IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 393
3258119

	BETWEEN	NEW ZEALAND AIR LINE PILOTS' ASSOCIATION INDUSTRIAL UNION OF WORKERS INCORPORATED Applicant
	AND	JETCONNECT LIMITED Respondent

Member of Authority:	Rachel Larmer
Representatives:	John Hall, counsel for the Applicants Aaron Lloyd and Isabella Denholm, counsel for the Respondent
Investigation Meeting:	26 and 27 February 2025 in Auckland
Submissions and Other Information Received:	28 March and 28 April 2025 from the Applicant 26 March and 10 April 2025 from the Respondent
Determination:	4 July 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The New Zealand Air Line Pilots Association Industrial Union of Workers Incorporated (NZALPA) is a union that has brought proceedings on behalf of 130 pilots (Pilots) it represents who are employed by Jetconnect Limited (Jetconnect).

[2] Jetconnect is a New Zealand registered company that is wholly owned by Qantas Airways Limited (Qantas), which is an Australian registered company. Jetconnect pilots and cabin crew comply with Qantas Group operating policies.

[3] This matter involved a dispute about the interpretation, application, or operation of clause 13.4.3 (which governs operational duty travel) in the Jetconnect and NZALPA

Collective Employment Agreement dated 10 August 2018 – 25 October 2020 (the 2018 CA).

[4] Clause 13.4.3 of the 2018 CA states:

> Transport by Air: When travelling by air for purposes related to Company business, Pilots shall be booked economy class on a Part 121 (or equivalent) operator. When booked on a Qantas Group aircraft the booking will be upgradeable, wherever possible, in accordance with the Qantas Staff Travel Program Conditions applicable to Jetconnect.

[5] The reference in clause 13.4.3 of the 2018 CA to "Company business" meant operational duty travel. The reference in clause 13.4.3 of the 2018 CA to "121" was to a New Zealand Civil Aviation rule part which applies to New Zealand registered aircraft with more than 30 seats. The reference in clause 13.4.3 of the 2018 CA to "equivalent" referred to operators of overseas registered aircraft of a similar size.

[6] Clause 13.4.3 of the 2018 CA was silent on when the upgrade would occur, which has caused this dispute between the parties. Jetconnect said clause 13.4.3 did not entitle Pilots to be booked on confirmed business class international operational duty travel. NZALPA said it did, so it claimed Jetconnect's failure to do so had breached the 2018 CA.

The Authority's investigation

[7] NZALPA originally lodged a statement of problem regarding the disputed operational duty travel on 20 February 2020. That claim was subsequently withdrawn, while the parties attempted to resolve their dispute internally. When that was unsuccessful, NZALPA lodged these current proceedings on 19 October 2023.

[8] It was agreed during the case management conference that liability would be determined at a first investigation meeting (IM) then, if necessary, penalties/remedies would be determined separately.

[9] The Authority held a two-day in-person investigation meeting on the disputed interpretation of clause 13.4.3 of the 2018 CA, as it related to the contractual obligations associated with operational duty travel.

[10] NZALPA's witnesses were:

(a) Josh Bennetts, who is a pilot and also the Administrative Head of the NZALPA Jetconnect Pilots' Council; and

(b) Mark Dignan, who is a lawyer and who was employed by NZALPA as a Legal Officer from 2014 to 2019. He was on the negotiating team for the 2018 CA.

[11] Jetconnect's witnesses were:

(a) Shelley Musk, who currently is Head of Jetstar Airways Limited (New Zealand) (Jetstar) which is a wholly owned subsidiary of Jetstar Airways Limited Pty Limited. At the material time Ms Musk was "Head of Jetconnect";

(b) Michael Gulliver, who is Jetconnect's General Manager and since 7 January 2020 he has also been one of Jetconnect's directors;

(c) Paul Consedine, who is currently Jetconnect's Manager Workforce Planning and Crewing Operations. At the material time Mr Consedine was a Jetconnect Aircrew Planner.

[12] Both parties lodged written submissions after the investigation meeting and Jetconnect also confirmed in a memorandum the dates of all of the collective agreements the parties had entered into.

Qantas Travel Program Conditions

[13] Different "Travel Priorities" applied to operational duty travel versus non-operational duty travel. These proceedings only concerned operational duty travel.

[14] The Qantas Staff Travel Program Conditions and the Qantas Duty Travel Program Conditions (together referred to as the Qantas Travel Program Conditions) primarily applied to staff duty travel (operational and non-operational). These two documents operated in conjunction with each other and there was some overlap between them.

[15] The Qantas Travel Program Conditions were regularly reviewed and updated by Qantas. Each time an update occurred it replaced the previous version of the policy.

The most current version is accessible to all staff on the Qantas Staff Travel Website: iFly.

[16] Qantas subsidiaries (such as Jetconnect) can recommend to Qantas any terms and/or benefits that should be included or excluded in the Qantas Travel Program Conditions, but ultimately Qantas, as the owner of these policies, could determine their content at its sole discretion. Jetconnect's eligibility under Qantas's policies is also at Qantas's discretion.

[17] The current (2025) Qantas Travel Program Conditions is version 4.3, which sets out Pilots' Travel Priorities. It states that the relevant onload and upgrade class to be applied to operational duty travel was set by the relevant agreement, which in this case was the applicable Jetconnect collective agreement. The applicable collective agreement for the purposes of these proceedings was the 2018 CA, which no longer applied.

[18] When the 2018 CA was signed, version 1.4 of the Qantas Staff Travel Program Conditions applied and version 2.1 of the Qantas Duty Travel Program Conditions applied. The Qantas Travel Program Conditions in effect when the 2018 CA was ratified did not state when upgrades were to occur for Pilots undertaking operational duty travel.

[19] The Qantas Duty Travel Program Conditions in effect when the 2018 CA was ratified said that the Travel Priorities for employees of eligible subsidiary companies (such as Jetconnect) were allocated separately. That was to have occurred in accordance with the Subsidiary Companies and Airlines Duty and Concessional Travel Program Conditions, which were never published.

[20] The Qantas Travel Program Conditions did not address Travel Priorities for Pilots conducting operational duty travel and did not provide any information about the Pilots' booking class for such travel or information about when rosters would be published.

[21] The reference to "agreement for operational duty travel" in the Qantas Staff Travel Program Conditions first appeared on 1 March 2019, which was version 1.9 and in the Qantas Duty Program Conditions on 25 March 2021, which was version 2.5. This change was not negotiated, but was implemented by Qantas to address the fact that

airlines within the Qantas Group had different collective agreements, which contained differing arrangements for duty travel.

[22] The Qantas Travel Program Conditions therefore provided guidance regarding the order in which Pilots would be onloaded and upgraded in respect of each other. However, it was the specific terms in the applicable collective agreement that established the class that Pilots would be booked, onloaded and upgraded into. None of the parties' collective agreements, nor any version of the Qantas Travel Program Conditions, recorded when the booking, onboard and upgrade processes were to take place.

Jetconnect's upgrade practice

[23] Jetconnect established a local practice that has been in place since the parties entered into their first collective agreement in 2008, with a slight adjustment (in Pilots' favour) occurring in the second half of 2018.

[24] Jetconnect booked Pilots in economy class and then upgraded them, when possible, on the day of travel. However, since the second half of 2018 the practice changed in that after an economy booking had been made, Pilots could be upgraded where possible under the Qantas Staff Travel Program Conditions five days prior to the date of travel (referred to as the "5-days review" upgrade) or on the day of travel, subject to seat availability and the Pilots' Travel Priority. NZALPA claimed that approach breached clause 13.4.3 of the 2018 CA.

