

Attention is drawn to the order
prohibiting publication of certain
information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 109
3031542

BETWEEN JASON IRVINE
Applicant

AND VIRGIN AUSTRALIA (NZ)
EMPLOYMENT AND
CREWING LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Richard McCabe, Counsel for Applicant

Mark Lawlor and Joseph Williams, Counsel for
Respondent

Investigation Meeting: 6 and 7 November 2018

Submissions received: At the investigation meeting from Applicant and
Respondent
26 November 2018 from Applicant
19 November 2018 from the Respondent

Date of determination: 27 February 2019

DETERMINATION OF THE AUTHORITY

- A. Jason Irvine was disadvantaged by an unjustified action by Virgin Australia (NZ) Employment and Crewing Ltd regarding the failure to provide rest and meal breaks.**

B. Jason Irvine has not established an unjustified action by Virgin Australia (NZ) Employment and Crewing Ltd regarding good faith issues.

C. Costs are reserved.

Employment relationship problem

[1] Jason Irvine is a pilot working for Virgin Australia (NZ) Employment and Crewing Ltd (VANZ or the company). Mr Irvine has the rank of Captain. He is a member of the New Zealand Airline Pilots' Association (NZALPA) union and heads the Association's VANZ Council.

[2] This case concerns whether pilots receive rest and meal breaks, particularly in relation to VANZ's 22 June 2012 policy entitled "Rest and Meal Breaks Policy (New Zealand)" (the policy).

[3] By letter of 24 March 2016 NZALPA raised an issue about whether VANZ was complying with rest and meal breaks as required by legislation. Subsequently by multiple letters of 23 August 2017 personal grievance claims were raised by NZALPA on behalf of Mr Irvine and other pilots about the rest and meal breaks issue.

[4] Mr Irvine claims that VANZ does not comply with the policy in terms of giving him rest and meal breaks. VANZ claims that it does comply.

[5] An investigation meeting was held on 6 and 7 November 2018 and I heard evidence from Mr Irvine and Adam Nicholson (NZALPA Legal Officer). I also heard evidence from Alan Stuart Graham (VANZ's Base Manager – New Zealand) and Timothy Hosking (Virgin Australia Airlines Ltd's Chief Pilot International and also Manager of Flight Operations – Business Support, Performance). Submissions were heard on 7 November 2018 from the parties and a timetable was set for further submissions, which were later received from both parties.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[7] The issues for determination are:

- (a) Was Mr Irvine subject to an unjustified action by VANZ to his disadvantage regarding failure to provide rest and meal breaks in accordance with VANZ's policy or legislation?
- (b) Is there a 90 day issue regarding a personal grievance about good faith not being raised in time on Mr Irvine's behalf?
- (c) If able to proceed, was Mr Irvine subject to an unjustified action by VANZ to his disadvantage regarding failure to materially respond to the breaks issue following NZALPA's letter of 24 March 2016.

[8] This case was run by agreement as an informal representative action with only liability findings being sought. No personal grievance remedies or penalties for any breach of the duty of good faith have been sought.

Non-publication

[9] VANZ seeks permanent non-publication orders regarding two matters. The bases for the orders sought are commercial sensitivity and security issues. Mr Irvine takes no position to the application for non-publication orders.

[10] The Authority has the power under clause 10 of Schedule Two of the Act to prohibit publication of evidence given or pleadings. This is an appropriate case to make such orders regarding aspects of the evidence provided.

[11] I make a permanent non-publication order regarding evidence in documents filed in this proceeding and witness statements of:

- (a) details of the mechanism contained in VANZ's fatigue policy known as controlled rest; and
- (b) security requirements regarding pilots exiting the cockpit during flights.

NZALPA's letter and further discussion

[12] On 24 March 2016 Mr Nicholson from NZALPA sent a letter to Mr Graham from VANZ. It attached a copy of the Employment Court's decision in *Greenslade v Jetstar Airways Ltd*¹. The letter asserts that similarly to the situation in the case, VANZ has not provided and is not providing rest and meal breaks to its pilots as required by New Zealand legislation. An employment relationship problem is raised. A meeting is sought with the company to discuss the issue.

[13] I note that the *Jetstar* decision concerned break issues in place under an earlier version of Part 6D of the Act than that which this case concerns.

