

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 699
3147862

BETWEEN	HELEN DEWSNAP, DAVID HICKEY, MELISSA BENTLEY, ELIZABETH WARRINGTON,
AND	CHRISTOPHER CHUNG, BRENDA WILSON AND JUNKO KIYOMOTO- CRAIGIE Applicants
	AIR NEW ZEALAND LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Chloe Luscombe, counsel for the applicants Laura Chapman and Dana Thomson, counsel for the respondent
Investigation Meeting:	16 to 18 November and 5 and 20 December 2022 and 25 January 2023 in Auckland and by audio-visual link and phone
Submissions and further information received:	At the investigation meeting and 19 and 26 January and 24 May 2023 from the applicants At the investigation meeting and 19 and 26 January and 24 May 2023 from the respondent
Determination:	31 October 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This case concerns the impact of the Covid-19 pandemic on a group of long serving senior flight attendants working for Air New Zealand Limited (Air NZ or the airline). The flight attendants bringing this case are Helen Dewsnap, David Hickey, Melissa Bentley, Elizabeth Warrington, Christopher Chung, Brenda Wilson and Junko

Kiyomoto-Craigie (the seven attendants). All were made redundant by Air NZ in January 2021.

[2] Air NZ was dealing with the substantial impacts of the pandemic on the aviation industry, which it describes as extraordinary, unprecedented and devastating.

[3] The flight attendants' position is they were unjustifiably dismissed or disadvantaged by Air NZ's actions, including being made redundant at a time the airline was appointing flight attendants. Air NZ argues it acted fairly and in compliance with its contractual and statutory obligations.

Authority process

[4] An investigation meeting was to be held in May 2022 but had to be adjourned when counsel had to leave the country urgently for family reasons.

[5] An investigation meeting was held in Auckland on 16 to 19 November and 5 and 20 December 2022. For periods some of the attendants attended portions of the investigation meeting by phone. Submissions were then heard by audio-visual link on 25 January 2023.

[6] Written witness statements and affidavits were received along with evidence heard under oath or affirmation at the investigation meeting – from all seven of the flight attendants and Air NZ's Leeanne Langridge (General Manager for Cabin Crew 2012 to 2021), Debbie Giles (known professionally as Debbie McKeown, Senior Manager, Cabin Crew 2018 to 2021) and Kylee Paterson (Cabin Crew Manager – B787).

[7] In May 2023 the flight attendants' representative properly drew the Authority's attention to the Employment Court's judgment in *New Zealand Steel Limited v Haddad*.¹ The Authority offered the parties the opportunity to provide further submissions, which they both took up.

[8] This determination has been issued more than three months after the date on which the last information was received. When I advised the Chief of the Authority that this would likely be the case, he decided that s 174C(4) of the Employment Relations Act 2000 (the Act) was applicable.

¹ *New Zealand Steel Limited v Haddad* [2023] NZEmpC 57.

[9] I have carefully considered the extensive material provided. However, as permitted by s 174E of the Act, this determination does not record everything received from the parties but states findings of fact and law, expresses conclusions and specifies orders made as a result.

Issues

[10] The broad issues for investigation are:

- (a) Were the flight attendants unjustifiably dismissed by Air NZ?
- (b) Alternatively, were they disadvantaged by unjustifiable actions of Air NZ?
- (c) Did Air NZ breach its duty of good faith to the flight attendants?
- (d) If grievances are established by any or all of the flight attendants, what remedies (if any) should be awarded, including consideration of reinstatement (sought on the basis of the previous, more advantageous terms and conditions) and any implications of an earlier arrangement reached between Air NZ and the flight attendants' union E tū?

[11] There are some differences between the attendants' personal positions and the remedies they are seeking.

[12] The attendants initially sought penalties for breach of good faith by Air NZ but there were no closing submissions on this point and given that the good faith issues form part of the grievances for which remedies are ordered below, I do not consider this further.

The attendants

[13] All seven attendants were long serving with the airline, working in senior international roles. They were very committed to the role and the airline, with a description of it as a way of life, not just a job.

[14] All were members of the E tū union at the time and most remain so.

[15] The attendants were part of a group of grand-parented flight attendants who had enhanced terms and conditions as a result of a settlement agreement between Air NZ,

the Flight Attendants and Related Services Association Inc (FARSA) and the Engineering Printing and Manufacturing Union (EPMU). The two unions later became the E tū union. The 19 August 2023 agreement became known as the Wa Mua Settlement Agreement.

The Wa Mua Agreement

[16] This agreement provides that certain groups of flight attendants, including all the seven attendants, would have grand-parented terms and conditions – salary, allowances, overtime, sick leave and related matters. Those terms became known as the “Schedule 100” terms.

[17] In the event of a redundancy situation the grand-parented group had better job security by way of protected career pathways.

[18] Once a grand-parented flight attendant ceased to be covered by a named collective agreement under the terms of the Wa Mua Agreement their name “must” be struck off the list of grand-parented flight attendants, with the effect that they would no longer be entitled to the benefits of the Wa Mua Agreement and would no longer be entitled to Schedule 100 terms. Other staff were on Schedule 200 terms.

[19] Grand-parented flight attendants became known as the “pre-MUCA Cabin Crew”, meaning their employment commenced before the multi-union collective agreements (MUCAs) that covered flight attendants’ work. Those employed after the Wa Mua Settlement agreement became known as the “post-MUCA Cabin Crew”.

Air New Zealand

[20] Witnesses for Air NZ spoke of the devastating impact the pandemic had on its business, having to deal with multiple people, wellbeing, operational, regulatory financial and other challenges. Despite strong interim profits of \$198 million for the six months to 31 December 2019, the airline suffered an annual loss of \$87 million for the year ending 30 June 2020. This was the first loss the airline had suffered in 18 years.

[21] This picture continues – an annual loss of \$440 million for the year ending 30 June 2021 and an interim loss of \$376 million for the six month period to 31 December 2021.

[22] The airline acknowledges that this was a particularly tumultuous time for employees that worked on its international network. Flight schedules were substantially reduced. By the end of March 2020, the airline had reduced its international flying by around 95 % of pre-pandemic levels. In the 12 months of the pandemic, approximately 4,000 employees lost their jobs by reason of redundancies across Air NZ' s business.

[23] Air NZ took steps to avoid compulsory redundancies including voluntary pay decreases for management, cancelling discretionary bonuses, reviewing all supplier costs and negotiating with all involved unions for collective agreement variations.

[24] In addition expressions of interest were sought for voluntary redundancies, part time flying, a furlough scheme and leave without pay.

First round of restructuring

[25] In March 2020 New Zealand's borders close, followed by an order in April 2020 that all people entering New Zealand by air are to enter managed isolation and quarantine.

[26] In around late April 2020 Air NZ commences consultation on what became known as the "May Proposal", the outcome of which was confirmed in early May. This ultimately resulted in 950 full time equivalent flight attendant roles on the 777 and 787 fleets being disestablished. May 2020 also saw the airline's 777 fleet grounded – parked in the Alice Springs and Mohave Deserts. Generally the 777 fleet undertook longer haul flights than the 787 fleet.

[27] The Pre-MUCA crew have redundancy protections meaning none could be made redundant as part of the May 2020 consultation. They are retained and transferred from the 777 to the 787 fleet, displacing some 787 post-MUCA crew who were made redundant. As a result in June 2020 the seven flight attendants involved in this case and others are transferred from the Long Haul to Mid Haul collective agreement. All are given a start date of 22 June 2020 regardless of when they actually transfer to the fleet and a Deputy Service Manager (DSM) title.

