

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 734
3195059
3195099

BETWEEN

LEIF FREDRICKSEN
Applicant in 3195059

WARREN LAWRENCE
Applicant in 3195099

AIR NEW ZEALAND
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Richard McCabe, counsel for the Applicants
Laura Chapman and Dana Thomson, for the Respondent

Investigation Meeting: 18, 19 July and 18 August 2023 in Auckland

Submissions and further information received: 17 November 2023

Determination: 8 December 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Leif Fredricksen and Warren Lawrence are employed by Air New Zealand as pilots. At the time of the events which have given rise to this employment relationship problem they had each worked for Air New Zealand for over 20 years. They say in respect of those events, they have been treated differently to other pilots in similar circumstances and that this different treatment has unjustifiably disadvantaged them in their employment. The different treatment they point to is Air New Zealand's refusal to facilitate their travel to the United States to receive the Janssen COVID-19 vaccine. Cpt Fredricksen and Cpt Warren say Air New Zealand's actions were unreasonable and unfair and has caused them hurt, humiliation and injury to feelings and individually,

caused Cpt Fredricsen to use leave and take leave without pay and for Cpt Lawrence, delayed his resuming duties on a different type of aircraft, for which he would have been paid at a higher rate.

[2] Air New Zealand does not accept the claims. It says it was not obliged under the terms of the parties' employment agreement to facilitate Cpt Fredricsen and Cpt Lawrence's flights to the United States and it was not reasonable to do so in the circumstances. It says they have suffered no disparity of treatment from other pilots because the pilots who Air New Zealand flew to the United States to have the Janssen vaccination operated on or were about to commence operating on the B787 fleet and therefore did not fly in the capacity of supernumerary crew as Cpt F and Cpt L would have had to if that option had been available.

The Authority's investigation

[3] By consent these applications were investigated together. In the course of investigating this employment relationship problem the Authority heard evidence from Cpt Fredricsen, Cpt Lawrence, Matthew Cox, Paul Smith, Trevor Lawson, Christine Ody and David Wilson.

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

Issues

[5] The issues for investigation and determination are:

- i. Were Cpt Fredricsen and Cpt Lawrence unjustifiably disadvantaged in their employment as a consequence of Air New Zealand's failure to facilitate their receipt of the Janssen vaccination?
- ii. If so, are they entitled to a consideration of remedies sought including:
 - a. Compensation for unjustified disadvantaged under s 123(1)(c)(i) of the Act; and

- b. Compensation for lost benefit under s 123(1)(c)(ii) of the Act.
- iii. Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Cpt Fredricsen and Cpt Lawrence which contributed to the circumstances which gave rise to their grievances?
- iv. Is either party entitled to an award of costs?

Relevant law

The test for justification

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

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

[8] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations. Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify actions taken “because a fair and reasonable employer will comply with the law.”¹

The parties’ employment agreement

[9] Cpts Fredricsen and Lawrence are members of the New Zealand Airline Pilots Association (NZALPA). Their terms and conditions of employment are set out in the NZALPA and Air New Zealand Limited Pilots’ Collective Employment Agreement (the CEA).² The CEA definition of ‘pilot’:³

¹ *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

² NZALPA and Air New Zealand Limited Pilots’ Collective Employment Agreement 16 May 2021.

³ CEA section 1 Definitions.

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

[10] ‘Supernumerary crew’ is defined as:⁴

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

[11] Section 2 of the CEA describes the area and incidence of pilot duty as:

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

Background

Air New Zealand consults on and implements a COVID-19 vaccination policy

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

[13] In July 2021 the government vaccination order (the Order) definition of “worker” was amended to include “aircrew members”.⁵ The effect of the amendment was that all employees who fell within the definition of “aircrew members” were to have received one dose of the Pfizer vaccine by 30 September 2021 and a second within 35 days of the first dose. At this stage Air New Zealand did not consider pilots such as Cpt Fredricsen and Cpt Lawrence to be included in this requirement because they operated A320 aircraft in its domestic network and could continue to do so without meeting the vaccination requirement under the Order. I say at this stage because Air New Zealand was mindful the Order may be amended to expand vaccination requirements.

