IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2025] NZEmpC 223
EMPC 59/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GARTH McGEARTY Plaintiff
AND	AIR NEW ZEALAND LIMITED Defendant
AND	NEW ZEALAND AIR LINE PILOTS' ASSOCIATION Intervener

Hearing:	17–20 March 2025 (Heard at Auckland)
Appearances:	RE Harrison KC and R McCabe, counsel for plaintiff PA Caisley and S Worthy, counsel for defendant P Wicks KC and J Hall, counsel for NZALPA as intervener
Judgment:	14 October 2025

JUDGMENT OF JUDGE KATHRYN BECK

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[1] This proceeding involves a de novo challenge to a determination of the Employment Relations Authority.[1]

[2] The plaintiff, Captain McGearty, pursues a personal grievance claim against his employer, Air New Zealand Ltd (Air NZ), for unjustified disadvantage and unlawful discrimination by reason of age.

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1 *McGearty v Air New Zealand Ltd* [2024] NZERA 55.

[3] The Authority found that Air NZ's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time those actions occurred, and that the plaintiff did not have personal grievances for either unjustified disadvantage or unlawful discrimination under the Employment Relations Act 2000 (the Act).

Issues

[4] The issues for determination in this proceeding are:

(a) whether Captain McGearty was disadvantaged by the unjustified actions of Air NZ;[2]

(b) whether Air NZ unlawfully discriminated against Captain McGearty by reason of his age;[3]

(c) if Captain McGearty was disadvantaged or discriminated against, whether he failed to mitigate his loss;[4] and

(d) whether Captain McGearty is estopped from claiming he was unjustifiably disadvantaged or unlawfully discriminated against due to his union membership with the New Zealand Air Line Pilots' Association (NZALPA), binding him to the terms of the collective employment agreement and any subsequent agreements made between Air NZ and NZALPA.

[5] NZALPA sought and was granted leave to intervene in the proceedings as the issues for determination involved interpretation of the union's collective agreement. It made submissions at the conclusion of the hearing which primarily addressed and supported Air NZ's positive defence of estoppel.

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2 Employment Relations Act 2000, s 103(1)(b).
3 Sections 103(1)(c), 104(1)(a) or 104(1)(b).
4 The Court is not required to determine the issue of quantum but a finding is sought on mitigation.

Background

[6] Captain McGearty is a pilot employed by the defendant, Air NZ. He has attained the rank of captain of the Boeing 777, being the most senior line pilot, referred to as C7. He turned 65 on 24 July 2017.

[7] The claims of unjustified disadvantage and unlawful discrimination arise from the same fundamental issue – namely, that once pilots turn 65, their options for international commercial flying are restricted by international law. These pilots are referred to as Age Restricted Pilots (ARPs).

[8] Under New Zealand domestic legislation, a pilot may continue flying until any age provided they meet the relevant licensing requirement. However, flying beyond New Zealand's territorial boundaries requires compliance with both domestic legislation and the laws applicable in the country the flight is operating in. For international flying, the requirements which pilots must meet are governed by the International Civil Aviation Organisation (ICAO).

[9] As part of its regulatory powers, ICAO publishes Standards and Recommended Practices that contracting states, including New Zealand, are required to comply with to participate in international civil aviation. In particular, standards published by ICAO are those which must be followed by contracting states unless a "difference" is filed. Filing a difference rejects a standard, but only within the territory of the contracting state.

[10] Contracting states are open to file a difference and regulate domestic air travel according to their own legislation; however, the ICAO standard provision in relation to age requirements (the Standard) imposes limitations on ARPs flying internationally:[5]

> 2.1.10 Limitation of privileges of pilots who have attained their 60th birthday and curtailment of privileges of pilots who have attained their 65th birthday.

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5 Civil Aviation Authority of New Zealand "Annex 1, Amendment 179 – Personnel Licensing" (25 August 2025) <www.aviation.govt.nz> at 2.1.10.

> A Contracting State, having issued pilot licenses, shall not permit the holders thereof to act as pilot of an aircraft engaged in international commercial air transport operations if the license holders have attained their 60th birthday or, in the case of operations with more than one pilot, their 65th birthday.

[11] The Standard has caused issues under New Zealand law, which prohibits age discrimination in employment matters. It is the tension between the Standard and the prohibition of age discrimination that gives rise to this proceeding.

[12] Although New Zealand has filed a difference to the Standard, it applies to territories which Air NZ's international fleets fly to, from, or through. The United States of America, for example, imposes both the Standard and age restrictions issued by the Federal Aviation Administration (FAA). This can create complexity for commercial flight operations and plans which require nominating alternate airports for emergency landings, as ARPs cannot fly through airspace where the Standard applies. The major exception to international flying for ARPs is to and from Australia, which has also filed a difference to the Standard. Some Pacific Islands have done so as well.[6]

[13] In practice, the options for ARPs and their employers are restricted, as the Standard prevents ARPs from operating an aircraft to any contracting state of ICAO which has not filed a difference to the Standard.

[14] Where a pilot's career is affected on becoming an ARP, the relevant clause in the collective agreement between NZALPA, Captain McGearty's union, and Air NZ prevails:

> **3.2.3 Pilots Precluded from Certain Destinations**
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> Where, by virtue of the effect of domestic or foreign legislation relating to the pilot's age, a pilot is prohibited from operating aircraft to sufficient of the destinations and/or destination alternates of the fleet on which the pilot is employed as to preclude the pilot's being able to be rostered in the pilot's current fleet in accordance with the prevailing rostering provisions, then the following shall apply:
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> 3.2.3.1 The Company shall seek from the pilot a stipulation as to the fleet and rank for which the pilot is eligible, and which is not sufficiently affected by the legislation, to which the pilot wishes to be transferred. The pilot may elect to take some or all leave due from the age relevant to the legislation, being remaining Annual Leave followed by

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6 Tonga, Niue and Apia in Samoa.

Retirement Leave (refer to 3.2.3.6). In that case, the stipulation by the pilot shall be made by six months before the end of that leave. If no leave election has been made, the pilot must make the stipulation by six months before reaching the age relevant to the legislation.

3.2.3.2 The Company shall create a position, if no vacancy meeting the stipulation is available at that time, for the pilot in accordance with the pilot's stipulation. This position, whether created or by virtue of an existing vacancy, shall not constitute a "vacancy" for the purposes of bypass and bypass pay for any other pilot.

3.2.3.3 Subject only to 3.2.3.5, on successfully completing the final simulator exercise (or aircraft circuits if required) relevant to the new equipment category the pilot will take up the position at the rank and on the aircraft type stipulated and be paid that applicable rate of remuneration. Where a change of aircraft type is involved the applicable bond and lock-on provisions shall apply.

3.2.3.4 Should the pilot fail to stipulate in accordance with 3.2.3.1 by the date of reaching the age relevant to the legislation, or fail to successfully complete any training necessary to take up the stipulated position, the pilot shall be appointed to the highest rank on the largest aircraft type to which the pilot's seniority would provide an entitlement and to which that pilot can be appointed and still comply with the relevant legislation and shall be paid at that applicable rate of remuneration.[7]

3.2.3.5 Where the pilot takes up the stipulated position prior to reaching the age relevant to the legislation the pilot shall continue, until reaching that age, to be paid in all respects as if the pilot continued to operate the aircraft type on which the pilot was previously appointed.

3.2.3.6 On the pilot reaching the age relevant to the legislation the Company shall calculate the value of all of the pilot's untaken leave entitlements as at the date prior to reaching the relevant age and provide a copy of these calculations to the pilot and an explanation of the following options.

On receiving their leave breakdown, the pilot may elect to:

a) receive some or all of the leave entitlement as a period or periods of leave; and/or
b) receive some of the leave entitlement as a lump sum payment (in accordance with the leave forfeiture process set out in 16.1.5.6.2); and/or
c) ring-fence some or all of the leave entitlement at the calculated rate and receive this leave on retirement from the Company.

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[7] Clause 3.2.3.4 in the previous collective agreement read: "Should the Captain fail to stipulate by the date of his reaching the age relevant to the legislation, or should the Captain fail to successfully complete any training necessary to take up the stipulated position, the Captain shall be appointed to a First Officer position on the fleet on which he held his command and shall be paid at that applicable rate of remuneration.

