

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2026] NZERA 364  
3296759

BETWEEN	MARK NICHOLAS First Applicant
AND	NEW ZEALAND AIR LINE PILOTS' ASSOCIATION INDUSTRIAL UNION OF WORKERS INCORPORATED Second Applicant
AND	BENJAMIN ROSSER Third Applicant
AND	JETCONNECT LIMITED Respondent

Member of Authority:	Rachel Larmer
Representatives:	John Hall, counsel for the Applicants Michael O'Brien, counsel for the Respondent
Investigation Meeting:	11 and 12 February 2026 in Auckland
Submissions and Other Information:	27 February and 13 March 2026 from the Applicant 6 March 2026 from the Respondent
Date of Determination:	9 June 2026

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

*The dispute*

[1] This matter involved a dispute about the interpretation, application, or operation of the collective agreement dated 11 October 2021 – 9 August 2024 (the CA) between the second respondent, New Zealand Airline Pilots' Association Industrial Union of Workers Incorporated (NZALPA), and the respondent, Jetconnect Limited (Jetconnect).

[2] The dispute involved Jetconnect's application of clause 3.3 of the CA, which in specific circumstances permitted the use, and recovery of, bonds for pilots it employed.

[3] Jetconnect has bonded pilots who already held the "type rating" to fly Boeing 737 aircraft (B737). The applicants claimed a bond was not permitted under clause 3.3 of the CA if the pilot already held the type rating for the applicable aircraft, which in this case was the B737.

[4] These proceedings did not involve any dispute about the use, or recovery, of training bonds for pilots who did not hold the applicable type rating (which in this case was for the B737), as the parties agreed that was permitted by clause 3.3 of the CA.

#### *The parties*

[5] The first applicant, Mr Mark Nicholas, and the third applicant, Mr Benjamin Rosser, were previously employed as pilots by Jetconnect to fly the B737.

[6] The second applicant, NZALPA is a union, which Mr Nicholas and Mr Rosser are members of.

[7] The respondent, Jetconnect, is a New Zealand registered company that is wholly owned by Qantas Airways Limited (QAL).

[8] Jetconnect has existed as a subsidiary of the Qantas Group in New Zealand since the early 2000s. At first Jetconnect held an Air Operator's Certificate (AOC) issued by the Civil Aviation Authority in New Zealand (the CAA NZ). However, by 2008 Jetconnect was operating under QAL's AOC.

[9] Jetconnect employs pilots and cabin crew to work on commercial flights operated by QAL and other operators as Jetconnect directs. Jetconnect currently only operates B737 aircraft. Jetconnect pilots and cabin crew operate wearing a Qantas branded uniform and they must comply with Qantas Group published operating policies and the QAL AOC requirements.

## *Abbreviations*

[10] The following abbreviations have been used in this determination:

- (a) Amended statement of problem (ASoP).
- (b) Amended statement in reply (ASiR).
- (c) New Zealand Airline Pilots' Association Industrial Union of Workers Incorporated (NZALPA).
- (d) Jetconnect Limited (Jetconnect).
- (e) NZALPA and Jetconnect Limited collective agreement dated 11 October 2021-9 August 2024 (the CA).
- (f) Boeing 737 aircraft (B737)
- (g) Boeing 777 aircraft (B777).
- (h) Qantas Airways Limited (QAL).
- (i) Air New Zealand Limited (Air NZ).
- (j) Virgin Australia Airline Pty Limited (Virgin Australia).
- (k) Virgin Australia (NZ) Employment and Crewing Limited (Virgin NZ).
- (l) Tasman Cargo Airlines Pty Limited (TCA).
- (m) Civil Aviation Safety Authority – Australia (CASA).
- (n) Civil Aviation Authority of New Zealand (CAA NZ).
- (o) Air Transport Pilot Licence (ATPL).
- (p) Air Transport Pilot Licence – Aeroplane (ATPL - A).
- (q) Qantas First Officer Initial Type Training (the training).
- (r) The Wages Protection Act 1983 (the WPA).
- (s) Air Operators Certificate (AOC).
- (t) Civil Aviation Safety Regulations 1998 (CASR).
- (u) Civil Aviation Act 1990 (NZ) (the CAA90).
- (v) Civil Aviation Act 1988 (Australia) (the CAA88).
- (w) Australian and New Zealand Aviation (ANZA).