Second round of restructuring

[28] On 20 June 2020 Air NZ sets a cost saving target of approximately \$8.5 million.

[29] On 16 September Air NZ communicates to unions and employees that cost saving measures would not be implemented due to further schedule reductions.

[30] Shortly after, on 22 September, consultation on the “September Proposal” begins – a further 367 flight attendant roles on 787s are proposed to be disestablished. A consultation pack is issued to all potentially affected employees. Flight attendants and their unions are consulted with feedback being sought.

[31] In addition to the pack an FAQ document is distributed during the consultation period.

[32] A dispute about the interpretation of the relevant collective agreements is taken by E tū to the Authority.

[33] On 2 October 2020 the Authority issues its determination – *E tū Inc v Air New Zealand Ltd.*² Air NZ is required to select pre-MUCA cabin crew for redundancy by their length of service, in accordance with the terms of Appendix V of the Mid Haul collective agreement, rather than other possibilities such as skills and experience.

[34] Air NZ takes the determination as meaning it has to cancel all furlough arrangements, as they involve post-MUCA crew and instead, make its about 600 furloughed employees redundant before it could make any pre-MUCA cabin crew redundant.

[35] On 13 October Air NZ issues another restructuring consultation pack based on the amended selection criteria – including pre-MUCA crew to be selected for redundancy based on shortest continuous service with the Air New Zealand Group. As the attendants are not aware of everyone’s detailed service records, they do not know whether they will be made redundant or not from the general announcements.

[36] On 22 October the airline confirms the proposal with the service selection criteria. Around 370 + flight attendants are to be made redundant, of which about 137 are pre-MUCA crew. Air NZ says 25 of those had longer service than the seven flight attendants.

[37] Air NZ says it is contractually required by the Mid Haul collective agreement to serve notice on the seven attendants at the same time as those flight attendants who had

² *E Tū Incorporated v Air New Zealand Ltd* [2020] NZERA 398.

longer service than them. However, it reaches an agreement with the union to give a longer notice period to around 15 DSMs who were pre-MUCA, including the seven attendants, to allow then additional time for them to provide training to others with longer service who were transitioning into new leadership positions.

[38] Air NZ provides a list of impacted post-MUCA employees to the union, then a list of pre-MUCA crew impacted by the proposal.

[39] Ms Wilson is on annual leave from 24 October to 13 November 2020 and receives no contact from the airline until after she returns to work.

[40] On 27 October an Air NZ general bulletin seeks expressions of interest for inflight service manager (ISM) and deputy service manager (DSM) positions.

[41] On 27 to 28 October the airline calls or emails (as staff have expressed a preference for) all the flight attendants involved in this matter, except Ms Wilson, to say they are unsuccessful in the selection process and their employment will be terminated for redundancy. Ms Wilson is not called as she is on leave.

[42] Around 29 October formal redundancy notices are issued, specifying for the seven flight attendants their last day of work being 31 January 2021. The Mid Haul collective agreement provides a minimum notice period of six weeks.

[43] On 30 October Air NZ says it needed expressions of interest received by now to complete training in time.

[44] Ms Wilson is notified initially on 15 November 2020 that she is not impacted by the changes but then notified that she is, as detailed below.

[45] The employment of most flight attendants affected by the September proposal is terminated on 7 December 2020. The following day furlough agreements for flight attendants affected by the May proposal are terminated.

[46] The training the seven attendants and others are undertaking finishes earlier than anticipated. The airline writes to the union confirming it would advise the remaining DSMs that it would bring their end-date forward and pay in lieu of notice. The decision has already been made at this point.

[47] On 17 December the seven attendants are verbally advised their final day of work is moving to 11 January 2021, with pay in lieu to be made until 31 January. The next day this is confirmed in writing. The training process is completed the same day.

[48] On 18 December 2020, Air NZ writes to the seven to confirm 11 January 2021 as their final date of employment.

[49] There is discussion by the airline with the union about establishing a recall process.

[50] The seven attendants recall on Christmas Eve Air NZ announces it is likely to resume some international flights and would need to re-engage additional cabin crew.

[51] Air NZ denies this, saying around 29 December 2020 it decides to attempt to re-route Los Angeles flights for overnight stays in Honolulu for safety reasons. According to Ms Langridge, between Christmas and New Year the airline considers recalling flight attendants on a temporary basis, as a result of the rapidly rising Covid case numbers in Los Angeles in around late December. Emergency phone calls are held over this period since the airline had not anticipated re-routing North American flights at the time before managers went on leave for Christmas.

The seven attendants finish with Air NZ

[52] Air NZ decides to appoint 40 flight attendants to help cover the increased staff needs for with the proposed temporary Honolulu stopover.

[53] From 3 to 5 January 2021 Air NZ recalls almost 40 former flight attendants for three-month fixed term temporary employment. Although not specifically invited to do so, some of the seven attendants put in an expression of interest but are not offered the roles. An email from Ms McKeown responding to Ms Warrington says that to remain compliant with the “pre-MUCA clause, the terminations of the DSMs that had an extended notice period must continue” along with noting that the 40 roles are temporary.

[54] On 11 January 2021 Air NZ terminates the employment of the seven flight attendants and any other remaining DSMs for redundancy.

[55] The next day offer letters are sent out to the recalled group.

[56] Two weeks later, on about 25 January, the recalled flight attendants re-start employment on three-month fixed term agreements. The initial re-routing plan is not approved by the United States government but Air NZ decides it needs additional resource to cover the isolation requirements for “higher risk” routes, with cabin crew isolation having to be spent in a hotel rather than at home, as initially permitted.

[57] Those former flight attendants who accept recall to a fixed term roles do not lose their contractual preference for re-employment to a permanent role under the Mid Haul collective agreement.

[58] Air NZ emphasises that it could only take into account the information it has at the time the roles were created, which was that they were temporary fixed term roles. As at 11 January 2021 when the seven attendants’ employment finished, it is not specifically aware it would need further resources for any other reason and no further recall process is in its contemplation.

Further recalls follow

[59] In March 2021 a recall of 41 flight attendants is sought for further temporary fixed term roles. Offers of those roles are made at this point to Ms Dewsnap, Ms Wilson, Mr Chung, Ms Warrington and Ms Bentley. Ms Bentley is the only one who accepts at this stage.

[60] In April 2021 there is a recall announced of a further 22 flight attendants for temporary fixed term roles. At this point offers are made to Ms Dewsnap, Ms Wilson, Mr Chung, Ms Warrington and Ms Kiyomoto-Craigie. Ms Kiyomoto-Craigie is the only one of this group who accepts at this point.

[61] The seven flight attendants’ contractual preference period ends on 11 January 2022.

[62] On 3 February 2022 the government announces its border reopening plan.

[63] On 14 February 2022 Ms Bentley and Ms Kiyomoto-Craigie accept permanent Air NZ roles. Mr Hickey and Mr Chung returned later working in other attendant roles. Ms Wilson returned of fixed term and casual agreements as ground staff for an extended time. At the time of the investigation meeting Ms Dewsnap and Ms Warrington did not work for Air NZ.

[64] On the evidence before the Authority most or all of the 40 flight attendants who are employed on fixed term agreements onto the 787 crew from January 2021 were still employed by Air NZ at the date of the investigation meeting, having been on further fixed term agreements and eventually becoming permanent employees again.

Consideration of Air NZ's actions

[65] What needs to be examined is whether Air NZ's actions and how it acted, were objectively what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred – s 103(2)A of the Act.