[14] The parties agree that the issue went to a Contract Management Group² meeting, in June 2016.

[15] NZALPA Negotiations updates from 2016 and 2017 show that the issue of rest and meal breaks was on the log of claims and was mentioned at times in proposals made by the parties. This included the possibility of VANZ giving pilots a number of designated days off as compensation for not getting breaks. It appeared that an agreement was close to being reached, but that did not occur. The parties agreed to take the issue out of the negotiation process.

[16] After negotiations letters were sent on behalf of pilots raising personal grievances with VANZ.

The collective agreement

[17] Mr Irvine and others are covered by a collective agreement negotiated entitled Virgin Australia (NZ) Employment and Crewing Ltd NZALPA Pilots Collective Employment Agreement (CEA). The agreement in place at the time the

[18] Clause 14 of the CEA provides:

14 Policies and Procedures

14.1 Pilots agree to comply with the policies and procedures of the Company which apply to them as varied or introduced from time to time. Where there is significant change or a new policy that impacts the Pilots, consultation will

¹ *Greenslade v Jetstar Airways Ltd* [2014] NZEmpC 23. Subsequently Jetstar's appeal was declined by the Court of Appeal: *Jetstar Airways Ltd v Greenslade* [2015] NZCA 432

² Sometimes referred to as the Collective Management Group.

occur. The Company will make available these policies and procedures to Pilots and Pilots agree to remain familiar with these policies and procedures. Such policies and procedures shall not be inconsistent with the provisions of this Agreement.

14.2 Failure to comply with these policies may result in disciplinary action up to and including termination of employment.

[19] The CEA makes no provision for rest or meal breaks during working hours. There is a reference to rest periods, but these are periods between duties.

Rest and meal breaks policy

[20] The VANZ policy applies to all team members based permanently in New Zealand.

[21] It begins by recognising the importance of breaks to manage fatigue and minimising health and safety or productivity concerns. VANZ aims to “ensure that all team, members are able to achieve rest breaks during their work hours in accordance with the legislation”.

[22] The policy contains a table, and states that team members are able to take breaks below as far as is reasonable and practicable:

| | Work Period | Break Entitlement |
|----------|--------------------|---|
| 1 | 2-4 hours | One 10 minute paid rest break |
| 2 | 4-6 hours | One 10 minute paid rest break and One 30 minute unpaid meal break |
| 3 | 6-8 hours | Two 10 minute paid rest breaks and One 30 minute unpaid meal break |
| 4 | More than 8 hours | The same breaks as in 3, as well as the breaks specified in 1 and 2, i.e. the entitlements effectively re-start after the employee’s eight hour of continuous work. |

[23] The policy continues:

Your break will commence once you are free of duty and wherever practical and possible, you may take your break within or away from your immediate place of work (eg on or off the aircraft; at or away from your desk).

Given the nature of Virgin...’s business and operations, it is acknowledged that breaks will not always be able to be achieved at set intervals. As such Virgin ... expects team members to display a reasonable degree of flexibility in the timing of their breaks.

In many circumstances breaks cannot be rostered at specific or set times. This means breaks will often need to be ... in some cases, self-managed.

Virgin ... expects team members to be responsive to the needs of their role, rather than take particular or set rest and meal breaks each work period. Virgin ... may direct the most appropriate time for these breaks to be taken in accordance with operational requirements.

Where breaks are not rostered, Virgin... will monitor on an ongoing basis to ensure there is sufficient opportunity to achieve rest and meal breaks within the duty, shift or work period.

Rest and meal breaks legislation

[24] At the time when the policy was drafted the Act contained different provisions for rest and meal breaks. However, on 6 March 2015 the provisions applicable at the time Mr Irvine's personal grievance was raised, came into force. Since this matter was heard the Employment Relations Amendment Act 2018 was passed, with the changes to the rest and meal breaks provisions coming into force on 6 May 2019.