⁴ Ibid.

⁵ COVID-19 Public Health Response (Vaccinations) Order 2021.

[14] In late August Air New Zealand commenced consultation with potentially affected employees and their unions about a proposal that certain roles be vaccinated. Pilots and their unions, including NZALPA, were consulted because the proposed roles to be covered by the policy included all pilots.

[15] On 21 September Cpt Lawrence and Cpt Fredricsen received letters from Air New Zealand because it did not have a record of their having received any doses of the Pfizer vaccination and the Order requiring only vaccinated pilots to undertake international duties would come into force after 30 September. The letter included:

What this could mean

If you have not had at least one Pfizer vaccination by 30 September 2021 and the company confirms its preliminary view, you would not be able to bid for or operate any international non-QFT duties while the requirement to have the Pfizer vaccination remains in place, while Australia remains a non-QFT place and while QFT flying remains limited. We anticipate that you would be able to continue to operate our domestic services.⁶

[16] The consultation period ended in late September and on 27 September the policy was confirmed. It included all pilots would be required to have had at least the first dose of a COVID-19 vaccine approved by Med-Safe in New Zealand by 14 November 2021. Cpts Fredricsen and Lawrence were covered by the policy. They do not dispute the implementation or application of the policy. Following confirmation of the policy Air New Zealand entered a consultation with Cpt Fredricsen and Cpt Lawrence about the impact on them if they remained unvaccinated after 14 November. The options discussed included periods of leave and leave without pay. They both continued to raise their request for a facilitated flight to the United States to receive the Janssen vaccination. They also both raised their respective concerns about the impact on their employment if they were unable to receive a vaccine of their choice.

Cpt Lawrence and Cpt Fredricsen request Air New Zealand facilitate their receiving the Janssen vaccination

[17] During the policy consultation process and prior to the policy being confirmed Cpt Fredricsen and Cpt Lawrence requested Air New Zealand facilitate a familiarisation flight (a famil flight) to the United States so they could receive the Janssen vaccination.

⁶ COVID-19 Public Health Response (Air Border, Isolation and Quarantine, and Required Testing) Amendment Order 2021, section 4 QFT means quarantine-free travel.

[18] They offered to contribute to the full or partial cost of associated expenses as Air New Zealand deemed appropriate. The requests also included that they be returned to New Zealand before the Order came into force on 30 September 2021. This was because only vaccinated pilots could leave New Zealand from that date. As they said in their evidence to the Authority, when they first made the request they were acutely aware the window for Air New Zealand to facilitate a flight was fast closing.

[19] Cpt Lawrence made the request on 24 September and Cpt Fredricsen on 26 September. In his request to Cpt Ody, Cpt Lawrence wrote:

We still await confirmation that Domestic pilots will be required to be vaccinated. In anticipation of Domestic A320 Pilots requiring vaccination, are you able to please facilitate a famil flight to lax on the B787 for myself to receive the New Zealand MedSafe provisionally approved Janssen Vaccine so as to arrive back in New Zealand prior to the border order coming into force on the 30th Sept 2021.

[20] Cpt Ody replied that day declining the request because "...we have no legitimate grounds on which you would be eligible for a famil flight on the B787, given that you are not moving to that fleet at any point in the foreseeable future". The email expressed hope that the Janssen vaccination would be available in New Zealand "in the not too distant future" but that there was no formal time frame for this.

[21] Neither Cpt Fredricsen nor Cpt Lawrence flew Air New Zealand B787 aircraft at this time. They flew domestic routes on Air New Zealand A320 aircraft. Why then did they make such a request?