[66] In *Grace Team Accounting Limited v Brake* the Court of Appeal stated:

[80] We consider that the appropriate approach to statutory interpretation in this case is the orthodox approach beginning with the words of the section and considering them in light of the purpose of the statute. When the words of s 103A are considered in light of the purposes of the statute set out in s 3 and the overarching duty of good faith provided for in s 4, we do not consider that the reference in s 103A to a “fair and reasonable employer” can properly be read down to mean “a genuine employer”, in the sense used in *Hale* (an employer not using redundancy as a pretext for dismissing a disliked employee).

[81] Given the explicit requirements for disclosure of information and consultation that now apply in redundancy situations, the reality is that the Employment Court will have before it the information provided by the employer to the employee justifying the redundancy. Whatever may have been the case in the pre-s 103A environment, the clear words of s 103A now require the Employment Court to determine on an objective basis whether the employer's actions and how it acted were what a reasonable employer would have done. That test has little in common with this Court's pronouncements in *Hale* and *Aoraki*.³

[67] Air NZ emphasises the reference in s 103A to “in the circumstances”. Clearly these were calamitous times for the airline industry. The airline stresses the focus is what a reasonable employer **could** have done and if its actions meet that test it is not for the Authority to substitute its own business judgement for that of the employer.⁴

[68] As noted in *Grace Team Accounting*, also relevant are good faith obligations requiring the parties to be active and constructive in establishing and maintaining a

³ *Grace Team Accounting Limited v Brake* [2014] NZCA 54.

⁴ *Innovative Landscapes (2015) Ltd v Popkin* [2020] ERNZ 55, at [7].

productive employment relationship between themselves, and in this case, the union as well.⁵ Being responsive and communicative are key features.

[69] Where continuation of an employee's employment is likely to be adversely affected by an employer's proposal, special obligations apply – providing relevant information and giving the employee an opportunity to comment on it.⁶

[70] The seven attendants do not argue that the decision to make a group of staff redundant in September 2020 was unreasonable at that time.

[71] In summary the seven attendants argue that their dismissal was not justified at the time it finally occurred, primarily because the airline failed to offer a redeployment option instead deciding to terminate earlier than the original date specified and pay out in lieu of notice. Good faith obligations and their value during the period when an employee's employment is in jeopardy were emphasised.⁷

[72] In summary Air NZ argues that prior to and at the time of termination of the seven attendants' employment, their permanent flight attendant roles were surplus to its requirements and they were therefore redundant both at common law and within the meaning in the Mid Haul collective agreement. The disestablishment of their roles and their subsequent redundancies substantively meet the test of justification under s 103A of the Act and were what a fair and reasonable employer could have done in all the circumstances.

[73] Further Air NZ submits that the only roles available in its business at the time of the termination of the seven attendants' employment were fixed term temporary roles and their employment could not be saved by virtue of such temporary roles existing. Even if they had successfully gained a temporary or fixed term role, their permanent employment would still have been made redundant.

Mid Haul collective agreement

[74] Turning first to the agreement covering the attendants at the crucial time. This is an important element in Air NZ's defence. There is an extensive number of clauses

⁵ The Act, s 4 (1A)(b).

⁶ The Act, s 4(1A)(c).

⁷ *Gafiatullina v Propellerhead Ltd* [2021] NZEmp C 146 and *WXN v Auckland International Airport Ltd* [2021] NZEmpC 205.

covering redundancy situations, over seven pages of the agreement. Some are highlighted here, other below.

[75] The Mid Haul collective agreement defines redundancy in clause 20.2.1 as:

... a condition in which an employer has Flight Attendant(s) surplus to requirements because of the closing down of the whole or any part of the employer's operations due to a change in plant, methods, material or products, or reorganisation or like cause requiring a **permanent reduction** in the number of **permanent Flight Attendants** who have not achieved the Airline's retirement policy. ... (*emphasis added*)

[76] Noting, there were no permanent flight attendant roles available until February 2022.

[77] Under clause 20.7.1 of the collective agreement:

Flight Attendants made redundant ... shall be given preference of employment for any vacancy that may become available in the same section as that in which they were formerly employed. The criteria for such re-employment shall be in the spirit of this document as expressed in clause 20.3.1 [*ensuring retention of staff with the necessary skills, knowledge and experience to provide an efficient and effective work force*].

[78] Appendix V Redundancy Proviso of the agreement provides:

If there are further redundancies required (ie all Other Flight Attendants across this Agreement and the Long Haul Collective Agreement have already been made redundant), then the Company shall select those Pre-MUCA Flight Attendants with the shortest continuous service in the Air New Zealand Group first.

Consultation - list of potentially affected employees

[79] I initially deal with three issues which could be described as more procedural, around the process of Air NZ providing information, identifying who was to be declared surplus and notifying them in October 2020. Other issues are dealt with in a largely chronological order.

[80] There was no controversy in this investigation meeting that service was the appropriate selection criteria. Thus what, under other circumstances might be a requirement for consultation on what the criteria would be, had already dealt with through the negotiations between the unions and the airline, as interpreted in the Authority decision.

[81] However, the seven attendants argue that in October 2020 Air NZ failed to provide relevant information directly to them in the form of a list of potentially affected employees, before providing notifying of who would be made redundant. This is said to amount to a failure to consult, impacting their ability to comment on the application of the criteria and have a sense of where they fitted.

The attendants' position

[82] This concerned attendants not being precisely aware of the service of all other attendants and thus not knowing whether they themselves were to be impacted by their employer's decision.

[83] They say that by 2 October 2020 when the Authority determination was released or at the latest 22 October 2020, being the date of the outcome document, Air NZ knew how it would be selecting for redundancy, appeared to have a master list and could identify to E tū which of its members were going to be selected for redundancy. The seven attendants, along with others, were not informed that they were on this list until they were notified of the termination of their employment.

[84] Submissions argue that the attendants therefore did not have the opportunity to give feedback on this – the broader decision to reduce head count was consulted about, but once the Authority determination was issued, the airline should have consulted about what that meant in a more meaningful way. Examples of this this having a genuine impact on attendants include:

- (a) Ms Warrington had long considered her service for around five months in 2000/2001 on a fixed term agreement should be regarded as 'continuous' with her permanent service starting the day following the fixed term agreement's expiry. She did not know if this would have made a difference as she was not given meaningful information about where she sat on the list or what the cut off date was, to allow her to comment;
- (b) Ms Warrington also missed out on an amnesty offered to employees to enable immediately prior fixed term service to be treated as continuous service. The amnesty period was short and she was overseas for a time. She should have been able to dispute others being on treated more favourably; and

- (c) Ms Kiyomoto-Craigie gave evidence that a large number of employees all had the same start date as Ms Warrington, but it was not known how Air NZ dealt with that and staff did not have the opportunity to comment. They assumed alphabetical order was used. Air NZ has stated that it would not have made a difference but the document they provided to the Authority did not show the full list and redacted information.

[85] Air NZ refers to being concerned about privacy issues, with the list containing personal information, including what could identify the employee's age, although the list once provided to the Authority did not include birthdays. The attendants argue that privacy does not provide a basis to withhold the information:

- (a) The information is not particularly sensitive – most of it is on regularly published rosters with the start date being the only exception. The start date is printed on the front of ID cards all attendants must wear at chest height when in airports; and
- (b) With Pre-MUCA employees, who are the only ones on the list and to whom the list would need to have been disclosed, the employment agreement expressly provides that redundancy selection is length of service based. This is said to infer consent that information is known to others. This is the basis Air NZ used to support why pilots' lists are available to pilots. Where the information is critical to the application of collective agreement provisions, it can lawfully be disclosed.

[86] Other possible options suggested were providing a list of service commencement dates without name identification or the proposed cut-off date, along with the employee's recorded date, allowing comment. This would give a more restricted opportunity to comment as they would not, via the list anyway, know where other staff sat.