> The timing of the allocation of the leave period(s) due to the pilot will be agreed between the Company and the pilot. At whatever stage the pilot elects to receive any or all of this entitlement it will be paid at the rate and value ascribed to it at the time the pilot reached the relevant age.
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> Once affected by 3.2.3 a pilot may not, except in the event the relevant legislation changes removing the age related prohibition, exercise bid rights for positions to which the legislation applies.

[15] The effect of cl 3.2.3 is that where a pilot's career is affected by the Standard, they are entitled to make an election to either retire and claim annual leave in addition to retirement leave, or transfer to a fleet and rank not sufficiently affected by the Standard. In practice, this means that they would transfer to the narrow-body A320 fleet.

[16] Transferring from the wide-body B777 or B787 fleets to the A320 fleet results in a reduction of income of approximately $80,000 per annum in base pay. The evidence also indicated that pilots in general prefer to fly the larger wide-body jets rather than the narrow-body ones.

[17] Air NZ wrote to Captain McGearty on 26 July 2016, approximately one year before he reached the age of 65, requesting that he stipulate his intentions pursuant to cl 3.2.3 – specifically, whether he wished to transfer to the A320 or take leave upon turning 65.

[18] There was a period during which Captain McGearty did not formally respond to Air NZ's requests and inquiries regarding his intentions. There is therefore some dispute over the timing of when he first indicated a preference to continue flying on the B777 rather than transferring to the narrow-body fleet.

[19] Air NZ maintains that despite its continued requests, Captain McGearty did not formally declare his intention to continue flying on the B777 until he sent it a letter dated 1 February 2018, stating that he did not consider that the B777 fleet was sufficiently affected by the legislation to the extent that would require him to make a stipulation.

[20] Captain McGearty says that leading up to his 65th birthday (prior to July 2017), he had raised the issue with Air NZ verbally and at least by late 2017, he informed Captain Shaw, senior B777 fleet manager, that he did not wish to transfer to the A320 and believed he could continue being rostered on the B777.

[21] Captain McGearty considered that he had an in-depth understanding of the rostering system from an operational and contractual policy perspective. He had several years on the international pilots rostering committee and had assisted on projects involving the development of new rostering systems.

[22] The process of allocating pilots to aircraft is not straightforward. Air NZ operations are configured by an allocation of pilots to particular aircraft. Air NZ pilots generally only operate one type of aircraft at any one time. For each aircraft type, a pool of pilots is created from which flying rosters will be established for each schedule period.[8] This process is detailed, complex and has to take into account many factors other than age.

[23] The rostering process is defined in the Crew Scheduling Rules (CSRs). The CSRs form part of the collective agreement under cl 11.2.5, although the clause states that the provisions of the collective agreement will prevail in the event of any inconsistency. CSRs are capable of being varied from time to time pursuant to a mechanism for amendment by the contract management group (CMG). Any variation to the rules is a contractually fixed process with some formality required.[9] Therefore, the CSRs (albeit contained in a separate document) are part of the collective agreement and cannot be amended other than by agreement.

[24] The ARP issue has previously been the subject of litigation, particularly where pilots were effectively demoted upon becoming ARPs.[10] Air NZ's approach to the ARP issue is a product of the factual context within which it has been operating,

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8 There are two schedules a year which cover a six-month period. Within each schedule period there are six 28-day rosters. Within each roster a pilot will have a number of Tours of Duty.

9 Within the CSRs, what is referred to as the "The Rostering Evolutionary Agreement" is the only mechanism by which the rostering systems can be changed.

10 See generally *Smith v Air New Zealand Ltd* [2000] 2 ERNZ 376; *Rowland v Air New Zealand Ltd* EMT Auckland AET 1242/00, 18 September 2002; *Air New Zealand Ltd v Rush* [2003] 2 ERNZ 344; and *McAlister v Air New Zealand Ltd* [2009] NZSC 78, [2010] 1 NZLR 153, [2009] ERNZ 410.

including changes to the Standard itself. However, it is common ground that the situation has evolved from when cl 3.2.3 was first negotiated into the collective agreement with NZALPA in 2005.

[25] When cl 3.2.3 was first introduced, Air NZ was operating wide-body aircraft, being the B747, B767 and B737. These aircraft undertook mid-haul and long-haul flying and consequently operated frequently to destinations that applied the Standard. In 2014, when the Standard changed to prohibit any pilots from operating past the age of 65, Air NZ and NZALPA amended the ARP provision to allow ARPs, upon turning 65, to elect to move to the A320 fleet.

[26] Over time, Air NZ reduced the range of wide-body aircraft that it flew and increased the number of flights to Australia and the Pacific. It also introduced more sophisticated and responsive rostering software. All of these changes impacted the ability to roster ARPs on wide-body aircraft.

[27] While the exact timing is not clear, sometime in 2014, other ARPs sought the advice of Captain McGearty who advised them that he believed they now could, and should, be accommodated on the wide-body fleet. As noted above, Captain McGearty says that despite his formal request not being made until early 2018, Air NZ was on notice of his individual position on the ARP issue prior to 2017.

[28] This is consistent with Air NZ's evidence that in late 2017, in response to renewed requests from ARPs to be accommodated on the wide-body fleet, the international rostering and scheduling committee (RSC), made up of representatives from Air NZ, NZALPA and the other union representing pilots, Federation of Air New Zealand Pilots (FANZP), undertook high-level modelling to determine whether it would be potentially possible to accommodate some ARPs as C7s.

[29] During this time, Captain McGearty was taking a period of annual leave which had commenced from 24 July 2017 when he turned 65.

[30] Captain McGearty's planned leave was due to end on 10 March 2018. Unfortunately, on 28 February 2018, Captain McGearty advised Air NZ that he no longer had medical clearance and commenced a period of sick leave.

[31] In a report dated 19 March 2018, Air NZ advised that the modelling results showed it was possible in theory to accommodate some ARPs across the rosters on the wide-body fleets, with some impacts to other pilots. Air NZ commenced a consultation process with NZALPA and FANZP with a view to attempting to agree the terms of a trial.

[32] It is fair to say that discussions were not easy. Air NZ says the age issue has created disharmony among pilots, and between unions themselves. Younger pilots took issue with what they saw as barriers to their progression onto the wide-body fleet. For NZALPA, this resulted in a conflict of interest within the membership between ARPs and other pilots.

[33] Captain McGearty regained his medical clearance on 2 May 2018. Despite his formal request to Air NZ in February 2018, he was not rostered as a C7 pilot at that time. He continued to be paid, but without incentive pay, until he went on leave without pay later that year.

[34] On 11 July 2018, NZALPA requested Air NZ to halt work on the trial until legal advice was obtained. Air NZ agreed.

[35] NZALPA set up an internal framework[11] to manage any conflicts of interest, which involved assigning specific union officers and legal counsel into two independent groups.

[36] On becoming aware that the trial was not proceeding, Captain McGearty wrote to Air NZ on 12 July 2018, asking for an explanation as to next steps. Captain Whittaker (then Air NZ chief air operations and people safety officer) advised that he would be in touch to discuss options.

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[11] A Chinese wall.

[37] On 10 August 2018, Air NZ wrote to Captain McGearty, advising him that given the delay in plans for a trial, it would now roster him for the next C20[12] course unless he elected to take leave without pay.

[38] On 16 August 2018, Captain McGearty responded, noting that he had attended two meetings to resolve the matter raised in his 1 February 2018 letter. He recorded his understanding that the research to date stated that a minimum of three pilots could be rostered without accommodation. He advised that the letter from Air NZ gave him two unpalatable choices, both of which were contrary to his contract and human rights legislation. He asked a series of questions including "Can I be rostered to my current position?".

[39] Air NZ responded to Captain McGearty on 27 August 2018, acknowledging that the situation was not ideal. It stated that the fairest approach, while waiting for consensus, was to continue the current arrangements but allow ARPs like Captain McGearty to have the choice of moving to an A320 position or taking leave without pay. It answered his earlier questions and advised, amongst other things, that it would waive the requirement of a bond in the event he chose to resign or retire, and advised that he would not be subject to a "lock-on".[13] It attached a letter setting out the terms of leave without pay and informed him that he was rostered to attend an A320 course in September 2018, should he wish to move to that position.

[40] Captain McGearty was placed on leave without pay from 30 August 2018.

[41] On 13 September 2018, Air NZ sought a formal response from Captain McGearty in relation to leave without pay.