[25] NZALPA has proposed different interpretations of clause 13.4.3 of the 2018 CA at different times during these proceedings:

(a) In the statement of problem, NZALPA said Pilots were entitled to confirmed business class international duty travel at the time of booking;

(b) In the list of issues the parties agreed were to be determined by the Authority, NZALPA claimed Pilots were entitled to confirmed business class international duty travel at the time their roster was published;

(c) In submissions lodged after the investigation meeting, NZALPA said clause 13.4.3 required Pilots to be given confirmed business class international travel "as soon as possible", which it said the '5-days review' and 'on the day of travel' upgrades failed to comply with.

[26] Both parties claimed that a plain and ordinary interpretation of clause 13.4.3 in the 2018 CA supported their interpretation of it.

Transition of the Air Operator Certificate

[27] On 17 October 2017 Qantas proposed to Jetconnect that the New Zealand Air Operator Certificate (AOC) be transitioned to form part of the Qantas Australian AOC. That meant the ownership of the corresponding aircraft would change from being held by Jetconnect to being held by Qantas.

[28] A decision was made on 7 December 2017 that the New Zealand Jetconnect AOC would be transitioned to the Qantas AOC. That left Jetconnect without a meaningful asset base, the result of which was that Jetconnect no longer had predominant control over the aircraft on which Pilots were flying, whether when operating or when passengering.

[29] Because Jetconnect did not have control of the aircraft on which the operational duty travel would be occurring, duty travel was no longer at Jetconnect's sole discretion. The AOC transition also meant that Jetconnect no longer had a Chief Pilot, but instead had a "Manager of Flight Operations".

[30] From mid-January 2018 Jectconnect began transitioning its seven New Zealand registered aircraft onto the Qantas AOC. Although Jetconnect Short Haul Pilots and Cabin Crew continued to operate on the Tasman as they had done under the Jetconnect AOC, they were flying the Qantas AOC Australian registered aircraft. It was within this context that the bargaining for the 2018 CA was taking place.

[31] The transition of the Jetconnect AOC to the Qantas AOC was finalised on 30 November 2018. This change to the AOC did not affect operational duty travel obligations or practice.

The parties' collective agreements

[32] At the time of this investigation meeting, the parties had entered into four collective agreements. The first was dated 2008 to 2011 (the 2008 CA). The second was dated 18 April 2013 to 17 April 2016 (the 2013 CA). The third was the collective agreement in issue in this matter, the 2018 CA. The fourth was dated 10 August 2021 to 9 August 2024 (the 2021 CA).

[33] Clause 13.4.3 in all of these collective agreements dealt with duty travel, with the language used in the clause having evolved over the years.

The 2008 CA

[34] The relevant clause in the parties' 2008 CA was clause 13.4.3 that stated:

> Transport by Air: When travelling by air for purposes related to Company business, Pilots shall be booked economy class upgradable wherever possible in accordance with Company staff travel policy on a Part 121 operator, wherever possible on a Qantas Group aircraft.

[35] In practice, Pilots were booked into economy and had their bookings reviewed for upgrades on the day they travelled.

The 2013 CA

[36] During bargaining for the 2013 CA, NZALPA made a bargaining claim for Pilots to be booked economy class seats upgradable on a space available basis. Jetconnect rejected that claim. NZALPA likewise rejected Jetconnect's bargaining claim that Pilots' duty travel would be provided in accordance with the Jetconnect Staff Travel Program.

[37] The parties subsequently agreed on wording in clause 13.4.3 of the 2013 CA that stated:

> Transport by Air: When travelling by air for purposes related to Company business, Pilots shall be booked economy class upgradable wherever possible in accordance with Company staff travel policy on a Part 121 operator, wherever possible on a Qantas Group aircraft.

[38] Although the wording of clause 13.4.3 had changed slightly, the same booking and upgrade arrangements as had been adopted under the 2008 CA continued to apply under the 2013 CA.

The 2018 CA

[39] The wording of clause 13.4.3 changed slightly between the 2013 CA and the 2018 CA. Clause 13.4.3 in the 2018 CA stated:

> Transport by Air: When travelling by air for purposes related to Company business, Pilots shall be booked economy class on a Part 121 (or equivalent) operator. When booked on a Qantas Group aircraft the booking will be upgradable, wherever possible, in accordance with the Qantas Staff Travel Program Conditions applicable to Jetconnect.

[40] The only change to the duty travel arrangements that had occurred under the 2008 CA and 2013 CA from the duty travel arrangements that applied under the 2018 CA, was that from the second half of 2018 Jetconnect applied 5-days review upgrades, five days prior to travel, in addition to upgrades on the day of travel. This is discussed in paragraphs [100] and [101] of this determination.

The 2021 CA

[41] The duty travel clause remained unchanged in the 2021 CA, so clause 13.4.3 stated:

> Transport by Air: When travelling by air for purposes related to Company business, Pilots shall be booked economy class on a Part 121 (or equivalent) operator. When booked on a Qantas Group aircraft the booking will be upgradable, wherever possible, in accordance with the Qantas Staff Travel Program Conditions applicable to Jetconnect.

Material facts

Duty travel

[42] Operational duty travel is 'must ride' travel. Commercial passengers may be offloaded where necessary to enable operational duty travel to occur. Non-operational duty travel and leisure travel are not 'must ride' travel, meaning commercial passengers will be allocated seats before staff members. Separate booking processes therefore applied to operational duty travel.

[43] Duty travel benefits are governed by the various collective agreements, policies and local practice that applied at the relevant time. The collective agreement is the only document which set out the cabin class a Pilot will be booked into for duty travel. The policies only concern onload and upgrade priorities for staff on duty travel.

Booking of duty travel

[44] Jetconnect's position in the 2013 and 2018 collective bargaining was that a claim for business class bookings would not be accepted, which was the same position it had adopted in the 2008 and 2021 bargaining.

[45] That meant the process for booking and managing operational duty travel had remained generally consistent since 2008. Operational duty travel for Pilots had always been booked in economy and reviewed for potential upgrades at a later date.

[46] Prior to the introduction of an automated booking droid, operational duty travel was booked 5 to 10 days prior to the travel taking place, and then upgraded on the day of travel at the airport (either at check in or at the departure gate), subject to a Pilot's Travel Priority relative to other travellers and a business class seat being available.

[47] Around the time of the bargaining for the 2018 CA, elements of this process were changing, which included the introduction of the automated droid. After ratification of the 2018 CA a Local Area Procedure LAP JOC031 (the LAP) was created to reflect Jetconnect's local practice for booking duty travel to ensure it complied with the relevant documents.

[48] The LAP provided for the possibility of an upgrade from the initial confirmed economy seat under clause 13.4.3 of the 2018 CA. That was permitted under the Qantas policy because it did not alter the fact the initial bookings were being made in economy.

[49] The LAP is no longer in force, as it was subsequently incorporated into Jetconnect's normal day to day operational functions. The LAP information now sits within the Jetconnect Daily Checklist and Pax Bookings User Guide, which set out the steps Jetconnect Operations used when booking and managing operational duty travel for Pilots and Short Haul Cabin Crew.

[50] Booking is a complex process, as staff members receive different operational duty travel benefits depending on their employment agreement, Travel Priority and local practice. The first step was to build a roster. Once that had been done then Jetconnect started the process of making bookings. Bookings were now done by the automated droid, which booked all Pilots into economy class ("M" seat). Third party travel software then 'confirmed' the booking or 'waitlisted' it.

[51] A confirmed booking meant the Pilot had a guaranteed seat. A waitlisted booking meant the Pilot would be onloaded if/when a seat became available. Because operational duty travel must be 'confirmed' Jetconnect had to manually check that all of these bookings were confirmed.

[52] The only exception to confirmed economy bookings for operational duty travel was for Flight Examiners and Simulator Instructors who were conducting positioning duties to/from simulator duties. These particular pilots were booked into confirmed business class as per their "Additional Terms and Conditions", which sat outside the parties' collective agreements.