[87] I find the suggestion of seeking explicit consent from all affected flight attendants at that particular point unrealistic.

Air NZ's position

[88] The airline asserts it provided all relevant information in the revised consultation pack, giving employees a chance to comment, including on the proposed selection

criteria. The outcome pack summarises feedback received. Some of the seven attendants provided individual feedback.

[89] There were time pressures with the airline, before the selection was undertaken, with it seeking the outcome of voluntary redundancy offers. However, Ms Langridge accepted in questioning that the voluntary redundancy process was not a barrier to consulting on the list.

[90] Air NZ provided the full list of impacted employees to the seven attendants' union before informing the employees affected. Ms Langridge's evidence was that as the union was representing its attendant members on all collective matters and required Air NZ not to speak directly to its members on those issues. Air NZ complied and the list was thus provided to the union, with it being for the union to share it with its members.

[91] Ms Patterson suggests the union did not think it was appropriate to share the full list with all B787 cabin crew as it may have caused unwarranted disclosure of the affairs of others, anxiety and/or some form of cultural issues.

Conclusion

[92] The frustration for these attendants is evident. Under other circumstances there could well have been more opportunity for discussion between the airline, the union and staff about arrangements regarding the list, including other ways of presenting material and longer-term considerations of whether an approach more like that of the pilots should be adopted for flight attendants. On the material before the Authority, an open list had not been the history for flight attendants and this was not the most opportune time to have a wider discussion on whether a change of approach was warranted.

[93] There is an argument that this was not a situation like that in *Vice-Chancellor of Massey University v Wrigley* where more subjective material was being assessed. However, staff may have wanted to comment on their own dates and possibly those of others, such as how the situation of a number of staff being recognised as having the same date of commencement was dealt with.

[94] There is only modest evidence to support that the sought disclosure would have made a real difference although I note the submission that it is impossible to say with any certainty that it made no difference. Regarding Ms Kiyomoto-Craigie the lack of

transparency, due to an Air NZ error when it later incorrectly recalled Ms Dewsnap ahead of Mr Chung, along with her thinking she and Ms Warrington were next to each other on the list, made her suspect racism.

[95] In conclusion Air NZ had good faith obligations to consult with staff, including providing access to information relevant to the continuation of employment and an opportunity to comment.⁸ As a large organisation, it is reasonable to expect it to find a way to deal with any concern about unwarranted disclosure of other's information, although ultimately there appears to have been little information which was private anyway. The airline breached its good faith obligations.

Seeking expressions of interest before notification

[96] The seven attendants are critical of Air NZ in October 2020 advertising or seeking expressions of interest in ISM and DSM roles before telling current staff they were being made redundant.

[97] I accept this was a difficult period for the airline and others. It was under pressure due to the trainers leaving on 6 December 2020 and the need to get its roster published by a certain date. However, crucial dates were set by Air NZ and trainers were actually kept on anyway via a move to ground roles. Rosters are also changed after publication on occasion.

[98] On the evidence before me Air NZ could readily have prioritised calls to DSMs on the first day of contacting staff, 27 October 2020, so they would talk to them before advertising. Ms McKeown acknowledges that in hindsight this could have been done. Except as regards Ms Wilson, the distress to the attendants was avoidable.

[99] There was no justifiable basis argued for the airline's actions in this regard. It breached its obligations to treat the attendants fairly and reasonably when implementing a redundancy. There was a failure to respectfully afford them dignity in this regard.

[100] Air NZ witnesses seemed to regard the impact of this as not significant. However, evidence from the long serving attendants in summary was that they were in the dark, not having seen the list, saw their roles advertised and were only later informed they were selected for redundancy. This was upsetting and distressing for them.

⁸ The Act, s 4(1A)(c).

Brenda Wilson's notification

[101] Ms Wilson was on annual leave from 25 October to 13 November 2020. Under clause 20.4.3 of the Mid Haul collective agreement, notice of redundancy cannot be served on employees on annual leave. Ms Wilson was given a general opportunity to be notified whilst on annual leave but understandably declined.

[102] Ms Wilson was notified on 15 November 2020. It appears a cabin crew manager made several attempts to contact Ms Wilson by phone on her return to work but was unable to reach her. An email was then sent, which Air NZ accepts, contained incorrect and conflicting information about her selection for redundancy. She was told up front in the email that she was not selected for redundancy. The email however also referred later to her last day of employment was 31 January 2021.

[103] Ms Wilson called the manager straight away once she had identified the conflict. The manager told her she was never safe, she was always impacted. The correct position was thus informed by phone with an email follow up to the same effect, some three quarters of an hour later.

[104] Ms McKeown told Ms Wilson a couple of days later that the manager was genuinely sorry for the distress caused to Ms Wilson. She confirmed to the Authority that the situation was a result of human error but was the only such error to occur in almost 1,000 notifications made around the same time.

[105] Air NZ argues Ms Wilson was not disadvantaged by unjustified action and it did not breach its duty of good faith as it had good systems in place, the error was identified and rectified within an hour and Ms Giles apologised to Ms Wilson on behalf of the airline.

[106] I do not find that is sufficient to mean that the airline's actions were justifiable. The airline was well resourced and should have had better systems in place to prevent such an error. This was a significant error – telling a long-standing staff member their job is safe when in fact it is not. The lack of care and attention to detail was described as devastating by Ms Wilson. She was also impacted by a failure of the person who made the error to apologise to her or for any explanation to be given as to why that was not happening.

[107] The company's actions were unjustified.

December surplus situation when end of employment date changed

[108] Focusing now on a substantive issue. Air NZ had to assess whether there was a surplus at the time it decided what its new structure was to be and thus how many roles it needed to lose. As noted above, there is no dispute about Air NZ's October 2020 decision that positions were surplus.

[109] There is however a concern amongst the attendants that Air NZ knew on 17 or 18 December 2020, at the time it notified them of the change in their last day of work, it was going to require more staff for the Los Angeles route and thus have a recall.

[110] Air NZ's position is that at the time the decision was made to release the seven attendants from their notice period, it had no permanent alternative roles and no recall of flight attendants was in contemplation. Ms McKeown and Ms Langridge confirm that, adding that the potential need for temporary additional flight attendants because of the Covid situation in Los Angeles was only identified in late December.

[111] It is understandable that the seven attendants are suspicious of the fine timing between when they were notified on 18 December 2020 that Air NZ would release them on 11 January 2021 and when the airline must have decided there was a temporary need for additional staff given its announcement in late December 2020.

[112] However, it was unable to be established on the evidence before the Authority, that there was an awareness when the decision was made to release the seven attendants early that temporary staff would, or even would likely, in the very near future to be needed.

[113] Ms Langridge's evidence is that Air NZ first considered a recall between Christmas and New Year in 2020. Things progressed rapidly with the recall announced to cabin crew on 3 January 2021.

[114] This was a very fluid and unpredictable situation – changes to international travel restrictions in the middle of a global pandemic. In a sense a wide variety of future paths could have legitimately been considered to be possible by the airline. But on the evidence before the Authority I could not be satisfied that at the point the decision was made and notified to the seven attendants, Air NZ had decided or could sufficiently foresee that there would be an imminent need to increase its flight attendant numbers.

Once notice of 11 January finish was given

[115] There are several arguments made for the attendants about what Air NZ's obligations were once it decided it needed the 40 people or roles. These are examined over the following pages.