[42] On 28 September 2018, Mr McCabe, NZALPA's counsel, wrote to Air NZ advising that in the circumstances, Captain McGearty felt he had no option but to elect to take leave without pay. However, he repeated a proposal that he work as a simulator instructor or undertake administrative duties until such time as the situation was

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12 Captain on an A320.

13 A lock-on refers to a period of time following a change in rank, equipment category transfer or appointment to a check or instructor position, during which a pilot is frozen in that new rank, equipment category or position.

resolved. He noted that Captain McGearty was ready, willing and able to perform his duties on the wide-body fleet. Mr McCabe noted that Air NZ had not responded to the issue of compliance with the Human Rights Act 1993 (HRA)[14] and stated:

> … the fact remains that Captain McGearty is not disqualified from continuing to operate the B777, even without reasonable accommodation. Alternatively and in any event, Captain McGearty would if necessary be entitled to the benefit of reasonable accommodation by Air NZ under s 35 (HRA), should that prove to be necessary.

[43] Mr McCabe then raised a personal grievance for disadvantage and discrimination on the grounds of age on Captain McGearty's behalf.

[44] While the trial was stalled, NZALPA sought an opinion from Sir Hugh Rennie KC on the interpretation and application of the relevant provisions in the collective agreement, compliance with the HRA and the Act, the possible adverse effects on other pilots of accommodating ARPs, and possible grievances.

[45] FANZP did not support the proposal to seek a legal opinion. Its position was that the current A320 option for ARPs was sufficient to meet Air NZ's legal requirements.

[46] On receipt of Sir Hugh Rennie's opinion in February 2019, NZALPA forwarded it, together with the *McAlister v Air New Zealand Ltd* judgment,[15] to Air NZ and all union members, and set up a meeting of members to discuss any issues.

[47] Sir Hugh Rennie's opinion was that Air NZ was entitled, and required, to roster ARPs to destinations not affected by the Standard, except to the extent that it did not amount to unlawful discrimination. I return later to the distinction between unlawful and lawful discrimination.

[48] NZALPA then entered into discussions with Air NZ with a view to reaching an agreed position on how ARPs could be accommodated.

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14 Human Rights Act 1993, s 35.

15 *McAlister v Air New Zealand Ltd*, above n 10.

[49] There are periods during this time when Captain McGearty did not have medical clearance to fly but by August 2019, he was able to do so.

[50] By September 2019, the ARP trial framework was developed and agreed with NZALPA. However, it was declined by FANZP which maintained it would disadvantage non-ARP pilots.

[51] Captain McGearty was offered and agreed to[16] the ARP trial on 25 September 2019 and was appointed the most junior of the four C7 ARPs.

[52] However, on 30 March 2020, all B777 aircraft were grounded and the ARP trial was suspended due to COVID-19.

[53] When the trial restarted in April 2022, Captain McGearty did not have the seniority for it and, according to Air NZ, could not be accommodated as captain on the B777 fleet. He remained eligible for an A320 role and was offered a position as a B787 Captain (referred to as C8) in July 2022, but he declined.

[54] Captain McGearty's claim for remedies ends on 24 July 2022, being the date on which he turned 70.

Law

[55] The operation of the anti-discrimination provisions in employment are covered in both the HRA and the Act. The relevant statutory provisions are set out in ss 21, 22(1), 30 and 35 of the HRA, and ss 103(1), 104(1), 105 and 106 of the Act.

[56] The Act contains parallel provisions to the HRA but is confined to discrimination against existing employees. Section 103(1)(c) of the Act provides for the ability to bring a personal grievance claim for discrimination.[17] For the purposes of s 103, discrimination in employment matters is defined in s 104 which refers to the

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16 Without prejudice to his claims.
17 Employment Relations Act 2000, s 103(1)(c).

prohibited grounds of discrimination contained in s 105 of the Act. The prohibited grounds of discrimination include age.[18]

[57] Section 104 of the Act provides the test for discrimination; however, this provision is subject to exceptions contained in s 106 of the Act. Section 106 is itself required to be read subject to certain provisions in the HRA including s 30, which states:[19]

> **30 Further exceptions in relation to age**
> Nothing in section 22(1)(a) or section 22(1)(d) shall apply in relation to any position or employment where being of a particular age or in a particular age group is a *genuine occupational qualification* for that position or employment, whether for reasons of safety or for any other reason.
> (Emphasis added)

[58] Age discrimination in employment matters is therefore unlawful unless the discrimination constitutes a "genuine occupational qualification", a term which is not defined in either the HRA or the Act.

[59] The operation of the age discrimination provisions and the Standard was considered in *McAlister v Air New Zealand Ltd*. The plaintiff, Mr McAlister, was a pilot in command and flight instructor for Air NZ which, at the time, had an employment policy reflecting the Standard and FAA rules on ARPs. Upon turning 60, Mr McAlister was unable to continue flying as an instructor on the B747 and was effectively demoted.

[60] The Supreme Court found that age was self-evidently a material ingredient or factor in Air NZ's decision to demote Mr McAlister and, therefore, age discrimination was made out. However, the finding of discrimination remained subject to the exception in s 30 of the HRA, which may provide a defence to age discrimination, such that no unlawful discrimination has occurred.

[61] The Supreme Court found that the age restriction applied to ARPs was a genuine occupational qualification within the application of s 30 in relation to

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[18] The prohibited grounds of discrimination in s 105(1) of the Employment Relations Act 2000 mirror the prohibited grounds in the Human Rights Act 1993, s 21.

[19] Human Rights Act 1993, s 30.

territories which apply it.[20] However, the exception contained in s 30 is itself subject to a general qualification:[21]

> **35 General qualification on exceptions**
> No employer shall be entitled, by virtue of any of the exceptions in this Part, to accord to any person in respect of any position different treatment based on a prohibited ground of discrimination even though some of the duties of that position would fall within any of those exceptions if, with some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer), some other employee could carry out those particular duties.

[62] Accordingly, although the age restriction in the Standard constitutes a genuine occupational qualification for the purposes of s 30, Air NZ must make accommodation or adjustments for ARPs, provided the accommodations do not comprise an unreasonable disruption of their activities.

[63] As noted by the Supreme Court in *McAlister*, the question of reasonable accommodation is a matter of substantial dispute, turning on detailed consideration of what is possible in terms of the rosters which would have permitted Mr McAlister to have the flying hours to maintain his qualification. [22]

[64] Determining the required adjustments (not involving unreasonable disruption of the activities of the employer), often referred to as "reasonable accommodations", is ultimately a fact-specific analysis.

[65] As *McAlister* was resolved following the Supreme Court appeal, there has not been any final judicial determination of what may constitute reasonable accommodation in these circumstances.

Plaintiff's case

[66] Captain McGearty argues that Air NZ had sufficient viable work available on the B777 fleet to enable him to be accommodated as a C7 ARP upon turning 65. He says its failure to provide such work constituted unlawful discrimination.

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20 At [41].
21 Human Rights Act 1993, s 30.
22 At [45].

[67] He argues that Air NZ did not owe competing duties to pilot unions, but to the extent that any duties were owed, they could not prevail over the legal duties which were owed to him personally upon him turning 65 and achieving ARP status.

[68] He submits that Air NZ failed to comply with the terms of the collective agreement and that such breach amounted to an unjustified action which disadvantaged him.

Defendant's case

[69] Air NZ claims that the Standard constitutes a genuine occupational qualification which entitles it to treat the plaintiff differently on the basis of age. It says it has implemented reasonable accommodations which had been operating, with agreement, for over a decade prior to the plaintiff's claim. Reasonable accommodation involved: enabling ARPs to move to the A320 fleet or retire, committing to creating a pilot vacancy where none existed to accommodate ARPs who wanted to move to the A320 fleet and, later, developing and implementing the ARP trial.

[70] Air NZ submits that its reasonable accommodation framework was generous and by itself more than satisfies their legal obligations not to unlawfully discriminate. It argues that Captain McGearty's requests in 2017 and 2018 to continue as a C7 ARP were not feasible prior to the implementation of the trial and would have required implementing a bespoke roster. It says that accommodating him in this manner would have caused it significant business disruption.

[71] Air NZ says it has complied with its employment obligations under the collective agreement, as well as its legal obligations under the HRA and the Act not to unlawfully discriminate against Captain McGearty. It argues that no disadvantage is made out by him.

[72] NZALPA largely agrees with Air NZ's position and says further that as a union, it has a right to represent its members in collective bargaining and reach agreements on their behalf. It says members are bound by, and able to rely on, those agreements. It is particularly concerned with the binding nature of the ARP trial framework.