[53] Jetconnect does not currently employ any Flight Examiners or Simulator Instructors.

[54] Rosters are published to Pilots every 28 days via the Jetconnect crew roster planning system. At present, Jetconnect's practice was that initial bookings into economy class were made immediately following the roster publication.

[55] That meant NZALPA's submission that clause 13.4.3 required business class duty travel at the time of booking or at roster publication had the same practical effect, as these two processes currently occurred at the same time. However, Jetconnect noted it could also elect to make bookings for duty travel at some other time, as it was not required to book duty travel at the time the roster was published.

[56] After roster publication, the Jetconnect Crewing Operations team updated the roster to account for any crewing changes since roster publication arising from sickness, delay/disruptions or other business/operational and/or personal reasons. There were always a number of changes that needed to be made after the original roster had been published.

[57] Once all fare paying customers in business class had been allocated seats, the Jetconnect Crewing Operations team reviewed the bookings of Pilots and wherever possible, upgraded them in accordance with the Qantas Travel Program Conditions. Prior to the 5-days review upgrade being implemented by Jetconnect, staff travel upgrades would only be actioned in the 60 minutes prior to departure, which is when bookings closed for commercial customers.

[58] Pilots were upgraded based on their Travel Priority outlined in the Qantas Travel Program Conditions, relative to all other operational duty travellers awaiting upgrade confirmation. Upgrades on the day of travel were not subject to the availability of a D fare seat. At that stage any available business class seat (regardless of fare type) would be allocated to a Pilot on operational duty travel (subject to their Travel Priority) because the seat would not have been booked by a paying customer.

[59] Prior to the 5-days review upgrade being implemented by Jetconnect, Pilots were always booked in a confirmed economy seat, and upgraded (whenever possible) on the day of travel. Jetconnect implemented the 5-days review to provide an opportunity for Pilots to be upgraded to a confirmed business class D fare seat (if

available) earlier than the day of travel. Pilots never received a confirmed business class seat prior to the day of travel before the 5-days review upgrade was implemented.

[60] The Qantas Travel Program Conditions currently state that the onload class for Jetconnect operational duty travel is to be applied as per "the agreement", meaning the applicable collective or individual employment agreement.

[61] Qantas did not permit Jetconnect to book a confirmed business class for operational duty travel, as that would have removed premium seats from the market for its commercial travellers, thereby adversely impacting on Qantas's potential revenue from passengers for its premium seats. It made commercial sense that Qantas wanted to maximise commercial bookings of its premium business class seats.

The 5-days review

[62] On 31 July 2018 Jetconnect raised the 5-days review with NZALPA's bargaining team. Although NZALPA's witnesses disputed that had occurred, the Authority preferred Ms Musk's evidence about that as it was supported by contemporaneous notes.

[63] Five days prior to operational travel occurring, the Jetconnect Crewing Operations team reviewed the roster and availability of business class D fare (referred to as "the 5-days review"). The 5-days review was an internal Jetconnect process, which was not recorded in the Qantas Travel Program Conditions.

[64] The 5-days review was a separate review applied by Jetconnect Crewing Operations to Jetconnect employees which was set out in the Jetconnect Operations Daily Procedures Guide and Checklist. It was implemented by Jetconnect to give its pilots the best opportunity to be confirmed into business class, taking account of commercial considerations. It was effectively a local operating procedure, applied at Jetconnect's discretion.

[65] If a D fare class was available the Pilot would be confirmed into business class in accordance with their onload and upgrade order. If no D fare class was available the Pilot remained in a confirmed economy fare (M fare) and would be eligible to be upgraded on the day of travel (i.e. at check-in or at the gate) subject to their Travel Priority relative to other Qantas Group duty travellers.

Flight Examiners and Simulator Instructors – Additional Terms and Conditions

[66] During the course of bargaining for the 2018 CA, a number of Flight Examiners and Simulator Instructors who had been on individual employment agreements joined NZALPA and became covered by the negotiations and applicable collective agreement.

[67] These pilots had predominantly worked in New Zealand, but the removal of flight simulators from New Zealand required them to travel to Australia to do their work. This category of pilots viewed that as an additional burden that had not existed when they had accepted their employment with Jetconnect. Specific arrangements were agreed for this category of pilots to reflect that they could no longer perform their duties in New Zealand.

[68] The bargaining that occurred over the period 12 September to 10 November 2016 focused on confirmed business travel for Flight Examiners and Simulator Instructors who were conducting simulator duties in Australia, due to the lack of flight simulators in New Zealand that they had previously been using for their work.

[69] Between October and December 2016, Jetconnect sought guidance from Qantas on how to address NZAPLA's operational duty travel interest. The Qantas Industrial Relations (IR) Team did not agree to create a new Travel Priority for Jetconnect Flight Examiners and Simulator Instructors, as that would have created disparity between Jetconnect Pilots' Travel Priorities and the Travel Priorities of other Qantas subsidiaries.

[70] However, Qantas IR agreed that Flight Examiners and Simulator Instructors could be offered additional benefits in an "additional terms and conditions letter" that sat outside of the 2018 CA. This was intended to recognise the changes made to their usual work location, which had been New Zealand but which had become Australia during the course of the bargaining.

[71] On 3 January 2018 a letter with the proposed Flight Examiner and Simulator Instructor Additional Terms and Conditions was circulated to them for feedback. On 2 May 2018 draft Additional Terms and Conditions for Flight Examiners and Simulator Instructors conducting positioning duties to/from simulator duties were tabled for negotiation.

[72] On 12 September 2018 Jetconnect sent Flight Examiners and Simulator Instructors a letter attaching (among other things) the variation to clause 10.10 of the Company Policy for their employment. This letter was sent after the Jetconnect Flight Operations Flyer in August 2018 had been sent out to Pilots, which is discussed later.

[73] The September 2018 letter from Jetconnect that recorded the variation to clause 10.10 of the Company Policy regarding the Flight Examiner and Simulator Instruction terms of employment stated:

> When on an operational positioning, and/or deadheading duty Flight Crew travel will be booked in accordance with the applicable Jetconnect employment agreement and the Qantas Staff Travel Program Conditions for Subsidiary and Associated Companies and Airlines of Qantas Airways Ltd (the Programme). All Flight Crew are to adhere to the Programme. Jetconnect may take disciplinary action against any Flight Crew who fails to adhere to the Programme Conditions which may include the loss of Staff Travel privileges. Refer to the Programme Conditions for further information. […]

[74] The September 2018 letters to Flight Examiners and Simulator Instructors did not include any reference to the specific terms that had been tabled in May 2018 (i.e. that their duty travel would be booked in business class at the time of roster publish if a D class fare was available). Those terms had been incorporated into the Local Area Procedure, which established the practical implementation of how booking and upgrading pilots on international duty travel was to occur in accordance with the applicable collective agreement and relevant policy.

[75] On 12 October 2018 the Flight Examiner and Simulator Instructor Additional Terms and Conditions were finalised. The LAP published in November 2018 confirmed that:

(a) Flight Examiners and Simulator Instructors would have their bookings reviewed and upgraded to confirmed business class seats at the time of roster publication, if a D class seat was available. If not, then they would remain booked into economy class;

(b) All other Pilots would be booked economy class. These bookings would be reviewed five days prior to the operational duty travel occurring and upgraded to business class if a D seat was available. If a D seat was not available, the booking would remain economy class;

(c) Any upgrades had to be done in accordance with the Pilots' onboarding and upgraded category, and the date of joining (i.e. their Travel Priority).

History of the bargaining

[76] On 10 June 2016 the parties entered into bargaining for the 2018 CA. At the first bargaining meeting NZALPA presented a claim for Pilots undertaking duty travel to be provided with confirmed business claims bookings. Jetconnect rejected that claim. NZALPA had raised similar claims in previous bargaining rounds, and Jetconnect had consistently maintained that would not be accepted.

