was “quite a long way away” and would pass on any information received. Mr Marsh said he had been told by the Ministry of Health the availability of Novavax in New Zealand was delayed until early 2022. He restated his concerns about the vaccines were their health and safety. Ms Musk said because they needed to plan for January, Jetstar would need to know by 10 December about his vaccination status and would respond to his leave application in a couple of weeks. Mr Marsh restated his grounds for asking for leave without pay were compassionate and he was reminded he could assess support networks.

[31] On 23 November Jetstar wrote to Mr Marsh recording the correspondence and meetings to date, advising the purpose of the letter was to summarise the discussion and actions from the 10 November meeting and to provide the response to his leave without pay request. The letter then addressed the following topics – availability of alternative vaccines, Mr Marsh’s leave without pay request, the request for special leave under the collective agreement variation, the requirements of Auckland airport and Jetstar’s need to know his vaccination status by 10 December to allow it to build the January 2022 roster.

[32] Regarding the availability of the alternative vaccines Mr Marsh had referred to, Jetstar stated it understood the specified vaccines had not been approved under the Order, if the vaccines for which Mr Marsh had expressed a preference became approved and were available outside New Zealand it would be his responsibility to access them at his cost and confirm to Jetstar they were recognised under the Order. The letter included the lawfulness of the Order had recently been confirmed by the High Court, that the requirement to be vaccinated was not a Jetstar requirement but a consequence of the Order and that Mr Marsh had a positive obligation to comply with the Order and “If you make the not to receive the COVID-19 vaccination you are not lawfully able to work in your position”.

[33] With regard to the leave without pay request, the letter included Jetstar’s decision to decline. The reasons included the business’s operational and commercial

requirements which involved that all New Zealand based pilots would be able to return to full time work from 1 December 2021, a comprehensive flying schedule would operate in December due to the anticipated Christmas peak and pent-up demand from out of Auckland was expected due to transition within the COVID-19 protection framework. The letter also referred to Jetstar having the correct pilot resource levels and no relief capacity. With respect to Mr Marsh's grounds of request, they were addressed as follows:

We have also considered that your request is based on you seeking to opt out of your position for a period of up to 12-month period to avoid having to comply with obligations under the Order. This is an Order that nearly all your colleagues have taken steps to comply with. We do not consider that the Qantas Group LWOP Policy should be used to avoid an employee having to comply with legislative obligations. Further, by deferring a decision it only creates potential downstream uncertainty for us over whether you will be able to lawfully perform your position in 12 months-time.

[34] The letter went on to confirm special leave without pay under the collective agreement variation was not available because it expired on 31 December 2021 and there was no plan to extend it further. Mr Marsh's 'opt out' for the December roster was confirmed but would not be available for January 2022. Reference was then made to the Auckland airport worker rules and that unless Mr Marsh could comply with them, including being vaccinated as required, he could not perform his role. The letter ended seeking Mr Marsh provide evidence of being vaccinated in terms outlined by 10 December 2021 then he could anticipate being presented with a proposal to terminate his employment on notice from 31 December 2021. The letter included contact details for the support services should he wish to access them.

[35] On 29 November new vaccines were announced as meeting requirements.

[36] On 7 December NZALPA wrote to Jetstar on behalf of Mr Marsh and another similarly affected Jetstar employee. The letter acknowledged NZALPA had had an opportunity to make submissions on the implementation of the Order by Jetstar but sought to raise concerns about an outcome of the implementation being the decision not to grant leave without pay for Mr Marsh and another pilot. The concern was the decline of the leave application would likely lead to their dismissal and such an outcome would not be fair, reasonable or proportionate - Mr Marsh, and the other affected pilot, wished to remain employed by Jetstar, they were not subject to disciplinary action, they had

proposed leave without pay as a way to maintain the employment relationship, they had indicated they will take the Novavax vaccine which was likely to be available in New Zealand in the next 12 months which is the period the leave without pay policy provides. The letter then referred to the statutory good faith obligation and the emphasis on maintaining the employment relationship and characterised the situation as one which would fall within the compassionate grounds of the policy. The letter requested Jetstar reconsider the leave without pay request.