The collective agreement

[73] Before considering either grievance, it is helpful to consider the terms of the collective agreement itself.

[74] The principles relating to contractual interpretation, including in the context of collective employment agreements, are well settled and do not need to be restated.[23] The staring point is the meaning of the language in the contract itself.

[75] Air NZ says it employs pilots and requires them to fly to any part of the world it may be operating in, which is formally expressed in the following section of the collective agreement:

> **SECTION 2: AREA AND INCIDENCE OF DUTY**
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> The Company shall employ its pilots and the pilot shall serve the Company in the capacity of pilot 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 his employment as a pilot as the Company may reasonably require.

[76] Section 2 of the collective agreement, commonly referred to as "all pilots, all ports" is regarded by Air NZ as a contractual obligation that pilots agree to be able to fly anywhere in the world where Air NZ may be operating or require aircraft to be flown. Air NZ argues that the Standard, which has affected a significant number of destinations serviced by their wide-body fleet, has prevented ARPs from discharging the obligation under Section 2. Air NZ's submission on the meaning and purpose of Section 2 is also supported by NZALPA who says that the requirement in Section 2 cannot be sustained in respect of ARPs due to the Standard. However, Captain McGearty says Section 2 cannot be given a literal effect so as to require each and every Air NZ pilot to fly at its directions to "all ports". He says that as a general provision, it must be read subject to the express contractual provision in cl 3.2.3.

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[23] See for example *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19]–[33] per Tipping J; and *New Zealand Air Line Pilots' Assoc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948 at [71], citing *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60].

[77] Captain McGearty argues that Air NZ's insistence that his circumstances, on turning 65, necessarily and inevitably triggered the cl 3.2.3 stipulation provisions was unjustified and resulted in a disadvantage to him. While cl 3.2.3 is primarily relevant to the disadvantage grievance claim and described as a backup, it is helpful to consider the provision at the outset.

[78] The purpose of cl 3.2.3, when introduced into the collective agreement, was to deal with the position of an ARP on reaching (initially) age 60 and then later age 65. I agree that cl 3.2.3 is the dedicated provision which addresses the inability of an ARP to fly to all ports and that Section 2 of the collective agreement is of limited assistance.

[79] Captain McGearty argues that Air NZ's overall approach to the interpretation of cl 3.2.3 is to treat it as being automatically triggered by the mere fact of an ARP reaching the age of 65. He submits that this ignores the wording of the provision itself, which is that it is only once certain factors are met that the requirement to stipulate under 3.2.3.1 arises.

[80] The wording of the clause bears repetition:

> **3.2.3 Captains Precluded from Certain Destinations**
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> Where, by virtue of the effect of domestic or foreign legislation relating to the pilot's age, a Captain is prohibited from operating aircraft as pilot in command to *sufficient* of the destinations and/or destination alternates of the fleet on which he is employed *as to preclude his being able to be rostered in his current fleet in accordance with the prevailing rostering provisions*, then the following shall apply:
>
> 3.2.3.1 The Company shall seek from the Captain a stipulation …[24]
>
> (emphasis added)

[81] I agree with Captain McGearty that on considering the ordinary and natural meaning of the words in cl 3.2.3, there are a number of preconditions that need to apply before the company is required to seek a stipulation from the pilot pursuant to cl 3.2.3.1. The phrases used are qualifying and would indicate that some threshold must be met before this clause is triggered.

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[24] Clause 3.2.3 is set out in full at [14] above.

Unjustified disadvantage

Sufficient destinations

[82] Captain McGearty argues that Air NZ historically, and in this hearing, essentially treated the wording "to sufficient of the destinations" in cl 3.2.3 as meaning to *any* or *all* of the destinations.

[83] As noted above, there are a number of factors that had changed in the relatively recent past. By the time Captain McGearty turned 65, the changes culminated into a real issue as to whether there were now sufficient destinations or destination alternates to enable him to continue flying as a C7 ARP. In particular, the number of flights to Australia using the wide-body fleet had increased significantly. However, there is no evidence that Air NZ investigated whether the destinations that Captain McGearty could fly to were sufficient.

[84] Captain McGearty argues that the failure to inquire as to whether he could fly to sufficient destinations is reflective of Air NZ failing to address the fundamental issue which arose when he turned 65, which was whether he could be accommodated or adjustments made, first, in terms of cl 3.2.3 and, second, in terms of s 35 of the HRA, so as to allow him to continue flying.

[85] Given the March 2018 report,[25] I find that it is more likely than not that Captain McGearty was not prohibited from flying to "sufficient destinations" in terms of cl 3.2.3.

[86] However, Air NZ argues that even if, in principle, Captain McGearty could have flown to sufficient destinations, to do so would have required a bespoke roster which was not in accordance with the prevailing rostering provisions.

Prevailing rostering provisions

[87] Accordingly, it is necessary to determine the meaning of "in accordance with the prevailing rostering provisions" within cl 3.2.3.

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[25] See above at [31] .

[88] Captain McGearty says that he could have been accommodated in accordance with the prevailing rostering provisions with the introduction of a "port block". A port block prevents an ARP from bidding for work, or being allocated work through the roster optimiser, where that work would be unlawful for the ARP to perform due to the Standard. Port blocks were also utilised when pilots were restricted as to where they could fly for health or personal reasons.

[89] However, the question of what controls would need to be put in place to ensure that Captain McGearty had a compliant roster is not as straightforward as the imposition of a port block. There are also restrictions on who, as an ARP, he could be paired with (referred to as pairing restrictions),[26] which would also need to be incorporated into any roster. Air NZ's position was that it would not be possible on an individual basis to implement port blocks and pairing restrictions to enable Captain McGearty to continue flying as a C7. Those changes would be in breach of the CSRs and therefore not in accordance with prevailing rostering provisions.

[90] It is appropriate at this point to discuss in further detail the Air NZ rostering system. Central to both the disadvantage and discrimination grievances is the rostering evidence concerning the feasibility of enabling ARPs to continue flying on wide-body fleets.

[91] The objective of Air NZ's rostering provisions is to ensure the transparent, equitable and consistent allocation of work to all pilots. As set out above,[27] the rostering provisions are agreed with the unions. Changes to the system can only be made by agreement. The collective agreement(s) and the CSRs contain a very carefully documented process that, amongst other things:

(a) requires all work, referred to as Tours of Duty (ToDs), to be advertised;

(b) provides that all pilots are entitled to bid; and

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[26] The Standard prohibits two ARPs from operating on the same commercial flight. For multi-pilot operations, an ARP may continue to fly provided that at least one pilot is under the age of 60. An ARP in this context is between the age of 60 and 65, remembering that after turning 65, pilots are prohibited by the Standard from flying to countries which have not filed a difference.

[27] See above at [23].

(c) requires Air NZ to maximise bid satisfaction based on seniority.

[92] Air NZ says there was no provision within the collective agreement or the CSRs or anywhere else that would allow it to lawfully create a bespoke roster for Captain McGearty, irrespective of the contractual rights of all other pilots. There was no provision within the collective agreement or the CSRs or anywhere else that would allow it to unilaterally put in place a port block, preventing one or more ARPs from flying to 80 per cent of the destinations serviced by the fleet; or implementing the pairing restriction required to accommodate ARPs on the wide-body fleet. Similarly, NZALPA also refutes Captain McGearty's submissions regarding the flexibility of the CSRs. NZALPA says it is not available to Captain McGearty to argue that the prevailing rostering provisions are open to the mechanisms he suggests, without breaching the terms of the collective agreement.

[93] However, that submission appears to overstate the limitations of the rostering system. In answer to questions, both Ms Dines, Air NZ's chief people officer, and Mr Wilson, Captain McGearty's fleet manager, agreed that where a pilot could not fly to certain destinations due to individual need such as family or health reasons, appropriate port blocks could be implemented. Pairing restrictions for ARP pilots in command appear to apply from the age of 60 in some jurisdictions and so presumably, where necessary, the combination of port blocks and pairing restrictions, while not straightforward, were also able to be put in place on an individual basis. Pairing restrictions would presumably already be in place in relation to Captain McGearty in any case, albeit not specifically related to him being over 65.

[94] That is not to say it would have been easy with the software used by the roster system as it was when Captain McGearty turned 65. However, between 2017 and 2018, there was a change in the rostering software used by Air NZ for the wide-body fleet, which introduced the Jeppesen Crew Pairing and Jeppesen Crew Rostering. This new software has made a significant practical difference in terms of the airline's ability to make adjustments for pilots on an individual basis.