[25] Part 6D of the 2015 provisions set out an employee's entitlement to rest and meal breaks in s 69ZD:

- (1) An employee is entitled to, and an employer must provide the employee with, rest and meal breaks that –
 - (a) provide the employee with a reasonable opportunity, during the employee's work period, for rest, refreshment and attention to personal matters; and
 - (b) are appropriate for the duration of the employee's work period.
- (2) The employee's entitlement to rest and meal breaks may be subject to restrictions, but only if the restrictions –
 - (a) are –
 - (i) reasonable and necessary, having regard to the nature of the employee's work; or
 - (ii) if subparagraph (i) does not apply, reasonable and agreed to by the employer and employee (whether in an employment agreement or otherwise); and
 - (b) relate to 1 or more of the following:
 - (i) the employee continuing to be aware of his or her work duties or, if required, continuing to perform some of his or her work duties, during the break;
 - (ii) the circumstances when an employee's break may be interrupted;
 - (iii) the employee taking his or her break in the workplace or at a specified place within the workplace.

Flights undertaken

[26] VANZ pilots based in New Zealand undertake flights between New Zealand, Australia and the Pacific Islands. Trans-Tasman flights are typically three to four and a half hours per sector, and are sometimes subject to winds. The shortest flight could be as short as two hours 10 minutes, with the longest up six hours and 40 minutes.

[27] Shifts are often between 9 and 10 hours, or around 10.5 hours. Multiple sectors are common, so that more than one flight is undertaken in a tour of duty.

[28] Mr Irvine flies B737-800, the only aircraft currently used by the company in New Zealand. B737-800 is operated with a two-pilot crew. Occasionally there will be a third person, not necessarily a pilot, present in the flight deck during the flight for various reasons, such as training. This creates more difficulties with moving around.

Sample work day

[29] Mr Irvine helpfully set out in detail a typical flying day, based on an actual day of work on 9 January 2018 when he flew a Wellington/Brisbane/Wellington route:

- At 0520 am, he was picked up from a Wellington hotel and arrived at the airport at 0545am, an hour before the departure time.
- He checked in his luggage and picked up flight planning paper work, went through security screening and proceeded to the aircraft.
- He performed pre—flight checks and flight planning on the aircraft. Generally this is done by both pilots. The call for boarding occurred at 0616 am and the doors closed at 0644 am.
- Once the aircraft is at cruising level, the Cabin Supervisor (head flight attendant) rang forward and informed the pilots that she would be coming in with breakfast in 20 minutes.
- Due in part to the weather, seatbelts were intermittently used, causing delays in the cabin.

- About 1 hour after departure the Cabin Supervisor brought in breakfast. Meals are eaten in their flight chairs with the tray on their knees.
- After breakfast the pilots sought a toilet break and for the breakfast trays to be removed.
- On this occasion the flight landed in Brisbane at approximately 1028 am New Zealand time (NZT), around 20 minutes early. The turnaround time between landing and the next take off for an international sector with VANZ is generally 45 minutes. If the flight had arrived late the turnaround time compresses to attempt to achieve the goal of leaving on time.
- The passengers took about 15 minutes to disembark. Mr Irvine completed the walk around of the plane and the first officer went back into the cabin to assist the flight crew with cleaning. Mr Irvine acknowledged that such assistance was not compulsory.
- At around 1110 am NZT the aircraft boarded and departed on schedule.
- The flight time returning to New Zealand was significantly shorter due to tail winds. The lunch meal was delivered about 25 minutes after becoming airborne.
- A toilet break was sought about an hour after departure.
- The aircraft landed ahead of schedule. Once the passengers disembarked Mr Irvine and the first officer helped the cabin crew to clean during the turnaround.
- After completing post-flight duties, Mr Irvine cleared customs and was taken back to the hotel at around 1530 hours (3.30pm).

Start and finish of a shift

[30] I now look the evidence in relation to portions of Mr Irvine's shift or duty when it could be argued he could have a break. It was not suggested by VANZ that under normal circumstances Mr Irvine could have taken a break between arriving at the airport and arriving at the aircraft at the start of a shift. Similarly once the pilot arrives at the aircraft and at the end of a shift.

Ascent and descent

[31] The ascent or 'climb out' phase and the descent phase are sometimes referred to together as the 'critical phase'. VANZ accepted that during the critical phase was not a time when breaks could be taken, although physiological needs could be met if necessary.