[37] On 13 December Ms Musk replied to the NZALPA letter. She confirmed the matters raised had been considered as well as the decision to decline the requests for leave without pay. The letter advised the operational and commercial requirements of the business had become more acute since the 23 November correspondence - pilot resignations and movement (or likely movement) to work with the parent company in Australia had reinforced Jetstar's concerns about pilot attrition coinciding with the anticipated ramp up of work in the first quarter 2022. This issue was significant for Jetstar because it needed to know the numbers of pilots available as soon to start building the January roster and this included knowing Mr Marsh's vaccination status because this was a condition of his ability to perform his role.

[38] With respect to the compassionate grounds on which leave was sought Ms Marsh's letter stated:

...we do not agree that these circumstances fall within the intended scope of that part of the policy and that your members "have been stricken by misfortune".<sup>7</sup>

The Order is one that nearly all their colleagues have taken steps to comply with. Furthermore, we have highlighted that we do not consider that the Qantas Group LWOP Policy should be used to avoid an employee having to comply with legislative obligations.

[39] The letter expressed a view all reasonable and practicable steps had been exhausted to assist Mr Marsh and his colleague in their decision-making process with regard to the vaccination consequences of the Order and confirmed next steps including that Jetstar would write to Mr Marsh the following week to invite him to a meeting.

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<sup>7</sup> A quote from the NZALPA letter 7 December 2021.

[40] As advised Ms Musk wrote to Mr Marsh on 16 December. The letter confirmed the parties' discussions to date regarding his vaccination status, set out the next steps including if Mr Marsh could advise by the following day 17 December if he had been vaccinated and if he had not, Jetstar's likely preliminary view to provide him an opportunity to consider and reflect. That view was because Mr Marsh had not yet advised he had received the first dose of the vaccine, Jetstar understood he had not and would move to review the ongoing employment relationship with the likely outcome being his employment would be terminated.

[41] On 23 December Ms Musk wrote again to Mr Marsh in a detailed letter of Jetstar's preliminary view his employment would be terminated as he was unable to work as a pilot because he remained unvaccinated. A meeting was proposed.

[42] On 17 January 2022 the parties met. Mr Marsh attended with his NZALPA representative and Ms Musk, Mr MacDonald and Mr Faulkner attended for Jetstar. The purpose of the meeting was to hear Mr Marsh's feedback on the 23 December letter and provide him an opportunity to comment on the preliminary proposal to terminate his employment. Mr Marsh reiterated it was unfair Jetstar would not grant him leave without pay to await the arrival of the Novavax vaccine, his concerns about the available vaccines were ongoing, he confirmed he could and was willing to work domestically and did not accept the Auckland airport rules could prevent him performing his duties. He also raised "as relevant and precedent setting" a colleague currently on leave without pay. Notice was discussed and Mr Marsh advised his preference was to be paid out his contractual two months' notice in January. The meeting ended with Ms Musk reminding Mr Marsh of the support services available, that she would consider all the issues raised and hoped to advise of a decision by the end of the week.

[43] On 21 January Jetstar wrote to Mr Marsh confirming the decision to terminate his employment.

[44] By letter dated 28 February Mr Marsh's representative wrote to Jetstar raising personal grievances for unjustified action and unjustified dismissal. On 3 March Ms Musk replied that Jetstar's view was Mr Marsh had no grounds for a personal grievance.

## Discussion

[45] Mr Marsh brings two personal grievances before the Authority – the first is Jetstar unreasonably and unfairly declined his claim for leave without pay amounting to an unjustified disadvantage and the second that Jetstar’s decision to dismiss him was unjustified. Jetstar says it has discharged the s 103A statutory duty and the decision to dismiss was one open to a fair and reasonable employer in all the circumstances.

*Did Jetstar fail to fairly and reasonably consider Mr Marsh’s claim for leave without pay amounting to an unjustified disadvantage?*

[46] To establish a personal grievance for unjustified action two limbs must be established - a breach of an employee’s condition of employment and that such breach causes an employee disadvantage in their employment.