[95] Both at the time Captain McGearty turned 65, and at 2 May 2018 when he was ready to resume flying, the software that was used for rostering the wide-body fleet

was called LT ROS. Air NZ says that LT ROS had no capability of adding port blocks. Instead, a pilot had to submit an "avoid bid", where crew can indicate the destinations that they wish to avoid being rostered.

[96] That avoid bid was then discussed within the RSC. If it was agreed, then the avoid bid was manually converted into a "management bid", which then went through the rostering system. Further changes were then required to the monitoring software to then monitor that restriction throughout the live roster.

[97] Air NZ says that whereas there was a port block facility in the REG ROS system used on the narrow-body fleet, there was no port block facility in the LT ROS system that was used for rostering the wide-body fleet in 2017/early 2018. Port blocks could not therefore be applied across the board to a group of people, such as ARPs, to prevent them flying to several international destinations; it had to be done manually.

[98] In addition, the LT ROS system had certain pairing restrictions hard coded into the software. To allow ARPs to remain on the wide-body fleet, it was necessary to re-code the system. Air NZ says it had no unilateral right to re-code the system. Changes could only be made by agreement by going through the RSC and the CMG.

[99] On 24 July 2017 when Captain McGearty turned 65, and on 2 May 2018 when he was ready to be rostered, no agreement had been reached to re-code the system. Air NZ says it was working with its unions in the hope that it would be able to reach agreement (and it did subsequently reach agreement with NZALPA), but as at both 24 July 2017 and 2 May 2018, NZALPA had not yet agreed.

[100] Air NZ says that the combined effect is that it could not roster Captain McGearty only to non-age-restricted destinations "in accordance with the prevailing rostering provisions" under cl 3.2.3 for the following reasons:

(a) The prevailing rostering provisions included the stipulation at cl 3.2.3 saying that ARPs would either retire or move to the A320.

(b) The prevailing rostering provisions had no port block per se. At that time they allowed only for the conversion of avoid bids into management bids with the agreement of the RSC. Although Air NZ was working through a process to reach agreement, it had not been able to secure agreement by 2 May 2018.

(c) A pairing restriction was required to allow ARPs to remain on the wide-body fleet. In LT ROS, pairing restrictions had to be hard-coded into the system, which could only be changed by agreement with NZALPA. As at 2 May 2018, Air NZ was working through the process of securing agreement, but did not actually have agreement from NZALPA .

[101] Air NZ submits that means that:

(a) it could not simply build a bespoke roster just for Captain McGearty, or assign him (and/or other ARPs) unrestricted flying without breaching the rostering provisions of its collective agreement;

(b) Captain McGearty could not be rostered in accordance with the prevailing rostering provisions; and

(c) the agreed accommodation of offering a role on the A320 applied to Captain McGearty.

[102] As already noted, cl 3.2.3 gives rise to the need for an inquiry or assessment by Air NZ as to whether Captain McGearty was prohibited from operating aircraft to sufficient of the destinations as to preclude him from being able to be rostered in accordance with the prevailing rostering provisions. It is only once the answer to that inquiry is negative that Captain McGearty is required to stipulate under cl 3.2.3.1.

[103] However, Air NZ never undertook the inquiry required of it in relation to him as an individual to ascertain whether in fact he could fly to sufficient of the destinations. His individual position was regarded as subsumed into the broader discussion in relation to ARPs.

[104] As I have found above,[28] while Captain McGearty was precluded from certain destinations under cl 3.2.3, he was not in fact prohibited from operating as a pilot in command on the B777 fleet to sufficient destinations.

[105] The rostering provisions need to be considered as a whole, not simply through the lens of their standard application. I agree with counsel for Captain McGearty that the phrase "prevailing rostering provisions" comprises the overall rostering system in operation at the time. This includes the levers in the system that needed to be pulled to accommodate individual need where necessary.

[106] It is not disputed that at some point in late 2017, Air NZ commenced work to ascertain whether it could accommodate ARPs on the wide-body fleet and, if so, how many. This work was undertaken by the RSC. The March 2018 report stated that the analysis was completed "without any changes to the existing rostering system and all current rules were respected". It concluded that there were feasible rosters produced that accommodated a number of ARPs. The analysis was completed in two separate runs, with the second run expanding the possible destinations that could permit ARPs to fly the B777. On the second run analysis applying specific rosters, up to three ARPs could be accommodated.

[107] The evidence illustrates that the provisions allowed for a "bespoke" roster where appropriate, and supported by management. Air NZ accepted that the provisions allowed for individual situations to be accommodated where necessary and that such accommodations had been made in the past.[29]

[108] There is no evidence of Air NZ requesting the software changes that it says would have been necessary for Captain McGearty to continue operating as a C7 ARP. Nor does it suggest it ever made such a request. I consider that any such request would have come within the prevailing rostering provisions, which allowed for flexibility in response to individual circumstances.

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28 See above at [85].

29 In answer to questions from the Court and counsel for Captain McGearty, Ms Dines and Captain Wilson acknowledged that port blocks had been put in place for individual pilots where personal circumstances required. Examples given were destinations that had the zika virus, which posed a risk for young families or those who were pregnant.

[109] Given that the trial document also states that a roster analysis had been conducted "applying the prevailing rostering provisions", I do not consider that it is open to Air NZ to argue that was not the case.

[110] Accordingly, I find that Captain McGearty was not precluded from being rostered within the prevailing rostering provisions and therefore the subsidiary provisions of cl 3.2.3 requiring a stipulation, were not triggered.

[111] For the reasons set out above, I have found that Air NZ could have continued to roster Captain McGearty to fly as a C7 at the time he turned 65. For how long is a separate issue.

[112] The failure to make an individual assessment amounts to a breach of the terms of the collective agreement and as such, an unjustified action on the part of Air NZ. Its decision to treat cl 3.2.3.1 as triggered was in breach of the collective agreement. The decision to place Captain McGearty on leave without pay in those circumstances was also unjustified.

[113] The breach of the terms of the collective agreement and the placement of Captain McGearty on leave amounted to an unjustified action or inaction in his employment.

[114] I do not consider that the actions were justified by Air NZ's desire to reach agreement with NZALPA before dealing with individuals. The company's argument that the failure was due, at least in part, to the actions of NZALPA, is addressed below.

[115] Captain McGearty says that these actions or inactions caused him to suffer both loss of income and job satisfaction, as well as considerable hurt and stress. He was clearly disadvantaged in his employment. However, I deal with the issues related to remedies below.

Unlawful discrimination

Was Captain McGearty unlawfully discriminated against by reason of his age?

[116] There is no dispute that Captain McGearty was discriminated against by reason of his age. The question is whether that discrimination was unlawful.

[117] As stated above, the exception to age discrimination (genuine occupational qualification) is subject to a general qualification under s 35 of the HRA. It provides that an employer cannot rely on an exception if, with some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer), some other employee could carry out those particular duties.

[118] In hindsight, Captain Wilson accepted that it had been possible to roster four C7 ARPs with all restrictions and accommodations in place from when the plaintiff turned 65 in July 2017 until July 2020 when the ARP trial was reported on. Air NZ says that there was no guarantee that Captain McGearty would remain a C7 ARP past about June 2020. Captain McGearty says this means that Air NZ accepted that he could have continued to fly from early 2019 when he would have returned from leave, until June 2020, but with no guarantee that he could continue doing so from then on.

[119] However, Air NZ argues that despite the possibility of Captain McGearty continuing as a C7, his inability to do so was not unlawfully discriminatory because cl. 3.2.3 amounted to a reasonable accommodation. NZALPA agrees.

[120] Air NZ highlights that in *Air New Zealand Ltd v Rush*[30] this Court opined on the ARP issue. In that case, Air NZ had promulgated a policy that no pilot who attained the age of 60 (the ICAO limit at the time) could hold a pilot in command role on a wide-body aircraft while the predominant operation of those aircraft involved age-restricted territories. At the time, Air NZ had developed a policy that maintained a limited number of positions on its narrow-body fleet to accommodate ARPs. On the policy, the Court made the following comment:

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30 *Air New Zealand Ltd v Rush,* above n 10.

> Its [Air New Zealand Ltd's] age-60 policy promulgated in November 2000 may have gone much, perhaps even all, of the way to fulfilling its obligations to Mr Rush.