[77] Jetconnect witnesses told the Authority they were "very firm" during the negotiations that Pilots would be booked economy and updated as per the Qantas policy, as Jetconnect could not agree to any duty travel benefits that went above and beyond what the Qantas policy provided to its subsidiary businesses. Jetconnect did not control the seat inventory on the aircraft and or the fare pricing, so it was limited to offering its Pilots only what Qantas had authorised Jetconnect to offer them.

[78] Business class seats are premium seats for premium customers, so Jetconnect accepted Qantas's position that it did not make commercial sense to guarantee confirmed business class seats to Pilots travelling for operational duty travel.

[79] When Jetconnect had engaged with Qantas about the Pilots' claim for confirmed business class seats to be removed from inventory (by being booked for duty travel), Qantas had made clear it would not agree to that. It was therefore not a claim Jetconnect could have agreed to, given the seats and airfares being booked were Qantas's.

[80] Ms Musk contacted the Qantas Benefits and Remuneration Team on several occasions during bargaining to discuss what duty travel benefits Jetconnect could offer its Pilots. This was necessary because Ms Musk (on Jetconnect's behalf) could not agree to certain benefits that were provided by Qantas without Qantas's express authorisation or approval.

[81] These discussions resulted in Ms Musk being authorised to agree to heightened duty travel entitlements for Flight Examiners and Simulator Instructors. That occurred because they could no longer do their work in New Zealand, so had to undertake more travel to Australia than was previously required in their role.

[82] In December 2017 the parties reached the First Agreement in Principle (the First AiP) for a collective agreement. It was put out to ratification, but failed.

[83] In January 2018 Jetconnect circulated a letter to Flight Examiners and Simulator Instructors that invited feedback on a proposal to give them additional terms and conditions that would sit outside the collective agreement.

[84] The discussions during bargaining regarding duty travel mainly focused on the additional terms and conditions for Flight Examiners and Simulator Instructors. The Additional Terms and Conditions for Flight Examiners and Simulator Instructors tabled on 2 May 2018 provided they would be booked business class seats (subject to D fare seat being available at the time of booking).

[85] On 11 May 2018 NZALPA presented a duty travel claim that stated all Pilots would be booked "at the highest class available". Jetconnect responded by saying "no change" would be made to its position on duty travel for Pilots, which would be booked in accordance with the Qantas subsidiary business Travel Priorities.

[86] On 16 May 2018 NZALPA sought clarification on how the AOC transition would impact on Pilots' travel and Travel Priorities. Jetconnect advised that the AOC had only affected leisure travel, so it had no effect on duty travel.

[87] On 29 May 2018 NZALPA raised the issue of duty travel again, asking for confirmed business class seat for Pilots who were undertaking "deadheading" and "positioning" operational duties. That was not agreed by Jetconnect. NZALPA also asked for clarification on Jetconnect's booking and onloading processes. Jetconnect responded that:

(a) All subsidiary company staff were booked and onloaded after Qantas staff;

(b) Operational and duty travel upgrades were governed by Qantas policy, and not included in the collective agreement;

(c) The commercial impact of booking Pilots on business class meant it was not an option Jetconnect would agree to.

[88] This process was not new, as it was the same process as had been occurring since the first 2008 CA had been agreed.

[89] NZALPA's witnesses accepted during the investigation meeting that Ms Musk had consistently asserted that any duty travel benefits would not be incorporated into the collective agreement or accompanying Heads of Agreement, as duty travel would

be governed by Qantas policy. During bargaining, the policy was present for the parties to work through. Members of NZALPA's bargaining team also had their own access to the full policy had they wanted to review it in its entirety.

[90] On 2 and 3 July 2018 the parties discussed and agreed in principle that the Qantas policy would apply to duty travel, and it would not be included in the collective agreement or Heads of Agreement. On 18 July 2018 the parties reached a Second Agreement in Principle (the Second AiP) for the 2018 CA.

[91] At 4.28pm on 19 July 2018 NZAPLA emailed a draft communication it proposed to send its members to three members of Jetconnect's bargaining team. The union's email said it had shared the draft communication "as a courtesy" and intended to send it to its members the next day. The draft communication was sent out unchanged to NZALPA's members on the morning of 20 July 2018. It was caveated by a sentence that said:

> Below are the highlights of the proposed new CEA, please note that this list is indicative only, and the detail in the clauses of the proposed CEA, will be made available in due course.

[92] The draft communication from NZALPA's bargaining team to members stated (among other things):

> **Duty Travel** as per Company Policy. Business Class for international travel and Economy for domestic travel (upgradable as per current policy) at the time of booking.

[93] When questioned during the investigation meeting, Mr Dignan accepted that the draft communication he had prepared regarding the duty travel information:

(a) Was inconsistent with the Qantas Staff Travel Program Conditions;

(b) Was inconsistent with what had been agreed in bargaining; and

(c) Had simply captured the intentions of the Pilots' interests.

[94] Jetconnect's then Chief Pilot had briefly reviewed the draft communication and made some comments on other matters, but failed to correct NZALPA's description of the duty travel benefit. None of the other comments made by the Chief Pilot were adopted before NZALPA sent the final communication to its members the next morning.

[95] On 24 July 2018 the parties conducted a clause by clause legal review of the Second AiP. No objection was made at this stage to the wording of clause 13.4.3. Ms Musk said NZALPA again raised duty travel and Jetconnect responded there would be "no change, Pilots would be onloaded and upgraded as per Qantas policy".

[96] On 30 July 2018 NZALPA requested various documents from Jetconnect, including a copy of "policy amendments agreed to within the CEA bargaining (…class of duty travel etc)." Jetconnect accidently sent the wrong extract of the Staff Duty Travel Conditions to NZALPA, as the extract it sent only related to non-operational duty travel. Ms Musk said this mistake was corrected on 31 August 2018, soon after it was discovered.

[97] Although the wrong extract had been sent, the relevant parts of the applicable policy only dealt with 'onload' and 'upgrade' priorities, which are separate processes to booking. Neither of the extracts from the Staff Travel Conditions stated that Pilots would be booked confirmed business class travel, so the error was not considered material by the Authority.

[98] On 31 July 2018 the parties met to discuss the ratification documents. NZALPA raised duty travel again. Jetconnect again reiterated its previously stated position that any upgrade from economy to business class would be made in accordance with Qantas policy.

[99] Confirmed business class travel at roster publication was discussed for Flight Examiners and Simulator Instructors conducting positioning duties to/from simulator duties (excluding their own "recurrency simulator"). Jetconnect confirmed these Flight Examiners and Simulator Instructors would receive confirmed business class seats as per the proposed Additional Terms and Conditions (subject to availability of a D class seat).

[100] At the 31 July 2018 meeting Jetconnect proposed that all Pilots undertaking operational duty travel would have their economy class bookings reviewed five days prior to travel (the 5-days review), to see if they could be upgraded to business class (subject to the availability of a D class fare and the Pilot's Travel Priority).

[101] The 5-days review advantaged Jetconnect Pilots over other Qantas crew travelling on duty travel, as it enabled Jetconnect to potentially confirm them into business class in advance of the day of travel. This offer went above the benefits

outlined in the Qantas policy and was offered at Jetconnect's discretion. Qantas had approved this offer by Jetconnect as being commercially viable, because by five days prior to travel most of its commercial customers would have already booked their seats.

[102] The CA was ratified on 10 August 2018 and it was signed on 29 August 2018.

[103] On 13 August 2018 Jetconnect formally withdrew the Jetconnect Staff Travel Policy and instead recorded that all duty travel would have to comply with the Qantas Staff Travel Program Conditions for Subsidiary and Associated Companies and Airlines of Qantas.