[47] A disadvantage is wider than the terms of employment. Jetstar was obliged to treat Mr Marsh fairly and reasonably and comply with the obligation of good faith which requires parties to employment relationships to be active and constructive and responsive and communicative.<sup>8</sup> The employer's obligations to comply with legislative requirements may override its obligations as an employer. In *Air Nelson Ltd v Neill*, the employee suffered disadvantage in his employment but this was seen as an unavoidable consequence of the promotion of high standards of public safety under the Civil Aviation Act.<sup>9</sup>

[48] Mr Marsh says Jetstar’s decision to decline his leave without pay request was unfair and unreasonable because it:

- (i) disregarded its own policy and misunderstood its obligations when assessing his leave without pay application; and
- (ii) given Mr Marsh’s application for leave without pay he had no obligation to be vaccinated.

[49] Jetstar says it fairly considered the request based on the information provided by Mr Marsh and balancing all the relevant factors including the pressure on the

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<sup>8</sup> Employment Relations Act 2000, s 4.

<sup>9</sup> *Air Nelson Ltd v Neill* (2008) 6 NZELR 58 (EmpC).

business to secure its pilot cohort in the pandemic re-opening stage and the potential implications of granting Mr Marsh's request for other vaccine hesitant employees, it was open to it to decline the request.

[50] There is no dispute between the parties that leave without pay was a discretionary policy. A discretion must be exercised fairly and reasonably. Did this occur?

[51] Mr Marsh sought leave without pay on compassionate grounds for a period of 12 months or until a vaccine acceptable to him such as Novavax became available.<sup>10</sup> He made this request because his view was the then available vaccine posed an unacceptable risk to his health and if he did not receive an approved vaccine within the stated timeframe, he understood his employment would likely be terminated. There can be no doubt Mr Marsh faced a formidable dilemma and has sought to engage with Jetstar to find a resolution using a mechanism within the parties' employment agreement – leave without pay.

[52] Jetstar accepted Mr Marsh was entitled to make a choice as to the vaccine he received. Jetstar's witnesses also accepted, in evidence before the Authority, that they understood at the time this decision was made that Mr Marsh's views were sincerely held. How then could Jetstar reach a view, on reasonable grounds that Mr Marsh was applying for compassionate leave with a view to avoid his legal obligation to receive the vaccine? In the circumstances of this matter and given the information before the parties at the time the decision was made, it could not because this view was not put to Mr Marsh to comment on in a manner which was fair and consistent with the obligation of good faith. At the meeting held to discuss the leave without pay request on 10 November Jetstar's view that the request was made with a view to avoiding a legal obligation of Mr Marsh's was not put to him to comment on nor was he challenged as to his view that he believed the available vaccine presented a serious risk to his health and safety. It could reasonably be expected such a meeting might be used to raise questions and gather information to better understand the basis of the request. This does not appear to have occurred. While it is accepted correspondence was subsequently exchanged by the parties concerning the leave request the core issue as to Mr Marsh's

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<sup>10</sup> Refer Mr Marsh email request to Mr MacDonald 9 November 2021 and NZALPA's letter 7 December 2021.

motivation for making the request, as identified by Jetstar in the correspondence of 23 November and 13 December was not further deliberated.

[53] For these reasons Jetstar is unable to establish it has fairly and reasonably considered Mr Marsh's request for leave without pay and a personal grievance for unjustified disadvantage has been established. Mr Marsh could reasonably expect such a request, in these particular circumstances, to be fairly and reasonably considered including having conclusions as to his motivation for the request put to him in a fair and reasonable way to allow him to comment. However, for the avoidance of doubt it does not follow, that the leave without pay request should have been granted. While Jetstar had an obligation to engage with this process in a manner consistent with the obligation of good faith including being responsive and communicative, so too did Mr Marsh.