Turnaround

[32] Pilots are required to stay on the plane when there are still passengers on board. During the turnaround period the pilot in command must prepare the aircraft for the next sector (including the walk around inspecting the outside of the plane), complete required documents (including flight planning, refuelling, weather conditions, load and balance), ensure the aircraft is safe for flight and authorised.

[33] Mr Irvine says that the full 45 minutes can be required for the tasks which needed to be undertaken in the turnaround. Usually only one of the pilots leaves the aircraft during a turnaround and that is to do the aircraft inspection. Mr Hosking considered that the tasks could be achieved in 35 minutes. For Virgin's domestic flights in Australia a 35 minute turnaround is scheduled.

[34] VANZ argued the point that potentially a pilot could go through security and have some rest time during a turnaround.

[35] Mr Irvine accepted it was possible in a 45 minute turnaround that a pilot could clear customs and immigration enter the terminal, buy a coffee, make a personal phone call and attend to personal matters. However, they would then have to get back through customs and immigration again to get back to the aircraft. Mr Irvine was not confident that he could ensure that he and anyone else he permitted to take a break would be back in time. Mr Graham and Mr Hosking agreed that a short break in the terminal was possible occasionally. Mr Graham described it as only possible if everything was going really well.

[36] There is a requirement in the Virgin Australia operating manual that three minutes are required to complete the pre-start checks from door closure. Mr Irvine says that pilots are generally seated at least 15 minutes period to doors being closed, sometimes up to 30 minutes. VANZ has an on-time departure policy, recognising the importance of punctuality.

[37] I find that it is unlikely that Mr Irvine could safely ensure that he left the aircraft and made it to the terminal for a break, certainly not a 30 minute break, and then returned to the aircraft in time, during a standard 45 minute turnaround. When the turnaround was extended, for example, if the flight arrived significantly early, that is a possibility. That is insufficient though for a consideration of whether there was usually a break available. Also, sometimes delays were not evident on arrival and so the pilot may be remaining on the aircraft expecting a standard turnaround time only to discover a delay had occurred.

[38] The other opportunity would be to take a break elsewhere in the aircraft. This again has some difficulties. The cabin is being cleaned. The front of the cabin, including the galley, is busy with catering staff replacing stocks of food and drink. Servicing equipment at times blocks passage through areas.

[39] I conclude that it would not be feasible to take a 30-minute uninterrupted break during the standard turnaround time. Sometimes a 10-minute break might be taken, although even that could usually be challenging given the responsibilities on the captain during the turnover and the requirements to walk to and get through immigration and customs and back.

Cruise phase

[40] The only remaining time when Mr Irvine could be seen as being on a rest or meal break was when the flight is in cruise mode. Usually for this time the plane is on automatic pilot with vigilance required by the pilots.

[41] Mr Irvine says that once the aircraft reaches the cruising level, there is generally at least another 20 minutes of active duties. These include the completion of navigation logs and entering navigation points into the onboard computers and making high frequency (HF) radio calls. VANZ witnesses put this period as 10 or 15 minutes.

[42] At all time the pilots are either in the 'Pilot Flying' or 'Pilot Monitoring' roles. Usually a pilot will have the role for a flight sector. So, for example, the Pilot Flying will undertake the take-off and landing for a flight. There are some functions which only the captain can undertake but many others can be undertaken by either pilot.

Mr Irvine says that headsets are on for the critical phases of flight, but can be off with the speaker turned up the remainder of the time. He says it would be unusual for a pilot not to listen to radios calls. Even the pilot who is eating a meal would be listening out for air traffic controller requirements and trying to check if the other pilot needs assistance. He also says that whilst eating a meal the pilot would be expected to keep an eye on the control panel and it would be very unusual for a pilot not to monitor communications whilst eating a meal. There are operating manual instructions regarding dealing with pilots' physiological needs.

[43] Mr Irvine said that the descent to approach and landing generally takes 40 minutes. Mr Hosking said that preparation for descent and the descent itself take about 40 minutes all together.

[44] During the cruise portion of the flight, pilots are required to monitor the aircraft, communications (including active and emergency frequencies and the interphone within the plane) and weather. Mr Irvine says that it is not uncommon for the entire cruise phase of the flight to be dominated by operational issues such as weather, aircraft serviceability, passenger related issues and other operational matters.