[22] The reasons are set out in a letter Cpt Lawrence wrote to Air New Zealand's Chief People Officer and Chief Operating Officer after the request of the famil flight was declined:

I recently wrote to my fleet manager Christine Ody requesting a familiarization flight to LAX for the purpose of having an alternative vaccine to Pfizer. This is not possible she replied.

This has recently been approved for a non-related B787 pilot who was facilitated to get a Janssen Vaccine via a familiarization flight. It is great that you accommodated your long haul pilots. I am disadvantaged because the same opportunity is not available for me. Other pilots would also like to have the opportunity available to them.

The issue for us A320 pilots is the potential loss of income should alternative vaccines not be available by the 16 Nov. If we wait for the Janssen, (it is only

one jab to achieve full vaccination status) the 26 Dec would be the last date Air New Zealand mandates to get that vaccine.

I do not want to have a loss of income due to a situation outside my control when I have tried to fit in with the companies mandate when alternative vaccines are available. Are you able to either reconsider the LAX famil flight or alternatively leave us on full pay until another vaccine (Novavax or Janssen) is available please?

[23] Cpt Fredricsen and Cpt Lawrence continued to raise the facilitation request after 30 September including in the consultation meetings Air New Zealand held with them to discuss the individual impact of the vaccination requirement under the newly implemented policy.

[24] The request was also directly addressed in a letter dated 27 October from Greg Foran, the chief executive of Air New Zealand, to NZALPA in reply to concerns it raised about accessing a vaccination of choice. In the letter, Mr Foran restates Air New Zealand's respect of employees' choice as to which vaccine they received, that it wished to support them where it could and to that end had explored importing an alternative vaccine or facilitating affected staff to import an alternative vaccine themselves. The letter records these efforts were without success due to constraints around importing vaccinations to New Zealand. With respect to getting employees on a flight to the United States where alternative vaccines are readily available the letter recorded this had been considered but could be taken no further for the following reasons:

...we don't think that we can legitimately "direct" our staff onto a flight that will be entirely voluntary and on which they will not be operating. This is clearly not what the discretion included in the Air Border Order was intended for. Further this is not a solution that we could offer to all affected staff. After careful consideration, we have therefore determined that we do not support an initiative where pilots would be directed onto an aircraft for the sole purpose of having a vaccine in the United States.

Discussion

[25] To establish a personal grievance for unjustified action two limbs must be established:

- a breach of an employee's condition of employment; and
- such breach causes an employee disadvantage in their employment.

[26] The employer's obligations to comply with legislative requirements may override its obligations as an employer. In *Air Nelson Ltd v Neill*, the employee suffered disadvantage in his employment but this was seen as an unavoidable consequence of the promotion of high standards of public safety under the Civil Aviation Act 1990.⁷

[27] Air New Zealand says its actions occasioned no unfairness to Cpt Fredricsen and Cpt Lawrence because:

- (i) their terms and conditions of employment were not affected by its actions in refusing to facilitate the famil flight;
- (ii) it was fair and reasonable not to facilitate the requested famil flights;
- (iii) it was fair and reasonable not to facilitate a flight to the United States by 'direction';
- (iv) while it accepts Cpt Fredricsen and Cpt Lawrence were type rated for B787 aircraft they were not flying or training to be flying B787 at that time in the Air New Zealand fleet whereas the pilots for whom the Janssen vaccination was facilitated were;⁸
- (v) the process Air New Zealand went through was fair and reasonable including exchange of correspondence, three meetings each with Cpt Fredricsen and Cpt Lawrence;
- (vi) Air New Zealand genuinely explored ways to facilitate access to the Janssen vaccine to those who requested it including actively considering, supporting staff seeking exemptions; and
- (vii) it was legally unable to facilitate a famil flight because it could not direct them onto the flight.