*Did Jetstar unjustifiably dismiss Mr Marsh?*

[54] On 21 January 2022 Jetstar gave Mr Marsh notice of dismissal with two months' pay in lieu, as he had requested and as provided under the parties' employment agreement. The grounds of dismissal were Jetstar had not received any approved official evidence that Mr Marsh had been vaccinated against COVID-19 or had applied for or obtained a medical exemption from vaccination. The dismissal decision followed a long and thorough process as narrated above.

[55] By this stage the amendment to Schedule 3A of the Employment Relations Act 2000 governed dismissals of this kind.<sup>11</sup> Jetstar was obliged to comply with, in both process and substance, the procedure set out in Schedule 3A(3) to terminate an employment agreement for failure to comply with relevant duties. The notice of dismissal relies on Jetstar's understanding Mr Marsh was required under a duty imposed by or under the COVID-19 Public Health Response Act 2020 to be vaccinated to carry out his work. Mr Marsh brings no challenge to that understanding. The application of clause 3(1) is established.

[56] Clause (2) of Schedule 3A is next and required Jetstar to give Mr Marsh reasonable notice of a specified date by which he was required to be vaccinated to carry

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<sup>11</sup> Employment Relations Act 2000, clause (1)(a)(i) of Schedule 3A.

out his work. Implicit in any reasonable notice is that it includes the grounds upon which the notice is exercised.

[57] Did Mr Marsh receive reasonable written notice of the clause (2) specified date? Yes. Over the period commencing in mid-September he received multiple notices of dates by when he must be vaccinated – first 29 October, then 10 December, then 17 December. He can have had no doubt as to the vaccination requirement requested of him and the reason why. When the 17 December date passed without the requested advice of vaccination, Jetstar then engaged with Mr Marsh through to 17 January as to consequences to his employment. This approach was broadly compliant with the statutory scheme. Though there were overlaps occasioned by its consideration of the leave without pay request and the complexity of dealing with such a novel and solemn situation, having satisfied itself Mr Marsh could not fulfil the vaccination requirement by the specified date, Jetstar then turned its mind to Mr Marsh’s possible dismissal before giving notice of termination.<sup>12</sup>

[58] The next consideration is whether Jetstar can demonstrate it has met the high threshold set by clause 3(4) and ensured all reasonable alternatives that would not lead to termination of Mr Marsh’s employment had been exhausted.<sup>13</sup> This would require an active inquiry by Jetstar and likely include a positive engagement with Mr Marsh to seek out and exhaust any such reasonable alternatives. Though the process Jetstar undertook with Mr Marsh was long and detailed it is unable to demonstrate it has exhausted all reasonable alternatives to dismissal, to the requisite high standard, prior to issuing the notice of dismissal. The failure to fairly consider the leave without pay request, as detailed above, means it cannot be said this alternative was exhausted. A further matter concerns whether Mr Marsh could have been directed, following appropriate consultation to use his annual leave balance to avoid dismissal. Jetstar says Mr Marsh indicated he did not wish to use his annual leave and sought to keep it as a contingency. It was within Jetstar’s ability to direct the use of annual leave and the information before the Authority does not suggest this alternative to dismissal had been exhausted.

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<sup>12</sup> Employment Relations Act, clause 3(4) of Schedule 3A.

<sup>13</sup> Ibid.

[59] For these reasons Jetstar is unable to establish it has discharged the statutory requirement to ensure all other reasonable alternatives to dismissal had been exhausted prior to dismissal. These failures render Mr Marsh's dismissal unjustified.

## **Remedies**

[60] Mr Marsh has established personal grievances for unjustified action and unjustified dismissal. He is entitled to a consideration of the remedies sought.

### *Reinstatement*

[61] Reinstatement is the primary remedy in proceedings for unjustified dismissal.<sup>14</sup> The remedy of reinstatement is to the employee's former position or one no less advantageous.<sup>15</sup> It must be awarded wherever practicable or reasonable to do so.<sup>16</sup>

[62] Mr Marsh submits reinstatement is reasonable and practicable:

- a party opposing reinstatement would have to prove reinstatement was not reasonable or practicable;<sup>17</sup>
- he can return to and successfully reintegrate into workplace;
- he was not dismissed for misconduct and has faced no disciplinary action; and
- the fact of a personal grievance and defence of that grievance is not a factor in assessing practicability or reasonableness.