[104] On 18 September 2018 NZALPA objected to the 5-days review on the basis it did not involve upgrading Pilots "as soon as possible".

Jetconnect Flight Operations Flyer

[105] The 2018 CA was ratified in the middle of a 'live' roster. That meant Pilots' upcoming operational duty travel had already been rostered and booked.

[106] After the 2018 CA had been ratified, Jetconnect began receiving calls from Pilots querying their confirmed business class booking in the 'live' roster for the current period. In response to these queries, Jetconnect's then Chief Pilot released a 'Jetconnect Flight Operations Flyer' in August 2018 (the Flyer), without Ms Musk's review even though her then role was "Head of Jetconnect".

[107] Ms Musk told the Authority she had understood the Flyer would be about how the live roster would be amended to reflect the Additional Terms and Conditions of the Flight Examiners and Simulator Instructors and the Minus Five-Day Review (meaning the 5-days review). Namely, that Jetconnect would be reviewing the bookings in the live roster and amending any bookings necessary to comply with the Additional Terms and Conditions and the Minus Five-Day Review.

[108] The Flyer (among other things) addressed "Duty Travel", and stated:

> With the recent change to the CEA, we are looking at the best way to implement the change. Pax duties that were made prior to the ratification are progressively being checked to upgrade the booking from "Economy/Upgradeable' to a 'Confirmed Business' – if a seat is available at the time of booking. Where there are no available Business Class seats available, the booking will remain as 'Economy/Upgradeable'. If you have questions regarding your booking, please direct them to your Base Captain, as the JOC [Joint Operations Centre] team are not the right people to ask why

> bookings have or have not changed. They are applying the rule set provided to them.

[109] In summary, the Flyer stated that bookings made prior to ratification were being reviewed and would be upgraded from economy/upgradable to confirmed business if available.

[110] Jetconnect's witnesses said this statement was about upgrading the live roster and that the confirmed Business Class duty travel referred to travel for Flight Examiners and Simulator Instructors as per their Additional Terms and Conditions that sat outside the 2018 CA, and the agreement to review all other Pilots bookings at some point between roster publish and the day of the duty travel occurring.

[111] NZALPA disputed that, and said the Flyer proved all Pilots got confirmed Business Class duty travel 'as soon as possible'.

[112] Ms Musk told the Authority that at no time during the bargaining had Jetconnect agreed to all Pilots being booked business class seats. Ms Musk said she had no authority from Qantas to agree to that, so could not have done so. Ms Musk also said she had no authority to fix any benefits outlined in the Qantas Travel Program Conditions, as those documents were owned by Qantas and were regularly updated by Qantas. Ms Musk said that was why:

> Jetconnect had made it very clear during negotiations […] that the benefits outlined in the Qantas Travel Program Conditions would not be incorporated into the 2018 Collective Agreement or the accompanying Heads of Agreement.

[113] Ms Musk said the parties never bargained for the condition that NZALPA claims clause 13.4.3 gave all Pilots, namely upgrading Pilots as soon as possible, which according to NZALPA meant at the first time a business seat became available. Jetconnect said it was clear throughout the entire protracted bargaining for the 2018 CA that bookings for Pilots would be in economy, and onload and upgrades to business would be in accordance with Qantas policy and the local practice specific to Jetconnect.

Conduct after the 2018 CA was signed

[114] The 10 November 2018 LAP set out the minus 5-days review processes to be followed by the Jetconnect Operations team. The LAP also incorporated processes that applied to reflect the additional benefits for Flight Examiners and Simulator Instructors

of being booked in business class (subject to a D class seat being available) at the time the roster was published.

[115] In January 2024 the Jetconnect Pax Bookings user guide was published. On 27 February 2024 Qantas Group Staff Travel Program (version 4.2) was published. On 16 April 2024 Qantas Group Duty Travel Program Conditions (version 2.9) were published. On 27 July 2024 Crewing Operations Daily Checklist was introduced. By then the LAP was no longer current, as it had been incorporated into the Daily Checklist and Jetconnect Pax Bookings user guide.

[116] On 1 January 2025 Qantas published the Qantas Group Staff Travel Program Conditions (version 4.3) and the Qantas Group Duty Travel Program Conditions (version 2.9).

Alleged duty travel related breaches of the 2018 CA

[117] On 20 August 2018 NZALPA sent Jetconnect a letter titled "Notice of Breach" alleging (among other things) breaches of the duty travel provisions in the 2018 CA. Jetconnect responded on 31 August 2018 denying any breaches of the 2018 CA had occurred and explaining the process for booking and managing Pilots' operational travel under the 2018 CA.

[118] Jetconnect said the duty travel onload and upgrade priorities were governed by the Qantas Group Staff Travel Program. Jetconnect said that some Pilots were under the impression they should be receiving confirmed business class, but that was incorrect. Jetconnect said it had been working with Qantas Staff Travel to determine the onload and upgrade codes that would apply to Jetconnect Flight Crew.

[119] Jetconnect also pointed out that the extract from the Qantas Group Staff Travel Program included as part of the ratification documentation was for non-operational duty travel (which was "off loadable"), not for operational duty travel (which was "must ride"). Around this same time, Qantas had advised Jetconnect that the duty travel onload and upgrade codes it had been applying were inconsistent with the operational onload and upgrade codes used for Qantas subsidiary businesses, so these needed to be changed.

[120] Jetconnect said the fare classes for booking economy operational travel was "M" and for business class was "D". If there were no D fare seats available, the booking

remained as confirmed M class upgradable. Onload categories 0-19 were operational and cannot be offloaded. Onload categories 19 and above were non-operational and can be offloaded.

[121] The lower the onload and upgrade priority the increased opportunity Flight Crew had of being onloaded and upgraded. Qantas's employees always took priority over those employed by Qantas's subsidiary businesses. The Qantas Travel Program Conditions contained sections that dealt with travel benefits of Qantas' associated subsidiary entities. Staff of subsidiary entitles had always received lesser benefits than Qantas's staff.

Issues

[122] The parties identified that the following liability issues were to be determined in these proceedings:

(a) Did clause 13.4.3 of the 2018 CA require that Pilots travelling for operational duty travel be upgraded to business class at the time the roster was published?

(b) Did Jetconnect's practice in relation to upgrading of Pilot's operational duty travel breach clause 13.4.3 of the 2018 CA?

(c) Did clause 13.4.3 of the 2018 CA require Jetconnect to continue to observe the Qantas Staff Travel Program conditions as at the date of the 2018 CA (without amendments in relevant areas) unless otherwise agreed?

(d) If clause 13.4.3 of the 2018 CA did not require Pilots to be upgraded to business class at the time their roster was published, then what did the words "whenever possible" in clause 13.4.3 of the 2018 CA require?

(e) Were the Qantas Staff Travel Program Conditions in effect at the time of the 2018 CA incorporated into it as an express term?

(f) Were the Qantas Staff Travel Program Conditions in effect at the time of the 2018 CA incorporated into it as an implied term?

Relevant law

[123] Section 129 of the Employment Relations Act (the Act) provides that where there was a dispute about the 'interpretation, application or operation' of an employment agreement, any person bound by that agreement may pursue the dispute in accordance with the relevant provisions of Act.

[124] Section 157(3) of the Act required the Authority to act as it thinks fit in equity and good conscience when determining the correct 'interpretation, application, or operation' of an employment agreement. The Authority must also generally further the objects of the Act, and must not do anything that is inconsistent with the Act, the Act's regulations, or the relevant contractual agreement.

[125] The law regarding the interpretation of contracts, including collective agreements, in New Zealand is well settled.