[28] It is correct that there was no express provision in the parties' employment agreement that would require Air New Zealand to facilitate Cpt Fredricsen and Cpt Lawrence receiving a vaccine overseas. A disadvantage though is wider than the terms of employment. Air New Zealand was obliged to treat Cpt Fredricsen and Cpt Lawrence fairly and reasonably and comply with the obligation of good faith which requires parties to employment relationships to be active and constructive and responsive and communicative.⁹ The situation Air New Zealand found itself in in the period prior to

⁷ *Air Nelson Ltd v Neill* (2008) 6 NZELR 58 (EmpC).

⁸ An aircraft type rating is a flight crew qualification to operate types of aircraft and associated models.

⁹ Employment Relations Act 2000, s 4.

30 September when the window of opportunity to facilitate pilots receiving the Janssen vaccine closed, was one where the good faith obligation manifested acutely. This was because the opportunity to facilitate pilots to receive a vaccine of their choice was an unprecedented situation and could result in employees in like circumstances, that is pilots as defined by the terms of the parties' employment agreement, being treated differently.

[29] On the evidence before the Authority Air New Zealand was aware of concerns throughout its pilot population about the Pfizer vaccine and that pilots were eager to take the opportunity to access different vaccines then only available overseas. To select a subset of that population to receive such assistance, including the detail of that assistance such as changing pilot rosters to facilitate individual travel to access the vaccination, requiring those pilots pay some costs associated with the facilitated travel, changing the usual route of a famil flight from trans-Tasman to the United States and the need to secure the B787 pilot cohort given the increase in air freight, without actively communicating with, in this case Cpt Fredricsen and Cpt Lawrence and providing them an opportunity to comment was a breach of good faith. This was because the failure to communicate has undermined Cpt Fredricsen and Cpt Lawrence's confidence that Air Zealand would treat them fairly and reasonably and this in turn has undermined the employment relationship.

[30] While this was an unprecedented situation and the window for action was small the good faith obligation was not suspended.

[31] I am satisfied after 30 September the circumstances which had allowed the facilitation flights had shifted significantly out of Air New Zealand's control due to the Order changes and any disadvantage could not then be said to be unjustified.

Remedies

[32] Cpt Fredricsen and Cpt Lawrence have established personal grievances for unjustified disadvantage. They are entitled to a consideration of the remedies sought.

Compensation for humiliation, loss of dignity and injury to feelings

[33] The circumstances of Cpt Fredricsen and Cpt Lawrence's personal grievances were stressful and upsetting and the effects remain profoundly felt. They each gave compelling evidence of the negative impact of their grievances. They are entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to such of \$8,000.00 each.

Compensation for lost benefit

[34] This aspect of claim is unsuccessful. The causative link between Air New Zealand declining to facilitate receipt of the Janssen vaccination and the loss is broken by the extension of the Order from 30 September 2021 which prevented the proposed flight occurring.

If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Cpt Fredricsen and Cpt Lawrence that contributed to the situation giving rise to their personal grievances?

[35] No deduction from the remedies awarded is to be made under s 124 of the Act. They have engaged in good faith with the process Air New Zealand put in place to work through the difficult situation faced by all parties as a consequence of the COVID-19 pandemic and raised a genuine issue in requesting Air New Zealand facilitate a flight to receive the Janssen vaccination. They did not contribute in a blameworthy way to the situation giving rise to their personal grievances.

[36] There are no deductions from the monetary remedies for reasons of contribution.

Summary of orders

[37] The Authority orders as follows:

- (i) within 21 days of the date of determination Air New Zealand Limited is ordered to pay Leif Fredricsen \$8,000 under section 123(1)(c)(i); and
- (ii) within 21 days of the date of determination Air New Zealand Limited is ordered to pay Warren Lawrence \$8,000 under section 123(1)(c)(i).

Costs

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

[39] If they are not able to do so and an Authority determination on costs is needed Cot Fredricsen and Cpt Lawrence may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Air New Zealand Limited would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[40] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁰

Marija Urlich
Member of the Employment Relations Authority

¹⁰ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.