[121] Air NZ submits that the prevailing policy in *Rush* largely reflects the position now embodied in cl 3.2.3.

[122] What amounts to a reasonable accommodation for the purposes of s 35 was of course not a matter for determination in *Rush,* nor was it considered in *McAlister* – points which are acknowledged by Air NZ.

[123] The Air NZ policy in place at the time was therefore not applied to Mr Rush's circumstances. That fact has consequences for an analysis under s 35.

[124] What constitutes reasonable accommodation is fact dependent and may evolve over time. A policy that may have fulfilled legal obligations at one time may no longer be compliant for present purposes given technological advances, commercial developments, and changes in legislative and regulatory environments. Over time, these changes may reduce the impact of what previously amounted to an unreasonable disruption. The onus is on Air NZ, as the employer, to ensure that it continues to meet its legal obligations in light of those factors.

[125] As noted above, in this case time moved on and the way in which cl 3.2.3 operated needed to evolve to reflect the changing environment.

[126] However, the issue is not whether cl 3.2.3.4 onwards was reasonable; it is whether the adjustments required to enable Captain McGearty to continue to operate as a C7 ARP comprised an unreasonable disruption of Air NZ's business activities. The argument that cls 3.2.3.1 onwards amounted to a reasonable accommodation is flawed. An employer cannot rely on an exemption where, with some adjustment to its activities (not being an adjustment involving unreasonable disruption of the activities), some other employee could carry out those activities. The focus is not on whether the adjustments are reasonable but whether there is unreasonable disruption.

[127] The legislative focus on whether adjustments are unreasonable, combined with the onus of proof resting on the employer seeking to rely on the exemption, is consistent with the primacy of fundamental human rights.

[128] The unreasonable disruptions relied on by Air NZ were that until it had new software for its rostering system, it was too difficult to create a workable roster for Captain McGearty. It says that even once it could make the adjustments in principle, it could not do so without the agreement of NZALPA.

[129] Captain McGearty says these two factors do not outweigh his human right to freedom from discrimination on the grounds of age. His age discrimination grievance rests primarily on the basis that the grievance has an express statutory focus on him, his circumstances, and has an overriding legal effect. Counsel for Captain McGearty noted that by contrast, Air NZ had relied throughout on its interpretation of cl 3.2.3 and its past practice as constituting the reasonable accommodation required by the HRA.

[130] This is where Captain McGearty's individual rights diverge from collective rights represented by the arrangements reached in the collective agreement.

[131] Air NZ rightly saw this as an issue that was bigger than Captain McGearty. However, it does not appear to have given due weight to what obligations it owed to him as an individual.

[132] As the Supreme Court has confirmed:[31]

> The right not to be discriminated against by reason of age is one of a number of non-discriminated rights recognised in s 105 of the 2000 Act and borrowed from the HRA. … These are free-standing rights, that is, rights not dependent on, or closely related to, the terms of the employment agreement between the parties. Once again, the only relevance of such agreement is that it, and the associated employment relationship, provide the context in which the right exists.

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[31] *Brown v New Zealand Basing Ltd* [2017] NZSC 139, [2018] 1 NZLR 245, [2017] ERNZ 642 at [69].

[133] Captain McGearty has rights that exist independently of the collective agreement, and which cannot be contractually cut across, diminished or recalibrated to the benefit of Air NZ. The only defence available to Air NZ is whether accommodating Captain McGearty would have constituted an unreasonable disruption of its activities.

[134] Air NZ presumed that there would have been difficulties and lack of co-operation by the RSC and/or CMG. However, it does not know that. And it does not appear that it discussed Captain McGearty's individual rights with the union to confirm that agreement could not be reached. Further, it is arguable that port blocks did not require the approval of the committees when relating to one individual in any case.[32] This seems to have been a management action in the past.

[135] Air NZ's defence is therefore problematic. It made no attempt to create a workable roster for Captain McGearty. It did not seek whatever consent, if any, was necessary to change his roster. It relied on cl 3.2.3 as a matter of course without inquiring into whether, with some adjustments not constituting unreasonable disruptions, Captain McGearty could continue flying as a C7. It unilaterally decided it was fairer to maintain the status quo while NZALPA, and to an extent Air NZ itself, worked through legal implications. This was despite the fact that Air NZ already knew or ought to have known the answer. It could accommodate Captain McGearty as a C7.

[136] In relation to the difficulty of rostering without the updated software system, accommodations had previously been made on an individual basis where there was a need to adjust a particular pilot's availability.[33] I accept that it may have been difficult; I do not accept that it amounted to an unreasonable disruption.

[137] In relation to Air NZ's argument that it required the agreement of NZALPA to operate cl 3.2.3 differently, or the RSC for any code change, I consider that there is a number of issues.

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32 See above at [93] and [107].
33 See above at [93] and [107].

[138] In the end, Air NZ proceeded with the ARP trial with NZALPA's agreement, but without FANZP's. It would appear that the lack of agreement at that point was not regarded as fatal to progress because it was recognised that it was necessary to meet legal obligations.

[139] The terms of the collective agreement were well drafted. Clause 3.2.3 was worded in a way that enabled it to accommodate a changing commercial and regulatory environment. That includes factors such as technological and rostering changes as well as changes to the Standard itself. Over the passage of time, those terms were operated in a way that no longer met the requirements of the HRA or the Act. This was essentially recognised by the parties in their discussion following the March 2018 report until dissenting voices became loud enough for NZALPA to consider it needed to take a cautious approach.

[140] Accordingly, Captain McGearty did not require any change to the collective agreement or NZALPA's agreement. Had Air NZ accommodated him from May 2018, it would have been complying with the terms of the collective agreement.

[141] In any case, notwithstanding any agreements with NZALPA, Air NZ had a duty to act to ensure that it complied with requirements in relation to fundamental human rights. However, it did not act promptly. It was not until 27 December 2017 that Ms Dines advised in a newsletter that Air NZ was looking into ARPs being able to continue to fly on the B777 and B787 fleets. This investigation led to the March 2018 report which concluded:

> There were feasible rosters produced that accommodated a number of +65-year-old Pilots.
>
> The determining factor for the number of +65-year-old Pilots that produced a feasible roster was the limit on the number of outliers.

[142] The trial framework was not agreed until September 2019, nearly 18 months later.

[143] Given the findings in the March 2018 report, I do not accept that making adjustments for Captain McGearty from 2 May 2018 (when he was cleared to fly) would have been unreasonably disruptive of Air NZ's activities.

[144] Air NZ says that while the March 2018 report was useful to demonstrate further accommodations to ARPs on the B777, it did not show that ARPs could in fact continue to fly "within the prevailing rostering provisions" as required under cl 3.2.3.

[145] I do not accept this. The report itself said that "the analysis was completed without any change to the existing roster system and all current rules were respected."

[146] The trial agreement also stated that it was proceeding on the basis of "prevailing rostering provisions". Dr Hassold, chapter lead AI (applied AI – crew ops), says this is incorrect. However, I consider he is taking an overly restrictive view of the term "prevailing rostering provisions" when considered against the evidence of Ms Dines and Captain Wilson. It was clear from their evidence that there was room within the system to accommodate individuals where necessary. Further, at a meeting of the various parties on 22 March 2019 in preparation for the development of the trial framework, it was "agreed that the starting point is that ARPs must be able to be rostered within the prevailing rostering conditions i.e. nothing will be altered in the rostering system to conduct the paper or live (if this occurs) trial." The statement within the trial agreement is consistent with the achievement of this goal.

[147] I accept that making a change that would operate across the board and into the future required the agreement and co-operation of NZALPA. However, such comprehensive agreement resolving specific issues such as seniority or the varying number of ARPs, was not required to accommodate Captain McGearty as an individual. There was no evidence that accommodation of Captain McGearty individually would have amounted to an unreasonable disruption.

[148] Duties of good faith were owed to Captain McGearty as well as to the pilot unions and to the other pilot employees.[34]

[149] NZALPA notes that Air NZ had duties of good faith in respect of pilot members of NZALPA on both sides of a contentious issue. It says that the continuation of any interpretive issues arising from cl 3.2.3 was not in the interests of its members who

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[34] Employment Relations Act 2000, s 4.

stood to be disadvantaged by any arrangements reached between Air NZ and an individual pilot.