[126] The Supreme Court in *Bathurst Resources Ltd v L&M Coal Holdings Ltd* affirmed that the key principles of contractual interpretation are those articulated by that Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*.[1] Those key principles are as follows:[2]

> [60] […] **the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.** This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning. (emphasis added)
>
> […]
>
> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, **the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant.** But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty. (emphasis added)

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[1] *Bathurst Resources Ltd v L & M Coal Holdings Ltd*, [2021] 1 NZLR 696; and *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2015] 1 NZLR 432.

[2] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n1, at [60] – [63].

[127] In addition, the Employment Court in *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* in the context of the interpretation of collective agreements stated the following:[3]

> Collective agreements, as successors to collective contracts and awards, are rarely either generic or unique instruments. Rather, they represent the development of a particular employment relationship between an employer and a union over a long period, which is confirmed and altered from time to time in collective instruments which must and do expire and are renegotiated. So, not only must the Court consider the relevant context in which the parties agreed originally to what is now known as cl 24.2, but regard must also be had to its adoption and re-adoption in successor collective agreements which have been settled in evolving circumstances.

[128] The Employment Court has confirmed on multiple occasions that it was not unusual when considering the relevant background circumstances of a collective agreement to consider the reality that a particular provision has been adopted in successive employment agreements.[4] Those successive agreements and the documents that surround them formed part of the relevant background.

[129] Extrinsic material such as the August 2018 Flyer and NZALPA's draft communication to its members on 19/20 July 2018 were not documents that had been negotiated or settled by the parties. They were not contractual terms, so were only potentially relevant is so far as they may have been relevant to consideration of the factual matrix and surrounding circumstances to ensure that the plain language reading of clause 13.4.3 was correct. Such documents were therefore limited to providing a valuable cross-check in order to ensure clause 13.4.3 did not have a special or particular meaning for these parties.

Did clause 13.4.3 of the 2018 CA require Pilots travelling for operational duty travel to be upgraded to business class at the time the roster was published?

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[3] *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* (2014) 12 NZELR 401 at [14].

[4] *Vulcan Steel Ltd v Manufacturing & Construction Workers Union* (2022) 18 NZELR 789 at [31]; *Aviation and Marine Engineers Association Inc v Air New Zealand Ltd* [2013] NZEmpC 172 at [71] – [72]; *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd*, above n3, at [14] and [17] ; *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] 1 NZLR 948 at [74] – [78].

[130] The first sentence of clause 13.4.3 of the 2018 CA clearly stated that Pilots "shall be booked economy class". It had a clear and ordinary meaning which, as set out by the Supreme Court in *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, is a powerful indicator of what the parties meant.[5] The booking was clearly mutually intended to be in economy class.

[131] Given the clear meaning of the first sentence of clause 13.4.3, for Pilots to be contractually entitled to upgrades at booking, or on roster publication (which currently occurred at the same time) the second sentence would have to record that entitlement. However, it did not do so.

[132] The second sentence of clause 13.4.3 stated that when Pilots were booked on a Qantas Group aircraft, the booking would be upgradeable, wherever possible, in accordance with the Qantas Staff Travel Program Conditions applicable to Jetconnect.

[133] There was nothing within the text of clause 13.4.3, or the 2018 CA as a whole, which required Jetconnect to upgrade Pilots at the time of booking or on roster publication. That would have been a significant change and a substantial benefit to Pilots, which they had sought without success for many years. The parties would therefore more likely than not have clearly recorded such an important new benefit, if that is what the parties had mutually intended.

[134] There was also nothing in the applicable Qantas policy (or subsequent replacement versions of it) that required the Pilots' upgrade to occur at a specific time or on a specified event. It would have been logical to have recorded that, had the parties mutually agreed on the timing for when upgrades were to occur.

[135] The absence of any timing related obligation in clause 13.4.3 of the 2018 CA or the applicable Qantas Staff Travel Program Conditions, meant Jetconnect was not required to upgrade Pilots at any specific point in time - including at the time of booking, or at the time of roster publication. This interpretation was supported by the background evidence the parties provided regarding their bargaining for the 2018 CA.

[136] There were numerous minor variations made to the duty travel clause prior to the 2018 CA, however the obligations in clause 13.4.3 regarding duty travel remained

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[5] *Bathurst Resources Ltd v L & M Coal Holdings Ltd*, above n1, at [43]; quoting *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n1, at [60] – [63].

fundamentally the same. Namely, Pilots were to be booked economy class, upgradeable at an unspecified time. Clause 13.4.3 of the 2018 CA was almost identical to the equivalent duty travel clause in the previous 2013 CA.

[137] Until the 5-days review was unilaterally implemented by Jetconnect in the second half of 2018, the historical booking and upgrading processes for Pilots' duty travel had continued unchanged since the first 2008 CA. The wording used in the various duty travel clauses in the 2008, 2013, 2018 and 2021 collective agreements remained generally consistent, as did the booking and upgrading processes that were applied, with the only exception to that being the 5-days review that was implemented in the second half of 2018.

[138] NZALPA's witnesses at the investigation meeting accepted that prior to the 2018 CA Pilots were always booked in economy class and had their bookings reviewed for upgrades on the day of travel. It was also not disputed that prior to the 2018 CA, the parties never considered that Pilots had an entitlement to confirmed business class seats at the time of booking or on roster publication.

[139] The Employment Court in *in E Tū v New Zealand Steel Ltd*, interpreted a clause that had been adopted in successive collective agreements.[6] It was relevant to the Court's interpretation that the disputed clause had remained unchanged over the years, and that a usual practice had been developed regarding its application.

[140] It was therefore relevant background knowledge that clause 13.4.3 in the 2018 CA remained materially the same as previous iterations of the clause in the first 2008 CA and in the 2013 CA. Clause 13.4.3 had also remained unchanged in the 2021 CA from the 2018 CA. It continued to read "Pilots will be booked economy" and upgraded "wherever possible" which were the key elements of the clause. This consistency suggested the parties intended clause 13.4.3 to be applied in accordance with how it had always been interpreted by the parties.[7]

[141] An obligation to upgrade Pilots at the time of booking (or roster publication) would have been a significant departure from the historical interpretation, application and operation of the duty travel clause. This departure was not supported by the clear

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[6] *E Tū v New Zealand Steel Ltd* (2024) 20 NZELR 369.

[7] *New Zealand Steel Ltd*, above n6, at [34] – [35].

wording of clause 13.4.3, which was substantially similar to the previous iterations of this clause.

[142] Logically, it cannot have been the mutual intention of the parties to create an entitlement for upgrades which significantly differed from a longstanding practice, without any significant change to the wording of clause 13.4.3 or without expressly agreeing on such a fundamental change. Even more so when the change NZALPA claimed had occurred would have adversely impacted on Qantas's revenue, which Qantas had informed Jetconnect's bargaining team was not authorised.

[143] Clause 13.4.3 of the CA more likely than not reflected that the same booking and upgrade process applied as had previously applied under the 2008 CA and the 2013 CA, namely Pilots would be booked confirmed economy for operational duty travel and would be upgraded to business class on the day of travel, subject to seat availability and the Pilots' Travel Priorities.

[144] The parties had not discussed or agreed on any specialised meaning for the words used in clause 13.4.3. The plain and ordinary words used therefore reflected the practice that had always applied. The only difference was that instead of the upgrade being as per the Jetconnect Staff Travel Program, in the 2018 CA it was to occur in accordance with the applicable Qantas policy, as it applied to Jetconnect.

[145] Having reviewed all of the background material the parties presented about how clause 13.4.3 came to be included in the 2018 CA, the Authority was satisfied the clause did not have a special meaning or unique meaning that was known only to the parties as a result of their bargaining. There was no reliable direct evidence that the parties had ever mutually intended for clause 13.4.3 of the 2018 CA to have a meaning other than what the clear and plain words used in the clause meant.

[146] Clause 13.4.3 of the 2018 CA did not require Jetconnect to book Pilots confirmed business class for operational duty travel at the time the booking was made or when the roster was published.