- (x) International Air Transport Association (IATA).
- (y) IATA Operational Safety Audit (IOSA).
- (z) Training and Checking Manual (TACM).
- (aa) Flightdeck Group 2017 (registered in Australia as Flightdeck Crewing Pty Limited) – Flightdeck.
- (bb) Joint Aviation Authority (JAA).
- (cc) European Aviation Safety Agency (EASA).

### *CASA Approval*

[11] The term “CASA Approval” is not a concept that is referred to or used in the CASA regulatory regime or within the airline industry.

[12] The concept of “CASA Approval” is a term that was created by the parties in these Authority proceedings as shorthand to mean “successfully completing the AOC holder requirements as stated in the CASR and AOC approval by CASA to hold the role of a pilot on the B737 for the AOC holder”, which in this case was QAL.

[13] The term “CASA Approval”, as used in this determination, recognises that approval for a pilot to operate for a specific operator will be based on the operator complying with the training and checking requirements that govern its AOC obligations, as approved by CASA.

### *The applicants’ claims*

[14] As a condition of employment by Jetconnect, Mr Nicholas and Mr Rosser (the two pilots) agreed to be bonded for 36 months for a maximum of \$37,000.00, and they entered into substantially similar Bond Agreements.

[15] Mr Nicholas and Mr Rosser left their employment with Jetconnect before they had worked for 36 months because they had both obtained higher paying employment elsewhere. Jetconnect sought to recover the training bonds from Mr Nicholas and Mr Rosser, even though they both had obtained the B737 type rating before they were employed by Jetconnect.

[16] The applicants’ claims were set out in their amended statement of problem (ASoP), namely that Jetconnect had breached:

- (a) Section 12A of the WPA, by making the offers of employment to Mr Nicholas and Mr Rosser that were conditional on them entering into a First Officer Repayment/Bond Agreement (the training bond), which the applicants claimed was an unlawful premium.
- (b) Clause 3.3 of the CA, by requiring a training bond to be entered into by prospective pilots, who had already completed endorsement training on the aircraft type, before they could receive offers of employment.

[17] The applicants in their ASoP sought the following remedies:

- (a) A declaration that Jetconnect's application of clause 3.3 of the CA to pilots who already hold an endorsement on the relevant aircraft is a breach of the CA.
- (b) A declaration that Jetconnect applying clause 3.3 of the CA to pilots who already hold an endorsement on the relevant aircraft breached s 12A(1) of the WPA.
- (c) An order that Jetconnect reimburse the bond amount Mr Nicholas has paid. No such request was made for Mr Rosser, as the ASoP noted he had not repaid any of his bond, although his evidence appeared to have contradicted that.

*Jetconnect's position*

[18] Jetconnect denied breaching the CA, and it said the training bonds were not a premium for employment, so were not prohibited by s 12A(1) of the WPA. It said the bond reflected the personal benefits Mr Nicholas and Mr Rosser had obtained as a result of the training Jetconnect had funded for them, namely:

- (a) An executable licence, because they had obtained the legal right to fly Jetconnect's B737 as First Officer; and
- (b) Approximately 50 hours of flying time (gained during training), which made them more attractive to future employers.

[19] Jetconnect acknowledged Mr Nicholas and Mr Rosser both held the applicable type rating (B737), but said they could not execute their type rating without successfully completing the initial training Jetconnect had paid for. Jetconnect said completion of

that initial training resulted in them obtaining CASA Approval, at which point the two pilots had “executable licences”.

[20] Jetconnect said the reference in clause 3.3.1 of the CA to it paying the “costs of a Pilot’s endorsement training on an aircraft type ...” permitted recovery of the training bonds the two pilots had agreed to in their respective Bond Agreements as CASA Approval was the “endorsement” referred to in that clause.

[21] Jetconnect claimed the training bond:

- (a) Was not a premium for obtaining employment, because it was a legitimate cost of meeting the legal requirements for Mr Nicholas and/or Mr Rosser to be able to perform their First Officer roles; and
- (b) Benefited Mr Nicholas and Mr Rosser personally, because the CASA endorsement and currency they obtained on a B737, would have enabled them to have worked for another operator in Australia or New Zealand flying B737s with “a significantly abbreviated training schedule”.