[45] Mr Graham accepted that a pilot is never free of responsibility, in the sense of being free of manipulation and monitoring roles, during a flight. Mr Hosking accepted that a degree of situational awareness is required at all times.

[46] Mr Hosking expected captains to discuss and arrange an appropriate breaks regime with the co-pilot. There are no facilities in the B737-800 for on-board crew rest. The flight deck is a confined area with Mr Irvine estimating that the other pilot is approximately two feet away from him when they are seated. Mr Irvine says that he cannot stand upright, although Mr Hosking says that he can. He accepts that he could not raise his arms up and stretch. Later evidence was that the cabin height was 190 centimetres, so that Mr Irvine at 188 cm would not be able to stand there once he put shoes on.

[47] Although there is no restriction on pilots attempting to have a stretch, they generally have to remain in their seat with a lap belt on. Pilots must remain in the flight deck, unless there is some necessity to leave, as outlined in VANZ policy.

[48] A meal is provided on every sector which pilots operate during a duty day. They are also offered tea and coffee or other non-alcoholic beverages at points during

flights. Mr Irvine said that as captain, his responsibility is not diminished because he is eating a meal. Thus more than a degree of operational awareness is required for good crew coordination. For example, pilots are generally always aware of the ongoing radio calls while eating. Also, company policy advises a 30 minute gap between each of the pilots eating their respective meal which creates a limitation.

[49] Meals can be disrupted by such things as weather, sick passengers, aircraft serviceability issues and operational concerns. On the example day described, Mr Irvine believes that the first officer's meal was interrupted but was unsure whether his own was. Mr Hosking accepted that interruptions occur but described them as rare. Mr Graham described interruptions as occasional.

[50] Mr Hosking noted that the policy does not proscribe that the break must be uninterrupted. Pilots were expected to use their judgement about whether to start the 30 minute break again or add on, after the interruption, what had been left from before. This was affected by the degree of interruption.

[51] There are fatigue minimisation techniques which VANZ permits. These included controlled rest. However, some of the flights which Mr Irvine flies are below the bottom of the range within which VANZ permits that technique to be used. Mr Hosking estimated that around 15% of the flights would be outside that range.

[52] In terms of restrictions on activities, cell phones, internet and personal devices are forbidden during the flight, which mean personal matters cannot be attended to whilst in the cruise phase.

Compensation measures

[53] It was common ground that there was nothing provided by VANZ for pilots which could be seen as compensation measures under Part 6D of the Act. Compensation measures are designed to compensate an employee for a failure to provide rest or meal breaks in accordance with s69ZD(1).³

³ Compensation measures are defined in s 69ZC of the Act.

Other employee groups

[54] Some evidence was given about pilots from another airline covering similar routes to VANZ pilots giving pilots what appeared to be a rostered lunch break when at airports overseas or that they were paid a compensatory payment.

[55] There was some limited evidence given about VANZ cabin crew, who appear to have a short break as well as some compensation paid. These employees obviously undertake a different type of work to pilots.

[56] Evidence regarding other groups provides some sense of other possible arrangements although it was largely anecdotal and not fully explored at the investigation meeting.

The parties' positions

[57] Mr Irvine does not consider that he is getting rest and meal breaks as at present he is not "free from duty" until his shift finishes. He says that the shorter sectors or flights do not allow much time for breaks even if time in the flight deck can be considered to be a break.

[58] Mr Irvine says that he is not proposing that I should or could take the entitlement to a break by withdrawing from operation of the aircraft at any point during the phase of flight, simply because a theoretical entitlement to a rest or meal break has arisen. Rather he is promoting the allocation of rest and meal breaks during working hours when the aircraft is on the ground, by VANZ arranging its flight schedules and rosters so as to enable him and other pilots to be provided with rest breaks and meal breaks during working hours, or provide reasonable compensation for not doing so.

[59] VANZ's primary argument is that rest and meal breaks are provided in flight and that that accords with the policy and the legislation and thus Mr Irvine does not have an unjustifiable action claim.

[60] The company acknowledges that if it could be shown not to have met its own policy or the requirements of the Act (which it denied), then Mr Irvine may have a disadvantage personal grievance. This was accepted to be the case even if the policy did not have the status of a contractual obligation.