NZALPA's draft communication to members

[147] NZALPA's submission that its draft communication to its members in August 2018, that was sent late in the afternoon to the Jetconnect team as a courtesy before it

went out to members, recorded the parties' mutual agreement that Pilots would be given business class duty travel at the time of booking was not accepted.

[148] This was a draft Mr Dignan prepared for NZALPA's members. It reflected his subjective understanding of what had been agreed. Jetconnect had no input into it. It was noteworthy that Mr Dignan's draft communication to members had the caveat on it that it was indicative highlights only and that the details of the clauses would be made available in due course. The then Chief Pilot's failure to correct a communication from NZALPA to its members, which he saw late in the day was an oversight. However, it cannot reasonably or objectively be interpreted as proof Jetconnect had agreed to business class travel for all Pilots.

[149] It was likely the then Chief Pilot (who did not give evidence) read that part of NZALPA's draft communication to its members as referring to the business class duty travel the parties had negotiated, and had agreed, for Flight Examiners and Simulator Instructors as the words used were aligned with that. Regardless, this reference in NZALPA's communication to its members did not change the plain wording of clause 13.4.3 in the 2018 CA, by creating a significant new benefit that had not previously been mutually agreed by the parties.

The Flyer

[150] NZALPA's submission that the Jetconnect Flight Operations Flyer in August 2018 recorded the parties' agreement to business class duty travel for Pilots was not accepted.

[151] The Flyer was a response to multiple questions being received from Pilots about the live roster, so it related to current duty travel. It was sent out by the then Chief Pilot without Ms Musk, as the then Head of Jetconnect, seeing it because it was intended to address current live roster queries Pilots had been raising. The Flyer was not relevant to an interpretation of clause 13.4.3 of the 2018 CA.

Did Jetconnect's practice regarding its upgrading of Pilots' operational duty travel breach clause 13.4.3 of the 2018 CA?

[152] As required by clause 13.4.3 of the 2018 CA, which was identically worded in the later 2021 CA, currently Pilots are booked economy class at the time of roster publication. Depending on the date of travel that could be anywhere between 38 days and ten days prior to travel.

[153] Pilots' bookings were upgraded five days prior to operational duty travel occurring, subject to the availability of a D class seat and the Pilot's Travel Priority relative to other staff members on the same flight. If no D class seats are available at this review period, the booking would be upgraded on the day of travel (subject to seat availability and Travel Priority).

[154] Jetconnect's practice of providing Pilots with upgrades to business class five days prior to duty travel met the 'wherever possible' requirement, as this is when it was operationally and commercially practicable to upgrade Pilots. It was also an improvement on the day of duty travel upgrades that other staff in the Qantas Group received.

[155] There are limited business class seats on Qantas flights, so it was reasonable for Qantas to want to maximise the commercial bookings of its premium seats. Removing these premium seats from paying customers would impact Qantas's revenue, so it was not surprising Qantas had not authorised Jetconnect to agree to that.

[156] Redoing rosters that included confirmed business travel too far in advance of the day of travel would be time consuming and impracticable given the extent of the changes that normally occurred prior to travel. The longer the booking was in place the more likely it would have to be changed later.

[157] Mr Consedine's evidence was that the upgrading process was limited by operational constraints, so confirming Pilots into business class more than five days prior to travel would be disruptive to the rolling booking system. The Authority accepted his evidence that there were operational constraints that made the upgrading of Pilots more than five days prior to travel impracticable.

[158] Jetconnect's practice of upgrading Pilots' operational duty travel five days prior to travel did not breach clause 13.4.3 of the 2018 CA.

Did clause 13.4.3 of the 2018 CA require Jetconnect to continue to observe the Qantas Staff Travel Program Conditions as at the date the 2018 CA was signed (without amendments in relevant areas) unless otherwise agreed?

[159] The Qantas Staff Travel Program Conditions were not an express term of the 2018 CA, for the reasons set out in paragraphs [172] to [184] of this determination.

Because Qantas could update or amend its policy, it was the current version of the policy that Jetconnect always had to comply with.

[160] When the parties lodged their submissions, the applicable Qantas Staff Travel Program Conditions was version 4.3, so that is the version that Jetconnect has to currently observe. When it changes, Jetconnect will then be required to observe the updated or amended Qantas Staff Travel Program Conditions.

What did the words "whenever possible" in clause 13.4.3 of the 2018 CA require?

[161] Clause 13.4.3 of the 2018 CA required Jetconnect to upgrade Pilots "whenever possible". The obligation to upgrade Pilots was linked to the Qantas Staff Travel Program Conditions, as they applied to Jetconnect. However, the Qantas policy did not define the words "whenever possible".

[162] NZALPA's submission that "whenever possible" meant "as soon as possible" was not accepted. The phrase "as soon as possible" implies the timing must occur immediately that it is able to occur. It has a sense of urgency associated with it. It was therefore significant that there was no reference to timing in clause 13.4.3. Clause 13.4.3 would have made the obligation more immediate by stating "as soon as possible", if that is what the parties had intended.

[163] There was no clear evidence that the parties had agreed economy tickets would be upgradable "as soon as possible" following booking, which would have been a significant change. That contrasted with evidence from all of the witnesses that Jetconnect clearly and repeatedly stated Pilots would not be provided with business class bookings for operational duty travel. Upgrading Pilots immediately would achieve an outcome NZALPA had been told consistently throughout the bargaining was not, and could not be, agreed.

[164] However, the parties elected not to define what was meant by "whenever possible". That reserved them considerable flexibility and discretion regarding the timing of upgrades, as it did not impose a strict deadline. The use of "whenever possible" signified there may be good reasons as to why an upgrade would not occur immediately.

[165] The commitment the parties agreed on was to Jetconnect taking action to upgrade Pilots when it was feasible and practicable to do so. That meant upgrades

would occur when it was operationally possible and doing so was consistent with the applicable Qantas policy.

[166] Because there was no specific timeframe imposed for the upgrades to occur, it was more likely than not the parties intended for the status quo regarding upgrades to continue, meaning the upgrade practice that had occurred since the first 2008 CA. Namely, upgrades on the day of operational duty travel, subject to availability and eligibility under the applicable policy.

[167] The 2013 CA had also used the term "whenever possible" for the upgrade obligation, so that lent weight to the 'status quo' interpretation, given clause 13.4.3 in the 2018 CA was virtually the same.

[168] The words "whenever possible" therefore had to be viewed within the context of the particular situation that had been occurring since the first 2008 CA and what would be reasonable in light of the parties' previous practice and processes. There were two elements to that, what was commercially possible given the seat and fares were provided by Qantas, and what was consistent with the applicable Qantas policy.

[169] The parties objectively cannot have intended to create an upgrade process that rendered the requirement for Pilots to be booked in economy irrelevant, which was the practical effect of the NZALPA's interpretation.

[170] The fact confirmed business class bookings were negotiated and agreed for Flight Examiners and Simulator Instructors was relevant context that undermined NZALPA's interpretation of clause 13.4.3 of the 2018 CA. If business class duty travel was already a contractual entitlement under the 2018 CA there would have been no need for the parties to have agreed on Additional Terms and Conditions that covered duty travel for the Flight Examiners and Simulator Instructors, which had occurred after the 2018 CA had been ratified.

[171] NZALPA's interpretation of clause 13.4.3 of the 2018 CA would also have required the Authority to vary a term in the collective agreement, which s 163 of the Act expressly prohibited.

Were the Qantas Staff Travel Program Conditions at the time of the 2018 CA incorporated into it as an express term?