#### *The 2016 collective bargaining*

[22] The provision of initial training by Jetconnect to pilots it employs is cost intensive. Training costs are also incurred by Jetconnect as part of the training and checking system that CASA requires the holder of the AOC to maintain. For a long time Jetconnect has struggled to retain pilots, with many choosing after a few years working for Jetconnect to seek higher paid employment elsewhere. That was a significant cost to Jetconnect’s business which it wanted to avoid or mitigate.

[23] During the collective bargaining negotiations NZALPA and Jetconnect had in 2016, they agreed to address that issue by increasing the bonding period in clause 3.2.3 of the CA to address that new recruits were often leaving after two years of employment. Accordingly, the duration of the bond was agreed to be reasonable as an outcome of the parties’ bargaining.

#### *The Collective Agreement*

[24] Clause 3.3 of the CA dealt with a training bond, and it stated:

3.3.1 On each occasion where Jetconnect pays the cost of a Pilot’s endorsement training on an aircraft type (including but not limited to an aircraft type applicable to the Pilot’s initial equipment assignment), command

upgrade training or training for an appointment to a standards position (training cost), Jetconnect may require the Pilot to enter into a training bond agreement (bond agreement).

3.3.2 The bond agreement will specify the actual training cost to the Company and a Pilot shall not be bonded for an amount in excess of those training costs. In the case of an initial employment endorsement the training cost may include all associated travel, accommodation and allowances incurred during the period by Jetconnect. Bond for subsequent endorsements will exclude all associated travel, accommodation and allowances incurred during the period by Jetconnect.

3.3.3 The bond agreement will provide as follows:

a. In exchange for the substantial benefit of Jetconnect paying the training costs, so that Jetconnect receives a reasonable return on its investment in the training costs, the Pilot will remain employed with Jetconnect for:

3 years – from the commencement of employment (where conflict occurs with Bond Agreements signed prior to ratification, the signed Bond Agreement term prevails if shorter than three years),

2 years – from the commencement of any subsequent endorsement training and after joining the Company, and

1 year – from the commencement of the command upgrade or standards training (the relevant period).

b. If the Pilot resigns from Jetconnect within the relevant period specified above the Pilot will repay a proportion of the training cost that is commensurate with the proportion of the relevant period that has not elapsed (repayment). This amount shall be calculated on a linear reducing basis per calendar month,

c. The Pilot will make the repayment within twelve (12) months, or such period as agreed.

3.3.4 The training costs shall not be repayable in the situation where the Pilot terminates his/her employment due to a loss of licence on medical grounds or where the Pilot's position is made redundant by the Company.

3.3.5 The training costs shall not be repayable in the situation of: a Command Upgrade, appointment to a Standards Position or where a Pilot is directed to complete endorsement training as a consequence of a change in fleet type where the candidate fails to achieve the competency standards required for the applicable qualification.

### *The Bond Agreements*

[25] The two pilots' respective Bond Agreements expressed that Jetconnect was committed to ensuring that new First Officers were appropriately trained and inducted after commencing employment, which resulted in Jetconnect incurring significant training costs.

[26] The bond repayment obligations that were imposed on Mr Nicholas and Mr Rosser were stated to relate to “repayment of actual expenses incurred by Jetconnect”. The actual cost of each pilot’s training was not recorded in their Bond Agreements. Jetconnect said the actual training costs for:

- (a) Mr Nicholas’ training was \$59,465.13 excluding ground transport to and from training facilities of approximately \$2,750 AUS and excluding his training salary of \$46,947.46.
- (b) Mr Rosser’s training was \$52,364.69 excluding ground transport to and from training facilities of approximately \$2,750 AUS and excluding his training salary of \$46,947.46.

[27] The Bond Agreements the two pilots entered into were similar regarding the key terms with some non-material aspects of the Bond Agreement being expressed in slightly different terms. The bond was repayable, based on a pro-rata amount, if the two pilots:

- (a) Resigned within 36 months of the commencement of their employment.
- (b) Did not commence, failed or withdrew from the First Officer training.