[61] It is recognised that breaks are not rostered for pilots, but rather they are expected manage their own and their co-pilot's breaks in accordance with events. Both parties agreed that some amount of situational awareness was required when the pilot was consuming a meal.

Conclusion on provision of breaks grievance

[62] Did VANZ provide rest and meal breaks in accordance with the policy? Obviously each flight and duty period is different and it is difficult to say that VANZ always or never complied with this policy as regards Mr Irvine. I will consider what can be seen as the only real and consistent possible opportunity for breaks, which is that they occurred during the cruise phase of a flight.

[63] The policy is prescriptive in the sense that it states that team members "are able to take breaks according to the table..." and the table specifies precise hours of work and the number and length of breaks.

[64] The policy continues that "[y]our break will commence once you are free of duty" and "wherever practical and possible, you may take your break within or away from your immediate place of work (eg on or off the aircraft...)". The policy recognises that breaks cannot be rostered at specific or set times. No breaks were rostered for pilots.

[65] The policy specifies that the break begins once the employee is "free of duty". Submissions for Mr Irvine argued that the definition of duty and duty period in the CEA should apply. This equates with the concept of a shift. That would mean that pilots could not take any breaks during their shift. That cannot be correct. It also does not fit comfortably with the reference earlier in the policy to the policy referring to "rest and meal breaks within a duty period".

[66] A pilot must be free of duty in order to take a break. I consider that here duty is used in the sense of responsibilities and tasks of the role. I consider that for Mr Irvine that in the context of being a pilot on an aircraft that person cannot be "free of duty" whilst the aircraft is in the air. This is in keeping VANZ's witnesses' evidence that operational and situational awareness continues.

[67] VANZ refers to the sentence before the table saying that breaks are taken according to the table "as far as is reasonable and practicable". I cannot accept that

that proviso would mean that a pilot was not able to have any times when they are free from responsibilities and tasks. It appears that pilots from at least one other airline flying similar routes are able to take breaks away from the aircraft.

[68] The policy contains some aspects of flexibility. It specifies that breaks are only away from the immediate workplace “wherever practical and possible”. However, I am not satisfied that, particularly as regards meal breaks, what is provided at present is sufficient to amount to a break within the immediate workplace.

[69] It also recognises that breaks may not be able to be rostered at specific or set times. I do not regard these flexibilities as detracting from the requirement that a break must be when the employee is free from duty.

[70] Having found that VANZ’s arrangement does not comply with its policy I need not go on and consider whether they comply with the legislation.

[71] It was not suggested by VANZ that going without a break was not a disadvantage, or that non-compliance with its own policy was not an unjustified action by VANZ.

[72] On that basis Mr Irvine establishes a personal grievance claim for unjustified disadvantage.

Good faith issues

[73] Two issues arose regarding Mr Irvine’s claim for disadvantage based on a breach of the duty of good faith. The first concerned whether a good faith grievance had been raised in time, The second related to whether a different type of good faith breach was alleged during the investigation than appeared in the pleadings and whether the Authority should consider the new type.

90 days issue regarding any good faith claim

[74] VANZ’s statement in reply stated that the disadvantage grievance was raised out of time. Submissions identified this referring to the good faith grievance.

[75] I am satisfied that if there was a failure to raise the good faith issue within 90 days, VANZ consented to that late raising⁴. NZALPA’s letter of 23 August 2017

⁴ S 114(1) of the Act.

includes an allegation that there was no material response by VANZ to NZALPA's 24 March 2016 letter and raises a grievance that VANZ's failure to address the issue amounted to a breach of the duty of good faith and unjustifiable action causing disadvantage.

[76] The response of 17 November 2017 from VANZ's representative denies a breach of good faith, with no reference to any late-raising of the grievance. VANZ is said to be willing to attend mediation in an effort to try and resolve 'the issues' by agreement. The parties subsequently did attend mediation.

[77] Mr Irvine is not prevented from pursuing a good faith grievance.

Different type of good faith breach

[78] In the statement of problem it was alleged that Virgin had failed to provide any "material response" to the NZALPA letter and a determination was sought that Mr Irvine had a grievance regarding Virgin's "failure to address" the breaks issue. No further particulars were sought.