[116] The obligation to keep considering the basis for redundancy is supported by the Employment Court's confirmation in *Jinkinson v Oceania Gold (NZ) Ltd (No 2)* - an objective review is required of all the employer's actions up to and including the decision to dismiss.⁹ In that case, that review included the decision not to redeploy Ms Jinkinson, since she would not have been dismissed had she been appointed to one of the alternative positions.

[117] Further, the Court in *Rittson-Thomas t/a Totara Hills Farm Ltd v Davidson* identified that positions which the employee had adequate skills and experience to undertake, should be offered to them.¹⁰

[118] A proactive approach to redeployment is required by the duty of good faith, with consultation and exploration required and differences in terms, duties, remuneration and skillsets not necessarily an encumbrance – *Gafiatullina v Propellorhead Ltd*.¹¹

[119] During the notice period there is an obligation to consider whether the positions are still redundant. On some occasions there might be a significant change of circumstances, such as a substantial influx of money or resignation of another staff member, which may mean that an employee no longer needed to be made redundant. It could well be unjustified to push ahead with the redundancy without considering the change of circumstances.

Temporary roles envisaged

[120] The evidence is that flying schedules and therefore the required number of permanent flight attendants did not change at any point during December 2020 and January 2021. If anything, Air NZ anticipated that the upcoming flying schedule could decrease. Assessing the decision to make fixed term temporary appointments at the time it was made establishes the legitimacy of that decision being open to the airline.

⁹ *Jinkinson v Oceania Gold (NZ) Ltd (No 2)* [2010] NZEmpC 102.

¹⁰ *Rittson-Thomas t/a Totara Hills Farm Ltd v Davidson* [2013] NZEmpC 39.

¹¹ *Gafiatullina v Propellorhead Ltd* [2021] NZEmpC 146.

[121] I accept that in January 2021 there were no anticipated future permanent roles. The definition of redundancy in the Mid Haul collective agreement is there was a “surplus of Flight Attendants” in circumstances which required a “permanent reduction in the number of permanent Flight Attendants”.

[122] That criteria was satisfied in January 2021 and continued to be satisfied as no expansion of permanent roles. Thus Air NZ was not obliged to offer permanent roles to the seven attendants.

Ability to pay out notice

[123] Having given notice to the seven attendants in October 2020 to expire on 31 January 2021, Air NZ decided to pay out a portion of the notice period meaning the employees had a shorter time left until their last day of work.

[124] At least two issues arise here:

- (a) was Air NZ entitled to pay out in lieu of notice in these circumstances?
- (b) if it extended the notice period originally to get to the 31 January finishing date, once it decided it needed more staff should it have extended the notice period (potentially to cover the temporary fixed term period)?

Notification sub-clauses

[125] The notification clause 20.4 in the Mid Haul collective agreement includes:

- 20.4.4 A minimum written notice of termination of employment with the Airline of six weeks shall be given to the Flight Attendant concerned. In circumstances, where the Airline is unable to comply with the minimum written notice of termination the Airline shall pay such notice in lieu.
- 20.4.5 Flight Attendants under notice of termination due to redundancy may request earlier termination and this will be considered by the Airline.
- 20.4.6 Except in the case of dismissal for serious misconduct, if the Airline dismisses a Flight Attendant after having given him or her notice under this section, then such Flight Attendant shall be paid wages in lieu of the remainder of the notice period, plus appropriate redundancy compensation entitlements.

Payment in lieu of notice

[126] The seven attendants argue that there is no contractual entitlement to pay out a period in lieu of notice once the notice period is set as being worked out. This is based on cl 20.4.4 identifying only that in “circumstances, where the airline is unable to comply with the minimum written notice of termination the Airline shall pay such notice in lieu” (emphasis added). In the present case it is difficult to say that the airline was unable to comply with the seven attendants working until 31 January 2021.

[127] Air NZ relies on cl 20.4.6 of the collective agreement which covers a situation where an attendant is dismissed after having been given (redundancy) notice.

[128] Air NZ argues that that clause constitutes a valid contractual entitlement for it to make a payment in lieu of notice. It sees this as consistent with the general termination provisions in clause 18. That requires parties to give one month’s notice of termination with a right under clause 18.2.2 to make payment in lieu of notice in non-redundancy situations:

Where a Flight Attendant is discharged without notice or good cause, he/she shall be paid one month’s pay in lieu of notice.

[129] It also argues that clause 20.4.4 supports – if Air NZ is unable to provide the minimum period of six weeks’ notice, it shall make a payment in lieu of such notice.

[130] It also points to previous consistent practice and neither the union nor any of the seven attendants raising any objection at the time. Air NZ would have expected the union to object if it took a different interpretation of the collective agreement, but it did not.

[131] Regardless of whether the cl 20.4.6 rationale was relied on at the time, taking into account the arguments above I accept clause 20.4.6 permits a payment in lieu of notice in these circumstances.

Lack of consultation on the change of end date

[132] The seven attendants were to finish on 31 January 2021 but Air NZ decided to change their final date of employment to 11 January 2021. Ms Keown made the decision and describes this as the right thing to do, when the training they had been providing was completed, it was challenging to have their roles disestablished but still provide

training and there was very little flying available. Her experience from earlier redundancies was that crew were unhappy working during their notice periods and payments in lieu of notice had been made. The union was notified of the decision rather than consulted with.

[133] It was not established that Ms McKeown knew about the potential recall process or of the need for temporary fixed term employees at the time the revised end date was notified. Ms Langridge accepts the timing was unfortunate but also says she was not aware of any potential recall process at that point.

[134] Having heard the evidence, I conclude that Air NZ relied on information that work may have been uncomfortable or tense between the different groups (former 777 staff and established 787 crew) and an assumption that staff would appreciate more time off on paid notice such as to search for work, without consideration or discussion on possible negative consequences of finishing earlier.

[135] I am not satisfied that a basis for a consultation obligation, regarding the operation of the contractual ability to terminate employment earlier and pay in lieu of notice, has been established. It was not evident that Air NZ had earlier indicated it would consult in such circumstances.

Extension of notice period argument

[136] The seven attendants argue that given there was an extension of the original notice period in 2020, the period could have been extended again once the need for 40 more attendants was established.

[137] Air NZ denies that it extended a notice period already notified. The longer notice period was given to provide cover during the training of flight attendants who were moving roles and needed to be trained to hold requisite qualifications by existing flight attendants who held the DSM rank, including the seven attendants. Evidence was received that the union had no objection to the longer notice period.

[138] The October 2020 letters of notification set out:

... this letter serves as notice that your employment will be terminating by reason of redundancy. However, you are encouraged to keep an eye on Korunet for any redeployment opportunities which may become available during your notice period...

...you will be required to work out a notice period from 29 October 2020 to 31 January 2021. Your final day of employment with Air New Zealand will be 31 January 2021 (“Your Final Day”). The period between the date of this letter and Your Final Day includes your notice period in accordance with your terms and conditions of employment.

[139] Potentially long notice periods may be of concern to staff. The collective agreement allowed attendants to request an earlier termination, which Air NZ had to consider.¹² Ms McKeown told the Authority that at least two DSMs who were offered a longer notice period declined to work for the required period and were released early. The seven attendants did not do that.

[140] The wording in cl 20.4.4 of a “minimum written notice of termination of employment” clearly leaves open the possibility of a longer period being given. The wording of the notice letter is in keeping with that, identifying the notice period as running from the date of the letter, near the end of October 2020, until 31 January 2021.

[141] There was no extension of notice period in the sense of a period being given for say the six weeks’ minimum and then extended for an additional six weeks.

Attendants argue notice period should have been extended

[142] The attendants say in the alternative to other arguments that Air NZ should have extended their notice period to cover the term of the temporary fixed term roles (so to around late April 2021). This includes on the basis of arguing the airline had extended the attendants’ notice period given in October 2020, an argument rejected above.