[28] No bond was repayable if their employment ended within 36 months due to redundancy, or loss of their pilot’s licence on medical grounds. The Bond Agreement allowed Jetconnect to deduct unpaid amounts from their final pay, including holiday pay.

[29] Mr Nicholas’ Bond Agreement stated (among other things):

As you are aware, your offer of employment with Jetconnect is conditional upon you successfully completing the First Officer Training. It is also conditional upon you agreeing to the First Officer Repayment/Bond Agreement by signing this agreement and returning a signed copy to Jetconnect.

[30] Mr Rosser’s Bond Agreement stated (among other things):

As you are aware, your offer of employment with Jetconnect is conditional upon you successfully completing the First Officer Initial Type Rating Training. It is also conditional upon you agreeing to the First Officer Repayment/Bond Agreement by signing this agreement and returning a signed copy to Jetconnect.

[31] Both Bond Agreements contained the same acknowledgement clause, which stated:

You acknowledge you have had the opportunity to obtain legal advice [and in Mr Rosser's case "financial advice"] regarding the First Officer Repayment/Bonding Agreement prior to signing it and you acknowledge that the terms of this First Officer Repayment/Bonding Agreement are fair and reasonable.

By signing below, I [Marc Nicholas or Benjamin Rosser, as the case may be], acknowledge that I have read, understood and accepted the provisions of the First Officer Repayment/Bond Agreement. I confirm that I have been provided with the opportunity to take independent advice on the terms of the First Officer Repayment/Bond Agreement prior to signing.

### **The Authority's investigation**

[32] A two-day in-person investigation meeting was held in Auckland.

[33] The applicants had the following witnesses:

- (a) Mr Nicholas (first applicant) is currently an Air NZ B777 pilot. Prior to that he was employed by Jetconnect as a First Officer to fly the B737.
- (b) Mr Rosser (third applicant) is currently employed by Virgin Australia to fly the B737. Prior to that he was employed by Jetconnect to fly the B737.
- (c) Mr Josh Bennetts is employed by Jetconnect to fly the B737. He is also the Administrative Head of the NZALPA Jetconnect Pilots' Council, which is a sub-committee established to manage the union's relationship with Jetconnect.
- (d) Mr Alastair Scott is a pilot employed by Tasman Cargo Airlines Pty Limited (TCA) to fly the B767-300 freighter and he is also a Training Captain for TCA. TCA holds an Australian AOC. Mr Scott holds a pilot licence issued by CASA. He is also a member of NZALPA's Technical Sub-Committee, which was established to provide subject matter expert advice on technical and safety questions.
- (e) Mr Rob Torenvlied is a pilot who is employed by Air NZ as a Training Captain. He has also been NZALPA's Technical Director and was the Flight Crew Training Manager of Freedom Air.

[34] The applicants relied on Mr Scott and Mr Torenvblid as expert witnesses. However, Jetconnect disputed their status as expert witnesses because they were both members of NZALPA, which was a party to these proceedings. The Authority considered the opinion evidence of these two witnesses was based on their experience about the benefits of ‘currency’ but did not cross the line into advocacy for the applicants.

[35] The respondent had the following witnesses:

- (a) Mr Andrew Ellis is a B737 Captain and he is employed by Jetconnect as Manager Flight Crew Operations. Mr Ellis has oversight of the recruitment process and he gave evidence about the applicable regulatory environment. He also addressed Mr Nicholas’ and Mr Rosser’s personal circumstances regarding their Bond Agreement and employment by Jetconnect.
- (b) Ms Sasha Robinson is the founding partner of Flightdeck Group (2017) and the owner of Flightdeck Consulting, which assists pilots to launch and advance their careers. She is also a former international airline pilot who flew the Airbus A330 and A340 worldwide. Ms Robinson gave evidence as an expert witness.
- (c) Mr Rodney Ewels is a Qantas pilot who holds the rank of Captain. He is employed by Qantas as the Flight Training Quality & Regulatory Affairs Manager. He is responsible for overseeing the implementation of the Flight Training Quality Management System, and for overseeing regulatory compliance. Mr Ewels resides in Sydney, and he gave evidence by Teams link.

[36] The parties lodged an agreed bundle of relevant documents that was 992 pages long, with additional documents being handed up by the parties during the investigation meeting. Mr Nicholas’ and Mr Rosser’s training records and other relevant information were also lodged separately on 9 and 10 February 2026.