[63] The availability of a vacancy is not a requirement of reinstatement.<sup>18</sup> The considerations are practicability and reasonableness. Jetstar is a substantial business, and it needs experienced pilots. Reinstatement would be possible. However, Jetstar says it is not reasonable or practicable to reinstate Mr Marsh. Jetstar holds sincere concerns as to Mr Marsh's ability to return to work their having expressed a view that it is

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<sup>14</sup> Section 123(1) Employment Relations Act 2000.

<sup>15</sup> Section 123(1)(a).

<sup>16</sup> Section 125(2) Employment Relations Act 2000.

<sup>17</sup> *Humphrey v Canterbury District Health Board Te Poari Hauora O Waitaha* [2021] NZEmpC 59.

<sup>18</sup> *Walker v Firth Industries a division of Fletcher Concrete & Infrastructure Limited* [2014] NZEmpC 60 at [83].

responsible for destroying his flying career and conduct towards Mr MacDonald in particular. Jetstar says there has likely been an irreparable loss of trust and confidence.

[64] While it has been on notice from the outset of Mr Marsh's intention to seek reinstatement that was some time ago and parties have moved on – Mr Marsh has a new role to which he is bonded until February 2026.

[65] The dismissal process will have inevitably eroded the trust and confidence between the parties and may make re-establishing that necessary element of any employment relationship difficult. Mr Marsh's evidence to the Authority suggests he holds a degree of resentment towards Jetstar. Given the team environment he would have to work in these unresolved issues weigh against the reasonableness of reinstatement.

[66] Mr Marsh's claim for reinstatement is unsuccessful.

#### *Reimbursement*

[67] Mr Marsh seeks reimbursement of earnings lost because of his dismissal pursuant to section 123(1)(b) and 128 of the Act. The claim is declined. If he had remained employed with Jetstar, in the terms he proposed, he would have received no pay. On the information before the Authority, he did not look for another job until over a year after his employment with Jetstar ended. While it is accepted Mr Marsh would have experienced difficulty finding alternative employment in his field following his dismissal given the vaccination Order requirements and very likely ongoing impact on job prospects of the effects of the COVID-19 pandemic, the apparent substantial delay in starting the search means he is unable to satisfy the Authority that he has taken the necessary steps to mitigate this loss.

#### *Compensation for humiliation, loss of dignity and injury to feelings*

[68] The established grievances fold into each other and are more appropriately compensated on a globalised basis. Mr Marsh said his dismissal and its consequences were humiliating, that his ability to provide for his family was undermined and colleagues thought he had been dismissed for misconduct. His friends observed him as depressed and angry, and he has felt his self-esteem and well-being damaged because of the events which gave rise to his grievances.

[69] I accept the circumstances of his personal grievances have had a profound and negative impact on Mr Marsh. He is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to such of \$20,000.00.

*If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Mr Marsh that contributed to the situation giving rise to his grievance?*

[70] No deduction from the remedies awarded is to be made under s 124 of the Act. The unjustifiability of Mr Marsh's dismissal has been established in Jetstar's failure to follow statutory requirements and the unjustifiable action arose from Jetstar's misdirection as to how to approach his leave without pay request. These obligations were not Mr Marsh's and there is to be no deduction from the monetary remedies for reasons of contribution.

### **Summary**

[71] Jetstar Airways Limited must pay Bradley Marsh \$20,000 without deduction within 21 days of the date of determination.

### **Costs**

[72] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[73] If parties are unable to resolve costs between them and an Authority determination on costs is needed Mr Marsh may lodge, and then should serve, a memorandum on costs within 21 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Jetstar would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

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

[75] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>19</sup>

Marija Urlich  
Member of the Employment Relations Authority

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<sup>19</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).