[143] There is an element of hindsight informing this argument, as the intake of 40 were ultimately kept on, through various temporary arrangements and eventually gained permanent status. The seven attendants see that if they had been extended on their Schedule 100 terms they would still be on them today, at least for those back working with Air NZ.

[144] Air NZ says that once notice is given it cannot be unilaterally withdrawn, save by agreement.¹³ Be that as it may, on the evidence before the Authority the attendants would have been agreeable to extending the period, if Air NZ had asked them to.

¹² Mid Haul collective agreement, clause 20.4.5.

¹³ Relying on *Westpac Banking Corporation v Smythe* Employment Court, Auckland 5/06, 10 February 2006 at [94] and *Malaysia Airline System v Malone* [2003] 1 ERNZ 494 (Emp C) at [42].

[145] At first glance it would have been possible to offer to extend the notice period until the end of the three-month period offered to the 40. Was Air NZ obliged to do so rather than to terminate their employment and offer the temporary arrangement to others on the recall list?

[146] Air NZ says it could not simply agree to extend the seven attendants' employment without breaching clause 3.1.3 of Appendix V – Redundancy Proviso of the Mid Haul collective agreement. Clause 3 relates to compulsory redundancies, requiring the application of contractual selection criteria, excluding Pre-MUCA attendants within the relevant collective agreement then the other agreement (Long Haul), then:

If there are further redundancies required ... then the Company shall select those Pre-MUCA Flight Attendants with the shortest continuous service in the Air New Zealand Group first.

[147] The airline argues that if it had extended the seven attendants' permanent employment in those circumstances, it could not have genuinely been said to have selected the seven attendants for redundancy at the same time as their longer serving colleagues, whose redundancies were also notified in October but who had finished work sooner. It believed it would very likely have faced claims from those colleagues. Evidence was given of Air NZ having very real concerns about this issue as it had been raised by E tū previously.

[148] Clause 3.1.3 was a contractual overlay on how the airline's obligation to be a fair and reasonable employer would apply. It had been agreed to staff with shorter service would be made redundant before staff with longer service. Air NZ had wider contractual obligations than its obligations to each individual. Also, this is not a situation where the attendants were misled by the employer into thinking they were in a different category from other staff whose redundancies were notified at the same time as theirs in October 2020. They were still in the shadow of the October 2020 announcements.

Application of the recall process to the seven attendants

[149] Air NZ relies on clause 20.7 giving flight attendants already made redundant a preference for re-employment for any vacancy. The company was in consultation with

the union and communicated to them about a recall process that would apply in relation to any vacancies.

[150] Air NZ argues that the 40 roles were “vacancies” and thus it has to offer them under cl 20.7 to staff already made redundant. The re-hire process pack from December 2020 includes a reference to a role which adds to existing headcount is a vacancy. As the seven attendants’ permanent roles were redundant and the upcoming roles were temporary fixed term roles, Air NZ reasonably considered the temporary roles to constitute a “vacancy” within the meaning of clause 20.7.1.

[151] I am reluctant to readily conclude that the recall process itself which was not a contractual provision (although influenced by contractual provisions) negates an obligation to offer suitable redeployment to existing staff. This is an obligation on fair and reasonable employers, not much added to in these circumstances by most relevant contractual redeployment obligation – clause 20.5 – which is focused on offering employment in another section, area or location in New Zealand.

[152] The airline relies on the contractual right of preference under cl 20.7.1 of the Mid Haul CA, which confirms redundant staff shall:

be given preference of employment for any vacancy that may become available in the same section as that in which they were formerly employed.

[153] As the airline points out the criteria for re-employment under Mid Haul collective agreement must be “in the spirit” of that agreement and as expressed in cl 20.3.1. Clause 20.3.1 states:

The objective is to ensure retention of staff with the necessary skills, knowledge and experience to provide the airline with an efficient and effective workforce.

[154] Air NZ argues it was therefore entitled to establish any fair and reasonable system to recall flight attendants with the necessary skills, knowledge and experience to provide the airline with such a workforce.

[155] There was an awkwardness in Air NZ’s evidence about whether the seven attendants were on the recall list in January 2021. Ms McKeown’s email to Ms Warrington referred to above suggests they must be made redundant. Ms Langridge’s witness statement does not specifically say whether they were on the list, focusing more on it being unfair for the remaining DSMs to be given preference over all already

redundant former employees, simply because their notice period was extended. Ms Paterson said they were definitely on the list.

[156] Ultimately given Ms Paterson's involvement with the details of the list, I accept the seven attendants were on the recall list but were not sufficiently high to be selected for the relevant roles within the 40.

Temporary nature of the role

[157] Once the airline decided that it needed quite a number of temporary staff, there is a prima facie argument that arrangements should have been made to either retain the seven attendants in their permanent roles to be part of the group covering that work, redeploy them into those temporary roles or at least offer them temporary roles.

[158] Air NZ says it was not obliged to offer redeployment to the temporary fixed term roles available in the January Recall as they were not suitable roles.

[159] Another staff member is reported to have been offered and accepted a temporary role, giving up his redundant permanent role and taking up a new temporary role on the Schedule 200 conditions. Although this report does not mean that the seven attendants cannot argue that a different and proper process should have occurred with them.

[160] There was evidence that the seven attendants were not offered the first recall roles because the roles were temporary, thus not comparable to their permanent roles. Their permanent roles were still seen by Air NZ as redundant. Although Ms Langridge's view seemed to be Air NZ did not see any obligation to redeploy the seven attendants into new (recalled) roles, regardless of whether they were permanent or temporary roles. It was required to use the contractual preference right for those who had been made redundant to fill the temporary roles.

[161] Ms Paterson says that the airline considered redeployment but decided the attendants were not eligible for redeployment into those roles because they did not have the required date of joining the organisation for a role.

[162] In any event, Air NZ, relying on *Malaysia Airline System v Malone*, submits that notice of redundancy cannot be used by an employer to roll employees onto fixed term roles as this would undermine the core purpose of notice of redundancy being to provide

an employee with a degree of certainty and ability to make arrangements for the future, including the obtaining of alternative employment.¹⁴

[163] I accept that the three-month fixed term temporary roles were not inherently suitable alternative roles. They were not permanent, rather fixed for a short period with no certain expectation at the point of offer of there being on-going work beyond the expiry of the three-month period. Under the Mid Haul collective agreement those employed on a temporary basis were not entitled to redundancy compensation.¹⁵ They also were not eligible for staff travel privileges. Only three of the roles were DSM rank with the remainder FA roles without leadership responsibilities and at a lower rate of pay.

[164] As a general proposition an employer will have difficulty establishing that it can force a fixed term role on an employee in the sense of them losing their redundancy compensation entitlement by being pushed to fixed term position and their employment finishing without redundancy entitlement. However, here Air NZ could on the face of it have asked the attendants to agree and they may have accepted given the dire circumstances the airline industry was in. But Air NZ was subject to the cl 3.1.3 constraint in Appendix V of the Mid Haul collective agreement.

Insufficient places and recall ratio issue

[165] Even if there was an obligation to extend the notice period or in some other way offer these roles to the seven attendants, there were numbers of questions. In addition, there were only three DSM roles available as part of the January Recall. One of those was taken someone with more seniority than the seven attendants, leaving at most two roles.

[166] There was an argument that under a ratio in the recall process, the other two DSM roles had to be filled by post-MUCA cabin crew, although there is a question about whether the recall process was agreed at the date the seven attendants were dismissed. Regardless, there were still insufficient roles to enable all seven attendants to be offered roles.