[37] The parties provided written submissions and additional information after the investigation meeting.

## **Issues to be determined**

[38] The parties agreed the following issues were to be determined:

- (a) Are the Bond Agreements, or the recouping of costs under them, employment premiums, in accordance with s 12A(1) of the WPA?
- (b) Has Jetconnect breached clause 3.3 of the CA by requiring Mr Nicholas and/or Mr Rosser to enter into a Bond Agreement as a condition of their employment?
- (c) Can Mr Nicholas and/or Mr Rosser recover from Jetconnect the bond repayments they have made?
- (d) If not, can Jetconnect recover the amounts outstanding under the Repayment Agreement from the Mr Nicholas and the Bond Agreement from Mr Rosser?
- (e) Does the costs presumption, which applies to a dispute about the interpretation of a collective agreement, apply to this matter?
- (f) If not, what costs should be awarded?

## **Agreed facts**

[39] Prior to lodging their evidence, the parties agreed on the following facts:

- (a) The training bond was entered into in relation to the associated costs of the training required to obtain CASA Approval.
- (b) Mr Nicholas and Mr Rosser would not have complied with CASA requirements to perform the role of a pilot on B737 flights operated by the AOC Holder, QAL, had they not obtained the CASA Approval by undertaking the specific training that was covered by the Bond Agreements.
- (c) The training Mr Nicholas and Mr Rosser undertook to achieve CASA Approval arises from QAL's regulatory obligations (and by association Jetconnect's obligations to provide QAL with appropriately qualified and authorised pilots). The parties also noted that was not an admission by Jetconnect that Mr Nicholas and Mr Rosser as pilots did not have their own obligations that arose from the regulatory obligations.

- (d) Mr Nicholas and Mr Rosser both held a B737 type rating prior to employment by Jetconnect.
- (e) The B737 type rating was a required qualification for the first and third applicants obtaining the required CASA Approval.
- (f) There were additional requirements for Mr Nicholas and Mr Rosser obtaining CASA Approval.

## **Relevant law**

### *Legislation*

[40] Section 12A(1) of the WPA prohibits a premium being sought or received by an employer for employment. Section 12A(1) states:

No employer or person employed on behalf of the employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed person to be employed or from any other person.

[41] The WPA is part of the minimum code of protections governing employment law in New Zealand.<sup>1</sup>

### *Case law*

[42] The cases involving premiums that are relevant to this matter are:

- (a) The Full Employment Court's decision in *A Labour Inspector v Tech-5 Recruitment Limited* and *Tech 5 Recruitment Limited (Tech 5) Tech 5 Recruitment Ltd*;<sup>2</sup>
- (b) The Employment Court's decision in *Holman v CTC Aviation Training (NZ) Limited*.<sup>3</sup>
- (c) The Employment Court's decision in *Kazemi v RightWay Ltd and Ors*.<sup>4</sup>

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<sup>1</sup> *Tan v Yang* [2014] ERNZ 733 at [40].

<sup>2</sup> *A Labour Inspector v Tech 5 Recruitment Limited* [2016] NZEmpC 552.

<sup>3</sup> *Holman v CTC Aviation Training (NZ) Limited* [2017] NZEmpC 60.

<sup>4</sup> *Kazemi v RightWay Ltd & Ors* [2019] NZEmpC 73.

(i) The Tech 5 decision

[43] The Full Employment Court in *A Labour Inspector v Tech-5 Recruitment Limited* and *Tech 5 Recruitment Limited (Tech 5) Tech 5 Recruitment Ltd (Tech 5)*<sup>5</sup> considered challenges by both the Labour Inspector and the employer, Tech 5 Recruitment Limited (Tech 5 Ltd), to the Authority's determination:<sup>6</sup>

- (a) The Labour Inspector challenged the Authority's finding that Tech 5 Ltd had not sought or received a premium in breach of s 12A(1) of the WPA in relation to its recruitment, and subsequent employment, of carpenters from the Republic of the Philippines (the Philippines).
- (b) Tech 5 Ltd challenged the Authority's finding that its deductions from wages to recoup "trade testing" costs it had incurred were a "premium" for employment, that was prohibited by s 12A(1) of the WPA.