[150] I do not consider that Air NZ meeting its obligations individually to Captain McGearty would have resulted in breaches of its obligations to others and no evidence of any such breaches was before the Court.

[151] In any event, providing reasonable accommodations to ARPs may result in adverse effects for other pilots. While the trial framework was intended to minimise such adverse impacts, this may be the consequence of achieving legal compliance, which remains the paramount requirement. While accommodations to ARPs may have resulted in those duties being unavailable to other pilots, all pilots are parties to and are bound by the collective agreement. Each pilot gains a benefit but must also sustain detriments from the operation of the terms of the collective agreement, where it is necessary to fulfil legal obligations.

[152] I am alive to the fact that the problem was bigger than Captain McGearty. Air NZ needed to take steps to address those issues with the unions and its employees with a view to finding a more permanent solution, particularly given the strength of feeling around the issue. However, that did not preclude it from resolving Captain McGearty's individual situation in the interim when it had clearly been put on notice of his claim of discrimination.

[153] Air NZ owed a continuous duty to Captain McGearty. I do not agree that it could not move towards accommodating him as a C7 ARP without first conducting the ARP trial and/or reaching agreements with the other two pilot unions. Making adjustments for a single pilot would not have caused unreasonable disruption of the company's activities.

[154] Accordingly, I find that Air NZ unlawfully discriminated against Captain McGearty by reason of his age from when he was ready and able to fly as a C7 in May 2018 up until the introduction of the ARP trial framework in September 2019.

[155] Once the ARP trial framework was agreed with NZALPA and introduced, the situation changed for Captain McGearty. I accept that at that time, requiring further adjustments to be made for him independent of this arrangement would cause unreasonable disruption of the business activities of Air NZ. However, with that said, there may come a point at which the ARP trial framework no longer satisfies the legal standard under s 35 of the HRA. The operation of cl 3.2.3, particularly in light of technological advances, requires continuous review.

Estoppel

[156] Having found that Captain McGearty was disadvantaged and unjustifiably discriminated against, it is necessary to consider Air NZ's positive defence of estoppel.

[157] The key elements required to prove estoppel are:[35]

(a) a belief or expectation by the defendant has been created or encouraged by words or conduct by the plaintiff;

(b) to the extent an express representation is relied upon, it is clearly and unequivocally expressed;

(c) the claimant reasonably relied to his or her detriment on the representation; and

(d) it would be unconscionable for the plaintiff to depart from the belief or expectation.

[158] Air NZ relies on the elements of estoppel and the case of *Stanaway v Pacific Forum Line (NZ) Limited.*[36] In *Stanaway,* the employer undertook a restructuring that purported to roll back crew according to seniority. While the Court found that Mr Stanaway was not rolled back in compliance with his contractual terms, his union had accepted the application of the rollback on his behalf. The employer negotiated with

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35 *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [44]. See also *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 at [42]; and *Harris v TSNZ Pulp and Paper Maintenance Ltd* [2015] NZEmpC 43, [2015] ERNZ 580 at [75]–[76].

36 *Stanaway v Pacific Forum Line (NZ) Ltd* [1994] 1 ERNZ 276.

the union on the assumption that it was authorised to do so and proceeded to restructure on the basis of the settlement reached with the union. For those reasons, the Court found it would have been inequitable to allow Mr Stanaway to resile from the agreement negotiated by his union on his behalf.[37]

[159] Air NZ acknowledges that Captain McGearty made representations on his own behalf that were different from those made by the union. However, it maintains that his active membership, communication, and participation with NZALPA, including representation by NZALPA's counsel, Mr McCabe, created or encouraged the belief that he was represented by NZALPA and bound by the successive agreements reached in relation to the ARP issue.

[160] Air NZ says that it was entitled to rely on, and did reasonably rely on, the agreement of NZALPA to measures relating to the ARP issue, as well as the proper process for accommodating ARPs in cl 3.2.3. Further, it claims that its reasonable reliance was cemented by:

(a) the duty of good faith requiring it to recognise the authority of NZALPA;

(b) the law of agency which required the plaintiff to accept the successive agreements between the defendant and NZALPA; and

(c) the plaintiff's own agreement to a fixed term in the ARP trial.

[161] Air NZ says Captain McGearty is now estopped from bringing his claims as it will suffer a detriment if its reasonable belief is departed from, which includes any remedies which would otherwise be awarded by the Court. It says it would now be unconscionable for Captain McGearty to depart from the reasonable belief that he was bound by the successive agreements.

[162] However, Captain McGearty claims that he is not estopped from bringing a personal grievance claim of unlawful discrimination, as s 238 of the Act prevents the

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[37] At 296.

parties from contracting out of the provisions of the Act, including age discrimination.[38] In addition, he says the agreements could not operate to estop him from advancing his personal grievance claims which pre-date the agreements reached by NZALPA and Air NZ.

[163] Captain McGearty submits that in any event, NZALPA did not have the authority to represent him in relation to his individual rights. He relies on s 18 of the Act, which differentiates between the entitlement of unions to represent members in relation to collective interests and individual rights.[39] In the latter, the union may only represent the individual employee if it has authority from the employee to do so.

[164] NZALPA cited several authorities to support its argument that the rights conferred on a union under s 18 of the Act are broad and not merely limited to the negotiation of collective agreements. It says that it did have authority under s 18 of the Act to reach agreement on the ARP issue and that the ARP trial was an exercise of its entitlement to represent its members in matters involving their collective interests.

[165] NZALPA submits that, at the relevant time, Captain McGearty was a member of the union and therefore subject to the authority vested in it under s 18 of the Act to resolve the operation of cl 3.2.3. Accordingly, Air NZ was entitled to engage and negotiate with NZALPA as Captain McGearty's authorised representative in respect of issues relating to him as an ARP, and in respect of the ARP trial.

Discussion

[166] While it is accepted that Air NZ had competing interests to deal with, the terms of its agreement with NZALPA could not override its obligations to Captain McGearty on matters of his individual, fundamental human rights. In particular, it could not contract out of those rights.[40]

[167] It is correct that Captain McGearty was at all material times a member of NZALPA (although he resigned briefly) and was covered by the NZALPA collective

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38 Employment Relations Act 2000, s 238.
39 Section 18.
40 Section 238.

agreement. However, Air NZ and NZALPA agreed to an ARP trial framework for the future. It is not retrospective. That framework does not purport to extinguish individual rights – in particular, it does not extinguish individual rights already asserted.

[168] I do not consider that the terms of the collective agreement itself give rise to estoppel. As set out above, I have found that the terms of the collective agreement supported Captain McGearty's claims and that Air NZ was in breach. The wording of the provision was able to accommodate the changing context within which it operated.

[169] The collective agreement required an inquiry to be undertaken as to whether Captain McGearty could fly to sufficient destinations within the prevailing rostering provisions. That inquiry did not take place. Once it did take place, it showed that he could meet the prerequisites contained in cl 3.2.3, albeit with some adjustments.

[170] I have found that Air NZ could have made adjustments for Captain McGearty on an individual basis, without unreasonable disruption of its business activities, and that it could have done so within the terms of the collective agreement.

[171] I do not consider that Air NZ required NZALPA's agreement to accommodate Captain McGearty as an individual, although I understand why it preferred to do so. In any case, there is no evidence of any agreement being sought. The lack of agreement in such circumstances cannot operate as an estoppel.

[172] Further, had the terms of the collective agreement purported to allow unlawful age discrimination, then I consider that s 238 of the Act would have effect and prevent contracting out of ss 103–106 of the Act. Sections 103–106 would have effect despite any provision to the contrary in any employment agreement.

[173] When Captain McGearty signed his individual offer under the trial framework, he did so specifically without prejudice to his personal grievance and any future grievances. Both Air NZ and NZALPA were well aware of his claims by that time. Accordingly, there cannot be said to have been any expectation created through his actions; nor was that expectation relied on by Air NZ. It appears from the offer

letter that it was Air NZ itself that included the without prejudice statement. In those circumstances, it is not unconscionable for Captain McGearty to assert his rights as he has done from the outset.

[174] It is not denied that NZALPA was representing its members' collective interests. However, at no point during this dispute is there any evidence that it purported to be expunging Captain McGearty's or any other individual rights by participating in the negotiations or reaching an agreement in relation to the ARP framework.

[175] Mr McCabe, as in-house counsel for NZALPA, wrote to Air NZ on NZALPA's letterhead and separately asserted Captain McGearty's rights as his representative. However, this does not mean that Captain McGearty's claims were automatically subsumed into NZALPAs position on behalf of all members. Mr McCabe's correspondence was clearly written on behalf of Captain McGearty as an individual.