¹⁴ *Malaysia Airline System v Malone* [2003] 1 ERNZ 494 (EmpC) at [46].

¹⁵ Collective agreement, cl 20.1.2.

Lack of consultation on recall

[167] The seven attendants allege failure to notify the seven attendants or consult with them about the recall list.

[168] Given that they were still employees at the time the recall was announced and expressions of interest sought via a cabin crew update, Air NZ should have given the seven attendants access to information relevant to the continuation of their employment, under s 4(1A)(c) of the Act. They were not given any information other the general update or in response to particular issues raised by individuals.

[169] The seven attendants were still employed, fixed term contracts were available, and the attendants were not told whether they were in the pool for the recall and if not, why not. There was a failure to explain to the attendants at the time if the airline what the airline saw clause 3.1.3 of Appendix V as an impediment to offering them the recall work or if they were too far down the list.

[170] The evidence was that by this point there were very modest number of those on the longer notice period and communication to those nine was feasible.

Lack of priority for redeployment into for other roles

[171] Broadly, Air NZ was obliged to consult and explore seek out redeployment opportunities for the attendants being made redundant. Although there is not an absolute duty to always offer redeployment, where the employer has carried out a “robust consultation process and actively and constructively considered redeployment” throughout the process it will be difficult to conclude it has acted unfairly - *New Zealand Steel Ltd v Haddad*.¹⁶ The obligation to be active and constructive in maintaining the employment relationship is significant.

[172] A failure to consult with an employee being made redundant about a role and seek their feedback was assessed to be procedurally unfair and a breach of the employer’s good faith obligations in *Gafiatullina v Propellorhead Ltd*.¹⁷

[173] The attendants say that despite being told they would be considered for redeployment, suitable redeployment opportunities were not raised with them.

¹⁶ *New Zealand Steel Ltd v Haddad* [2023] NZEmpC 57 at [73] and [74].

¹⁷ *Gafiatullina v Propellorhead Ltd* [2021] NZEmpC 146 at [146].

[174] This is a group of employees very committed to their flight attendant role. There was little scope for similar roles with other employers in this pandemic situation. I accept they were very keen to maintain their Air NZ employment and open to redeployment to at least other flight attendant options.

[175] Communications by the airline were encouraging about redeployment. From a September 2020 proposal consultation Q & A communication:

Redeployment is the preferred option if there were roles available. We are continually thinking of options for our people ... Of course, we'd consider this if something was available... We encourage you to keep an eye on the careers site as opportunities will be advertised there.

[176] The December 2020 letters advising of the change in final day of work encouraged the attendants to keep an eye out on Korunet for redeployment opportunities which may become vacant and further:

if we become aware of any suitable opportunities we will keep crew informed.

[177] The airline relies on its system – the staying connected register (SCR). The seven attendants and many others were asked to register their interest for any alternative roles in late October 2020. Employees who registered were able to select areas of its business they had an interest in for alternative roles. Once selected, the employee would receive details of alternative roles within those areas. A reminder about the SCR was sent on 18 December 2020. All seven registered and identified areas of interest between 30 October and 29 December 2020.

[178] Contacting people individually would have been demanding when there were hundreds working out their notice of redundancy. But after many finished in early December there were only about nine staff on notice in Ms McKeown's operational area.

[179] In addition to the 40 temporary roles, two different roles or groups of roles were raised – a medical administrator support role and roles on the A320 aircraft.

Medical administrator role

[180] This was a fixed term role. Ms Paterson's evidence was that it was originally advertised in or around August or September 2020 when a large number of impacted flight attendants were furloughed and before the seven attendants had been identified as

redundant. It was readvertised, likely in November 2020. The ad referred to the airline “aiming at furloughed crew, however if there is a furloughed crew who recently accepted redundancy, they are also welcome to apply”. This was not an encouraging message for applicants in other circumstances such as the seven attendants.

A320 roles

[181] Fixed term attendant crew roles on A320 aircraft were via the staying connected register in late December 2020, with expressions of interest due by 5 January 2021. Six of the attendants thus received the ad directly. Ms Bentley had not yet signed up but found out anyway. There was no attempt to offer these roles to the seven attendants and they were not given any preference in appointment, despite being able to perform them.

[182] Both Ms Bentley and Ms Warrington applied but were not accepted. Ms McKeown confirmed in her oral evidence that she had nine employees on notice of redundancy and no steps were taken to contact or give them priority or preference for these roles.

[183] Ms Langridge accepts even though roles were offered to A320 furloughed staff first, there were still roles remaining which no staff had a preferential right to. She still did not accept that the seven attendants should have been redeployed to the A320 roles, not agreeing that there was any obligation to give preference. She appears to have relied on an understanding that the A320 collective agreement required the airline to apply certain criteria when appointing to the A320. No such provision was identified.

[184] The rejection message received makes it clear Ms Warrington and Ms Bentley were not treated as current employees on notice - “great to see so many of our former Air NZ cabin crew express an interest in re-joining the business”.

[185] On the evidence before me Ms Bentley and Ms Warrington would have been able to perform these roles with reasonable support and training, likely a short conversion course. Ms Bentley in particular was formerly a purser on the A320.

[186] The airline says even if the seven attendants had been offered and accepted the role their permanent employment would still have been redundant within the meaning of the Mid Haul collective agreement, and they would have ceased to be covered by Wa Mua and so lost entitlements to Schedule 100 terms. In addition, Ms Wilson gave evidence she would not have accepted any fixed term roles as she lives in Palmerston

North and would not have been able to undertake any of those roles from her place of residence.

[187] Other roles which came up during evidence are less significant as the seven attendants did not have the relevant qualifications – hybrid learning facilitator and a specialised trainer role. A pilot administration role also fixed term was given to another (then) impacted flight attendant who Ms Warrington accepts was highly qualified for the role.

[188] Air NZ should have given priority for the A320 roles to the two suitable attendants being made redundant.

Conclusion

[189] That there was substantive justification for making some redundancies is not questioned. The question is whether a fair and reasonable employer, in these very difficult circumstances, could have acted as Air NZ did with these seven attendants.

[190] I conclude it did not:

- There was an unjustified failure to provide the attendants with significant information about their selection for redundancy regarding the list and an opportunity to comment on it.
- Advertising what were effectively their jobs before giving the attendants notice that they had been selected for redundancy was unfair, particularly in circumstances where they did not know precisely where they were on the list.
- There was a serious error with Ms Wilson being given incorrect and conflicting information about whether she was selected for redundancy.
- There was an unjustified lack of information provided about the recall situation, depriving attendants of the opportunity to comment.
- There was a failure consult with and give attendants priority for redeployment options, particularly in circumstances with the A320 roles where there was no difficulty under the collective agreements with giving them the roles.

[191] I have considered whether these concerns should be categorised as disadvantages due to Air NZ's unjustified actions rather than unjustified dismissal. As regards Ms Bentley and Ms Warrington the failure to offer them the A320 positions they applied for is sufficient to amount to an unjustifiable dismissal. They were willing and able to do those temporary jobs, but Air NZ did not redeploy them into the roles, even if they would have still lost their Schedule 100 terms.

[192] Regarding the other attendants, the actions towards them were disadvantageous but do not lead to a finding that they were unjustifiably dismissed. They were subject to unjustified actions to their disadvantage.

[193] I have considered whether the concerns should be seen as process defects which were not minor and did result in the attendants being treated unfairly. There were a number of important inadequacies.

Remedies

[194] Remedies are complex. There are differences between each of the individual attendants, including whether they seek reinstatement or not. Many have gone back to Air NZ but seek return to their Pre-MUCA status. This return to a role without an order of reinstatement is unusual in the employment context.