[44] Tech 5 Ltd's business was labour on hire. It recruited and employed tradespeople which it then contracted to builders, contractors or subcontractors. The recruitment and selection process had occurred in the Philippines for carpenters. Tech 5 did not use the same process when engaging New Zealand qualified carpenters.

[45] Tech 5 Ltd had offered each successful candidate from the Philippines fixed term employment for three years, subject to them agreeing to a "Philippines Relocation and Prepaid Expenses Agreement for Carpenters". This entitled Tech 5 Ltd to recover costs it had incurred that were associated with the Filipino carpenter's recruitment, immigration, relocation and training. The costs Tech 5 Ltd sought to recoup included flights, accommodation, immigration medicals, insurance cover, visa processing fees, trade testing, site safe testing and kit.

[46] If the Filipino carpenter's employment was terminated for any reason, other than a lack of work, before they had completed three years continuous service they had to repay \$6,650.00 of the relocation costs, salary advance and related tooling and clothing expenses Tech 5 Ltd had incurred. Each employee was given a schedule that set out what those costs consisted of for them.

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<sup>5</sup> *Tech 5*, above n2.

<sup>6</sup> *Tech 5*, above n2.

[47] Tech 5 Ltd had undertaken its own “trade testing process” (initially consisting of English language skills plus a skill saw test) in the Philippines to identify candidates who had overstated their practical, theoretical or global experience. Tech 5 Ltd did not undertake this trade testing when it recruited tradespeople in New Zealand, with New Zealand qualifications, or from other western countries.

[48] Candidates in the Philippines who passed the initial trade test were then assessed by a New Zealand licensed building practitioner, who Tech 5 Ltd had flown to Manila to ascertain each candidate’s ability to work safely under time pressure. The work the candidates did was marked, with their mark determining whether Tech 5 Ltd offered them a job in New Zealand.

[49] The trade testing costs involved the cost of flights between New Zealand and the Philippines for the Tech 5 Ltd directors and staff who participated in the trade testing of potential employees in the Philippines; the salaries of the Tech 5 Ltd employees who conducted the actual testing; the cost of a licensed building practitioner including his flights, accommodation costs; and the cost of the trade centre facility used to conduct the tests.

[50] The Full Court held that “premium”, as used in s 12A(1) of the WPA, not only captured payment to acquire a job, where a price is paid by the employee or prospective employee or was paid on their behalf to secure employment, but extended to situations in which an employer sought, or attempted, to recover or recoup recruitment related costs or other expenses that would ordinarily be borne by an employer.<sup>7</sup>

[51] While recognising that each case would be fact-specific, the Full Court commented that the lack of any benefit to the employee, other than getting the job, would be indicative of a premium.

[52] The only tangible benefit the employees in *Tech 5* got from agreeing to pay the trade testing costs was the offer of a job in New Zealand. They did not receive any transferable benefit by paying the trade testing costs, so the only benefit to them was the ability to be selected for employment.

[53] The Court therefore held that the benefit of the trade testing costs flowed one way only, namely to Tech 5 Ltd because it benefited from the trade testing but the

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<sup>7</sup> *Tech 5*, above n2 at [54].

employees did not. The cost of the trade testing in *Tech 5* was therefore held to be a premium within the meaning of s 12A(1) of the WPA.

[54] An employer would normally have borne the recruitments costs associated with the candidates who were being recruited from the Philippines, and Tech 5 Ltd did in fact incur those costs when recruiting New Zealand qualified employees. Because the Filipino employees had no choice but to accept they would have to repay the trade testing costs if they wanted to work for Tech 5 Ltd, that amounted to a “premium” under s 12A(1) of the WPA. The Full Court held that a payment which just allowed the prospective employee to be considered for employment would be an unlawful premium, not a bond.<sup>8</sup>

[55] The Full Court stated that recovery of a training bond was not prohibited by s12A(1) of the WPA, but held that Tech 5 Ltd’s recovery of its trade testing costs was not analogous to the recovery of a training bond. To avoid being captured by s 12A(1) of the WPA, a connection between the job and the reason for the bond was required and there needed to be a mutual benefits to the employer and employee.