[79] Initially it appeared the issue may have been whether VANZ responded at all, or made a response of substance to the NZALPA letter. However, during the investigation meeting the focus moved to whether Virgin failed to refer to or provide NZALPA with its policy on breaks. VANZ objected that this amounted to a new grievance, which had not been raised within the 90 day period. A timetable was set at the end of the investigation meeting to allow further submissions on this matter.

[80] It is not unusual in the Authority context for claims regarding a breach of the duty of good faith to be relatively little defined. The Authority is required to resolve employment relationship problems according to the substantial merits of the case, without regard to technicalities.⁵

[81] I consider that the claim regarding the policy not being provided can be captured by the grievance that VANZ failed to provide any "material response" to the NZALPA letter and the determination sought was that Mr Irvine had a grievance regarding Virgin's "failure to address" the breaks issue. It is therefore not a new grievance and the 90 day question does not arise as regards this issue.

⁵ S 157(1) of the Act

Failure to address the issue

[82] The argument that VANZ did not address the breaks issue when raised by NZALPA is not well founded. It is clear that VANZ responded to the claim. It acknowledged receipt of the letter and then the matter was discussed at a CMG meeting in June 2016. Mr Graham decided that the issue was not a suitable one for the CMG and that position was not disputed by NZALPA at the time.

[83] Had NZALPA insisted on a formal written response at that stage and not received one, the situation might be different. Rather an agreement was reached to deal with the issue in bargaining. The topic of the application of New Zealand meals and rest period legislation is included on the log of claims from 2016. No issue was taken regarding the wording of that entry. It was to discuss the matter in NZALPA's letter.

[84] NZALPA was then no doubt unhappy that an agreement resolving the issue to their satisfaction was not reached at bargaining, however, that is not of itself a breach of the duty of good faith.

[85] It is not unusual for issues between unions, on behalf of their members, and employers to move between interpretation or grievance discussions or litigation and bargaining, and sometimes back again.

[86] Once the grievances were raised on behalf of NZALPA members, VANZ's legal representative wrote setting out the company's position on the legislation and the policy. VANZ agreed to go to mediation. There is a gap of almost three months between the personal grievance letters and the response, but no issue was taken with this.

Failure to provide the policy

[87] It was submitted that VANZ breached its duty of good faith by failing to provide or raise the existence of this policy with NZALPA.

[88] I accept that the policy appears not to have been highlighted to Mr Irvine or his union who was bargaining on his behalf. There was no evidence of a request by Mr Irvine, or on his behalf, for a copy of any policy on that issue or more broadly for other information which the company held on rest and meal breaks. I accept that had

a request been made earlier VANZ would likely have provided the policy. However, NZAPLA did not know to ask as it did not know in 2016 that the policy was in existence.

[89] It appears that the policy was available to VANZ employees, possibly not highlighted in induction or training sessions. The policy was available on the Virgin Australia intranet, through taking five steps. However, they included reference to language relevant to Australian employment relations. There was also mention of a previous employer entity and thus the link may not have appeared contemporaneous. These things may not have helped a current New Zealand based employee from identifying the policy.

[90] The failure to refer to the policy in the response/s can be seen as unfortunate but I am not satisfied that there was a conspiracy to keep it from the union. Mr Hosking and Mr Graham seemed to genuinely have assumed that pilots knew about the policy but also the focus of the discussions was the legislative requirements, following on from the *Jetstar* decision.

[91] There is an absence of evidence that VANZ was aware that NZALPA did not know about the policy. The evidence did not detail the discussions at the CMG meeting or bargaining. In those circumstances I am not prepared to find a breach of good faith amounting to an unjustified action by VANZ.

[92] If I am wrong in that finding, then there is still an issue about whether Mr Irvine was disadvantaged due to the failure to be informed about the policy. There was a lack of evidence regarding the possible effect on bargaining of NZALPA being aware of the policy. Thus I cannot be satisfied that the failure to supply the policy was disadvantageous to Mr Irvine.

Costs and remaining issues

[93] Costs are reserved. Given that this was intended as a liability hearing only, I do not set a timetable. The Authority will make contact with the parties with a view to deciding whether any further steps are necessary.

Nicola Craig

Member of the Employment Relations Authority