Reinstatement

[195] Five of the seven attendants sought to be reinstated to their positions as Deputy Service Managers on the 787, with their previous Schedule 100 terms and conditions, inclusive of applicable employer superannuation contribution rates that were available at the time of dismissal and their protected status as Pre-MUCA employees, with continuity of service.

[196] Ms Wilson seeks a change in role, but it is difficult see how that can readily be captured under s 103(1)(a). Ms Dewsnap and Ms Warrington no longer seek reinstatement. It is submitted Ms Bentley should retain her role as ISM, as she was promoted in March 2022.

[197] Under s 123(1)(a) the Authority may reinstate an employee "in the employee's former position or the placement of the employee in a position no less advantageous".

To be granted reinstatement must be practicable and reasonable, under s 125. Both requires broad enquiries.¹⁸

[198] Ms Bentley with an unjustifiable dismissal grievance could be seen as having a stronger basis for reinstatement of her previous terms than others. However, had she been granted the fixed term A320 role she would have lost her Schedule 100 entitlements. Ms Warrington, also with a dismissal grievance, did not take up recall offers from Air NZ and thus is not seeking reinstatement to her Schedule 100 terms.

[199] The remaining attendants have disadvantage grievances. The airline's initial arguments are that reinstatement is not practicable and reasonable as the redundancies were substantively justified or even if they were (which is denied), the attendants' permanent employment was redundant. If they had been appointed to fixed term roles, they would have been on Schedule 200 terms.

[200] There are what might be described as technical difficulties getting staff back under the Wa Mua Settlement Agreement. Under its terms a "Pre-MUCA Employee" means an employee whose name appears in Schedule D of that agreement. Air NZ is required to maintain the list of pre-MUCA employees and delete from the list those who design or cease to be employed "in a role that is covered by the same collective agreement they were covered by on 23 September 2013 (except if they transfer pursuant to the redundancy provisos set out in the Schedules to each of the new MUCAs)". As the attendants ceased to be employed and thus ceased to be in a role covered by the CA they were covered by on 11.01.21. Their names have therefore reportedly been removed from the list. They therefore no longer qualify for pre-MUCA status pursuant to the terms of the Settlement Agreement.

[201] In addition, reinstating to Schedule 100 terms that are not part of the prevailing collective agreement that covers the work of the attendants without the agreement of E tū would cause the airline to be in breach of the Project Wa Mua Settlement Agreement.

[202] It is difficult to accept that in a hypothetical situation where a manager from Air NZ completely unjustifiably dismissed someone for a discriminatory reason for example, there would be no ability to reinstate that person.

¹⁸ *Hong v Auckland Transport* [2019] NZEmpC 54.

[203] However, I do not consider that reinstatement should be ordered in this case, it is not a reasonable or appropriate remedy given that the roles were redundant and any alternative work attendants were redeployed into would have involved them coming off their Schedule 100 terms.

Lost wages and other benefits

[204] Lost wages and other benefits are an appropriate remedy to consider for Ms Bentley and Ms Warrington who were unjustifiably dismissed but not for others.

[205] Ms Bentley's lost wages and other benefits should be based on the amount she would have received on a Schedule 200 basis in the A320 role until the time she was recalled to undertake 787 work which was at a higher rate. The redundancy compensation paid should not be deducted or required to be repaid as Ms Bentley lost the benefit of her Schedule 100 entitlements.

[206] Ms Warrington seeks losses up to the time she started in her new role – 16 January 2022. Although this is a long period the evidence before the Authority is that attendants who were recalled (even if primarily to 787 roles) retained roles initially in temporary forms until permanent roles were available after January 2022. Ms Warrington should receive the amount she would have received on a Schedule 200 basis in the A320 role for that period

[207] If the parties are not able to reach agreement on these amounts they have leave to return to the Authority.

[208] The attendants rely on the *New Zealand Steel Ltd v Haddad* Court decision where Mr Haddad declined a lesser paid role offered by the employer, without it impacting on remedies, as well as them having good reasons to decline the offers.

[209] I do not accept that Ms Warrington failed to mitigate by not taking up the recalled 787 offer - she felt worthless and traumatised by her experience, describing having PTSD and would have earned around half on the Scheule 200 terms had she taken that offer up. She should not have to pay her redundancy compensation back as she has not been reinstated

Compensation for humiliation, loss of dignity and injury to feelings

[210] The attendants seek \$40,000 each. Submissions outline the impact on them, with them all being long serving, in the 16 to 30 years' service range. I have carefully considered the evidence I have heard from each of the attendants and summarise it briefly below. All have suffered significantly, even those who have now returned to work for Air New Zealand. I have avoided taking into account evidence regarding the reduction to Schedule 200 terms as that was not part of the grievances established.

[211] It is appropriate to award a global amount to each covering the impacts of each of the disadvantage grievance aspects, as well as for Ms Bentley and Ms Warrington, their dismissal grievances.

Mel Bentley

[212] Ms Bentley has experienced worry and stress including about her family, suffered physical and emotional symptoms. She has sought counselling. The life she had carefully built up has been turned upside down and she has been disheartened by her long-time employer.

[213] Ms Bentley is to be paid \$22,000 as compensation.

Brenda Wilson

[214] Ms Wilson suffered the additional anger and upset about being told her job was safe only to discover it was not. This lack of care was particularly distressing as she had worked for the airline for 31 years. The way she was treated in other regards had robbed her of her confidence, sense of worth and being valued. Physical and emotional effects are also mentioned.

[215] Ms Wilson is to be paid \$25,000 as compensation.

Dave Hickey

[216] Mr Hickey describes being on an emotional rollercoaster with the carpet pulled out from under him. He has had difficulty sleeping and suffers a continued sense of unfairness and anger at his situation.

[217] Mr Hickey is to be paid \$20,000.

Liz Warrington

[218] Ms Warrington's personal relationship has suffered. She has felt cheated, worthless, cheap and tossed aside by her long-time employer. Her health and wellbeing were challenged. Ms Warrington has sought counselling and also refers to trauma sustained from the events with Air NZ.

[219] Ms Warrington is to be paid \$23,000.

Junko Kiyomoto-Craigie

[220] Ms Kiyomoto-Craigie felt neglected, belittled, victimised and disposed of. She was distraught worrying about providing for the futures of her children.

[221] Ms Kiyomoto-Craigie is to be paid \$20,000.

Christopher Chung

[222] Mr Chung describes feeling hurry, used and undervalued. He has suffered from substantial self-doubt, sleeping difficulties, social withdrawal. He was concerned about his future given that English was his second language, and the tourism sector was in disarray.

[223] Mr Chung is to be paid \$21,000.

Helen Dewsnap

[224] Ms Dewsnap lost her professional and personal confidence and went to feeling worthless, cynical and sad. She often cried so much that she hyperventilated. Ms Dewsnap felt like the real her had disappeared.

[225] Ms Dewsnap is to be paid \$20,000.

Liz Warrington's travel benefit

[226] I have considered whether Ms Warrington should be given an award regarding the travel benefit and concluded. Had she been redeployed to the fixed term A320 role her service there would not have counted towards her service for travel benefit purposes.

Contribution

[227] There is no basis on which to conclude that the attendants contributed in a blameworthy and causative manner to their personal grievances.

Orders

[228] Air NZ is to pay the attendants the sums of lost wages and other benefits and compensation outlined above within 28 days of the date of this determination.

Costs

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

[230] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the seven attendants may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Air NZ will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[231] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.

Nicola Craig

Member of the Employment Relations Authority