[176] Further, when Air NZ offered Captain McGearty the option of taking leave without pay or a position on the A320 in August 2018, its correspondence acknowledged that it understood that the plaintiff was looking at the issue from his "individual perspective". That indicates that Air NZ did in fact recognise that Captain McGearty's individual rights diverged from the collective interest, and presumably from the decision made by NZALPA to pause progress on the issue.

[177] There are times when there will be competing interests within a union, either on a broader basis as here between two groups of pilots, or between an individual and a union, as was also the case in this proceeding. The union's actions in undertaking, in good faith, work with Air NZ to develop an ARP framework do not preclude Captain McGearty from asserting that the previous existing situation was discriminatory.

[178] The elements of estoppel are unsupported by the evidence. Captain McGearty is therefore not estopped from bringing his claims for unjustified disadvantage and unlawful discrimination.

Remedies

[179] The Court is not required to make findings as to the quantum of remedies in the event that Captain McGearty is successful in his claims, which I have found he is.

[180] However, I have been asked to make findings in relation to whether he failed to mitigate his loss, along with other factual findings that impact the issue of quantum.

Did Captain McGearty fail to mitigate his losses?

[181] Where the employer puts mitigation in issue, the employee must provide relevant information as to the steps taken to mitigate the asserted loss. Ultimately it is for the employer to persuade the Court that the employee has acted unreasonably in failing to mitigate the asserted loss.[41] Each case must be assessed on the basis of its own circumstances.

[182] Mitigation of loss is to be assessed considering all the evidence, and on the basis that the employee is the victim of a wrong.[42]

[183] Air NZ says that from the time of his 65th birthday, Captain McGearty unreasonably failed to mitigate his loss by refusing to take a position on the A320. It later offered him the ability to transfer to the A320 without prejudice to his claim, and under favourable conditions, by waiving the lock-on and the bond requirement. However, he declined this offer.

[184] Captain McGearty, on the other hand, perceived the A320 position to effectively be a demotion, a point which Air NZ argues is not relevant as it was a guaranteed way for him to continue practising his profession. He also says that prior to the offer made by Air NZ in August 2018, the A320 would have been subject to a two-year lock-on and a $30,000 bond. Taking a position on the A320 would have cemented his losses, possibly until the end of his career.

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41 *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.
42 At [103].

[185] While Air NZ eventually offered to waive the lock-on and bond associated with the A320, Captain McGearty gave evidence that it would not eliminate the possibility of a more senior pilot on the A320 at the time, bidding for a position on the B777 and receiving it ahead of him. He therefore chose to protect and maintain his position as a C7 to avoid the possibility that senior pilots on the A320 would displace him. He also made it clear that he was ready, willing and able to work and proposed alternatives that would not prejudice that position, such as working as a simulator instructor or undertaking administrative duties.

[186] This Court has noted that no positive duty to mitigate emerges from the wording of the Act.[43] The key question is not whether a legal duty exists but what the prerequisites for reimbursement are.

[187] That analysis requires a consideration of what, if anything, might reasonably have been expected in the particular circumstances. Efforts made by the employee must be viewed in context.[44]

[188] I do not agree with Air NZ that the perception of the A320 as a demotion is irrelevant. Captain McGearty would not have been practising his profession at the same level, in the same way or with the same pay. If the difference was irrelevant, there would have been no case for discrimination. Flying as a C7 was a matter of pride for him and he had been pursuing his right to continue to fly at that rank for some time. That cannot be regarded as irrelevant.

[189] In the circumstances, it was not reasonable to expect Captain McGearty to mitigate his losses by electing a position on the A320. From his perspective, to do so would have been effectively an acceptance of his discrimination. While Air NZ offered an alternative position without prejudice to his claims, that offer did not resolve the possibility of Captain McGearty's seniority being displaced upon the ARP trial resuming 18 months later.

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43 *Maddigan v Director-General of Conservation* [2019] NZEmpC 190.
44 At [65] citing *Carter Holt Harvey Ltd v Yukich* [2005] ERNZ 300 (CA) at [38].

[190] In these particular circumstances, it was not unreasonable for Captain McGearty to refuse to mitigate his loss in the manner proposed by Air NZ.

Would the plaintiff have been more likely than not to have continued flying as a C7 ARP?

[191] Captain McGearty accepts that he would not have been immune to the operation of cl 3.2.3 at some future point.

[192] However, the likelihood of him continuing to fly as a C7 ARP is a point of difference between the parties. And what would happen once another ARP with more seniority came into the mix is not clear on the face of the collective agreement.

[193] Captain Wilson concedes that Captain McGearty's position would have continued until at least June 2020 but with no guarantee after that. He says that is because more senior ARPs would have either emerged on the B777 fleet as they reached 65 or more senior ARPs currently on the A320 fleet would have successfully applied for his position.

[194] Captain McGearty says that Captain Wilson's counterfactual is not appropriate and that his is the correct counterfactual in the proceeding. He says he could and should have been accommodated as a C7 on his return from leave in early 2018, and so would have continued in that position. He says there is no contractual provision that would then have been able to "bump" him.

[195] However, on the evidence before me, the issue of whether Captain McGearty would have continued flying as a C7 post June 2020 under the terms of the ARP trial framework requires significant speculation.

[196] Both Air NZ's and Captain McGearty's submissions are contingent on several assumptions in relation to pilots who turned 65 after Captain McGearty and some who had turned 65 before him. There are several variables that might have impacted Captain McGearty's ability to fly, which would be based solely on the personal and professional decisions of individual pilots in either group. Those decisions might include moving to the A320, retiring, deciding to work under the ARP framework or

undertaking other duties. It cannot be assumed that they would all want to continue as C7s.

[197] Crucially, once the ARP trial framework was developed and introduced, the question of whether an ARP could fly to sufficient destinations under cl 3.2.3 is answered by operation of the terms of the framework. I have already found above[45] that Air NZ was not required to make individual adjustments for Captain McGearty after the introduction of the framework as to do so would amount to an unreasonable disruption of its business activities. Accordingly, the answer to how long he would have continued to fly as a C7 lies in the application of the terms of the collective agreement (specifically cl 3.2.3) and the framework.

[198] Lastly, Captain McGearty was placed on leave without pay following the suspension of the ARP trial due to COVID-19. From March 2020 to mid-2022 when the trial was suspended, Air NZ offered Captain McGearty the choice of moving to the A320 or retiring. Captain McGearty claims that first, he was not appropriately "down trained" to the B787, in accordance with his seniority and second, he was excluded from accessing voluntary COVID-19 retirement packages as he was placed on leave without pay.

[199] As stated above, once the ARP framework was introduced, Air NZ was no longer required to make adjustments outside of that framework to account for Captain McGearty's individual circumstances. At that point he was entitled to be treated consistently with other C7 ARPs in his position (subject to seniority). What that meant during the COVID-19 pandemic is unclear.

[200] The Court does not have sufficient evidence to make any findings in relation to what impact these issues would have on remedies but the parties should be able to resolve matters between themselves. If they are unable to do so, they may seek the assistance of the Court.

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[45] See above at [155].

Outcome

[201] Accordingly, I make the following findings:

(a) Captain McGearty was disadvantaged by the unjustified actions of Air NZ. Air NZ's decision to treat cl 3.2.3 as triggered without undertaking an inquiry was a breach of the collective agreement and/or wrong on its merits. The decision to place Captain McGearty on leave without pay in those circumstances was also unjustified.

(b) Air NZ unlawfully discriminated against Captain McGearty by reason of his age. The unlawful discrimination occurred through Air NZ's failure to make adjustments to ensure that Captain McGearty could continue as a C7 – adjustments which did not amount to unreasonable disruption of its business activities.

(c) There was no failure on the part of Captain McGearty to mitigate his losses. The refusal to elect to take the position on the A320 was not unreasonable in the particular circumstances of this case given his desire to maintain and protect his position from discrimination.

(d) Captain McGearty was not estopped from claiming that he was unjustifiably disadvantaged or unlawfully discriminated against. His individual interests and claims were maintained independently of the collective interests of NZALPA.

[202] Costs are reserved. In the event the parties are unable to agree on costs, the plaintiff will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with the defendant having a further 14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck
Judge

Judgment signed at 1 pm on 14 October 2025