[172] The Employment Court in *Cuttriss v Carter Holt Harvey Limited* accepted the general proposition that a policy document is not expressly binding unless incorporated by reference in the applicable employment agreement.[8]

[173] Although the Qantas Staff Travel Program Conditions were referenced in clause 13.4.3 of the 2018 CA, the version that applied when it was signed in August 2018 was not. The version that applied when the 2018 CA was ratified was version 1.4, which no longer exists. The Qantas Staff Travel Program Conditions that currently applied is version 4.3.

[174] The parties could have chosen to incorporate the date or version number of the Qantas Staff Travel Program Conditions that applied as at August 2018, but they did not do so. Instead, the reference to the Qantas Staff Travel Program Conditions remained wide enough to encompass various iterations of this policy.

[175] The general reference to the Qantas Staff Travel Program Conditions reflected Jetconnect's repeatedly stated position during bargaining, namely that duty travel benefits would be governed by Qantas policy, and would not be included in the collective agreement or Heads of Agreement.

[176] This situation raised the same rhetorical question that the Employment Court posed in the analogous case of *Carter Holt Harvey Ltd v Pawson,* namely:[9]

> […] if these matters are terms and conditions of employment why do they remain…. company policies and are not incorporated expressly as terms and conditions of contract of employment?

[177] There was no evidence provided to the Authority that the parties had ever agreed to be bound by the Qantas Staff Travel Program Conditions that were in place as at August 2018 (version 1.4).

[178] The parties had not acted consistently with the existence of an express term, as Pilots had obtained all of the improved benefits set out in Appendix 1 of Jetconnect's

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[8] *Cuttriss v Carter Holt Harvey Ltd* (2007) 4 NZELR 494 (EmpC) at [40].
[9] *Carter Holt Harvey Ltd v Pawson* [1998] 2 ERNZ 1 (EmpC) at 10 – 11.

submissions, which would not have been available to them if the Qantas Staff Program Conditions had been an express terms of the 2018 CA.

[179] Jetconnect's bargaining team was not authorised to agree to fix the Qantas Staff Travel Program Conditions as an express contractual term. Quite the contrary. Qantas's instructions were that the duty travel benefits could only be provided by policy, with the applicable policy being at Qantas's exclusive discretion.

[180] That position was repeatedly communicated to NZALPA's bargaining team, so there should not have been any confusion or misunderstanding about it. NZALPA's witnesses also confirmed when giving evidence at the investigation meeting that they did not consider the policy would be frozen in time as at August 2018 as an express contractual term of the 2018 CA.

[181] Version 1.4 of the Qantas Staff Travel Program Conditions (that applied when the 2018 CA was entered into) expressly stated that Qantas had the discretion to amend, vary or replace the policy at any time. This information was included in the extract provided to the NZALPA bargaining team on 31 July 2018, before the 2018 CA was ratified.

[182] During the investigation meeting, Mr Dignan accepted that NZALPA was aware that Jetconnect did not have the authority to bind Qantas, and that Qantas retained sole discretion over version 1.4 of its Staff Travel Program Conditions that had applied in August 2018.

[183] NZALPA's witnesses also confirmed to the Authority that they knew that by allowing duty travel to be governed by a Qantas policy, the union had relinquished ultimate control over when and how upgrades took place. While Jetconnect could attempt to influence these decisions, ultimately it was up to Qantas to make the final decision on any changes or updates to its policy.

[184] In this context, it cannot have been the mutual intention of the parties to incorporate the Qantas Staff Travel Program Conditions as an express term of the 2018 CA.

Were the Qantas Staff Travel Program Conditions at the time of the 2018 CA incorporated into it as an implied term?

[185] The principles to be applied when assessing whether a term should be implied are set out in *Bathurst Resources Ltd v L & M Coal Holdings Ltd* which stated that "the legal test for the implication of a term is a standard of strict necessity, a high hurdle to overcome".[10] In its decision, the Supreme Court cited a passage from *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings*, that stated:[11]

> For a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

[186] These conditions were not met in these circumstances.

[187] It would not be reasonable and equitable to imply the 2018 Qantas Staff Travel Program Conditions into clause 13.4.3 of the 2018 CA. The parties clearly turned their mind to duty travel benefits during protracted bargaining and decided this benefit should be governed by a Qantas policy.

[188] The applicable Qantas policy did not deal with operational duty travel, so implying the 2018 Qantas Staff Travel Program Conditions into clause 13.4.3 of the 2018 CA would bind the parties by a document that was never intended to apply to the operational duty travel in issue in these proceedings.

[189] It was not necessary to imply the Qantas Staff Travel Program Conditions as a term of the 2018 CA in order to give business efficacy to it, because it was entirely operational without it. Rather, implying the 2018 Qantas Staff Travel Program Conditions into clause 13.4.3 of the 2018 CA would have reduced the business efficacy of the contract as it would have required non-operational Travel Priorities to be applied to operational duty travel, which is not what the parties had agreed during bargaining.

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[10] *Bathurst Resources Ltd*, above n1.

[11] *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1997) 16 ALR 376 (PC) at 376 .

[190] The Qantas Staff Travel Program Conditions was not such an obvious term of the 2018 CA that it "goes without saying". The more obvious interpretation was that clause 13.4.3 of the 2018 CA referred to a living policy, that the parties were aware would be regularly amended and replaced by a third party (Qantas), rather than to a specific document that was intended to be fixed at that specific date.

[191] The parties and their respective bargaining teams were knowledgeable and experienced enough to understand that a third party's policy that was expressly stated to sit outside of the 2018 CA, and which was not to form part of the Heads of Agreement document, was not a document that had been fixed or frozen in time, meaning it could only be amended by agreement of the parties.

[192] The main material change in the Qantas Staff Travel Program Conditions over the period 2018 to 2025 was that the current version expressly recognised that contractual arrangements prevailed regarding the operational duty travel onload and upgrade class.

[193] The Qantas Staff Travel Program Conditions were not an implied term of the 2018 CA.

Summary of outcome

[194] Clause 13.4.3 of the 2018 CA was a continuation of a series of clauses governing Pilot operational duty travel, which followed on from the clauses governing duty travel in the 2008 CA and the 2013 CA. These clauses had remained materially unchanged over the years, as had their application and operation.

[195] Pilots had never been entitled to confirmed business class seats at the time of booking or roster publication. The only exception to that was the Flight Examiners and Simulator Instructions who received that benefit, after the 2018 CA had been signed, as Additional Terms and Conditions that sat outside the 2018 CA.

[196] The interpretation of clause 13.4.3 of the 2018 CA NZALPA advocated for required a significant departure from a longstanding practice that had been in place since the parties started bargaining for their first collective agreement. NZALPA's interpretation was also not supported by the text of the clause, or the background knowledge available to the parties at the time the 2018 CA was ratified.

[197] Clause 13.4.3 has a plain and ordinary meaning, which is supported by the relevant background information available to the parties at the time the 2018 CA was entered into. Pilots will be booked in economy class and upgraded to business class wherever possible in accordance with the Qantas Staff Travel Program Conditions.

[198] There was no promise of an upgrade occurring at any particular point in time, as operationally (from the evidence presented during the investigation meeting) that would make little sense. If there was a promise of business class "at the time of booking" or "at roster publication" then the 2018 CA would have provided for that.

[199] Jetconnect's current practice of booking Pilots into economy class and upgrading them to business class on the day of travel, or five days prior to the date of travel (subject to a D class fare type being available and the Pilot's Travel Priority) did not breach clause 13.4.3 of the 2018 CA. This process was consistent with the phrase 'wherever possible' and with the way in which the duty travel clause had been applied since the 2008 CA.

[200] Accordingly, NZALPA's claims did not succeed.

What if any costs should be awarded?

[201] The parties agreed that the presumption that costs should lie where they fall for disputes involving the interpretation, application or operation of a collective agreement applied to this matter. Accordingly, costs lie where they fall.

Rachel Larmer
Member of the Employment Relations Authority