[56] For example, a bond could legitimately cover the employer’s payment of a recognised course of training, which resulted in the employee obtaining a qualification and the employer having a better qualified employee working for it. A bond would not fall within s12A(1) of the WPA in such circumstances, provided the duration was reasonable and other features of the bond were proportionate to the commitment the employee had made.

[57] The Full Court rejected Tech 5 Ltd’s argument that because it had not taken enforcement steps it had not sought or received a premium within the meaning of s 12A(1) of the WPA.<sup>9</sup> By including the discretionary ability to recover the trade testing costs from the Filipino carpenters in the relevant employment documentation, arising from the authorisation to make to deductions from their wages, Tech 5 Ltd had “sought” a premium in accordance with s 12A(1) of the WPA.<sup>10</sup>

[58] Seeking a premium was not limited to a situation in which the employer had taken enforcement action or had asked for repayment. The “seeking” of a premium

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<sup>8</sup> *Tech 5*, above n2 at [59].

<sup>9</sup> *Tech 5*, above n2 at [68].

<sup>10</sup> *Tech 5*, above n2 at [68].

under the WPA included situations where the employment agreement included an obligation to pay, and a mechanism to ensure that the repayment obligation could be satisfied.

[59] The induction information Tech 5 Ltd provided to the successful Filipino carpenters had informed them they had to meet costs, that included the trade testing costs. That amounted to 'seeking a premium' under s 12A (1) of the WPA.

[60] The Court did not accept Tech 5 Ltd's submission that the trade testing costs were like a training bond which fell outside the ambit of s 12A of the WPA, because it held the training costs had lacked the mutuality of benefits which would usually be a feature of a legitimate training bond.

(ii) The *Holman* decision

[61] In *Holman v CTC Aviation Training (NZ) Limited*, Mr Holman's employer CTC Aviation Training (NZ) Ltd (CTC Training) provided pilot training to aspiring and qualified pilots as part of a multinational group providing pilot training.<sup>11</sup> CTC Training was contracted to JAA/EASA (the governing bodies) to provide approved pilot qualifications to students who trained in New Zealand, so it had to have JAA/EASA qualified flight instructors to provide that training.

[62] Mr Holman entered into an agreement with CTC Training to complete the C-Category Instructor Rating qualification (the C-Cat), which opened up the prospect of Mr Holman being employed as a trainer by CTC Training, once he had completed the required qualification.

[63] Mr Holman's training agreement was entered into prior to the parties' employment relationship. CTC Training provided the necessary training to Mr Holman to get his C-Cat qualification, then it had employed him as a flight instructor. Liability for the C-Cat training fees arose under a separate preceding contract, under which Mr Holman was liable to repay the CTC Training costs, regardless of whether he was subsequently employed by it or chose not to accept any employment he was offered by CTC Training.

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<sup>11</sup> *Holman*, above n3.

[64] Mr Holman was required to make an initial \$5,000.00 payment prior to the commencement of the C-Cat course, with the remaining \$12,000.00 balance to be paid by fortnightly salary deduction over a four year term once he had entered into an employment agreement with CTC Training, as his employer.

[65] The parties agreed Mr Holman would undertake (and pay for) the C-Cat instructor training course with CTC Training and, following satisfactory completion of the course, he would be offered employment by CTC Training, if a position was available. Mr Holman entered into an aviation training bond with CTC Training for the financial support it gave him to complete his C-Cat qualification.

[66] The letter accepting Mr Holman into the C-Cat training course made it clear that if he decided not to complete the course or to commence employment with CTC Training, then the balance of the C-Cat qualification fee would be payable in full on his withdrawal, removal from the course, or at the completion of the course.

[67] Mr Holman completed the C-Cat course, obtained his C-Cat qualification, and obtained employment with CTC Training within three months of completion of the C-Cat course.

[68] Mr Holman signed an employment agreement that recorded the outstanding instalments for his C-Cat training would be paid by way of deductions from his salary, so these deductions were made with his consent, pursuant to s 5 of the WPA. Mr Holman subsequently claimed that the fees he was required to pay for the training that had resulted in his C-Cat qualification amounted to an employment premium, in breach of s 12A(1) of the WPA.

[69] The Employment Court held the aviation training bond Mr Holman had entered into with CTC Training (as his employer) was not a premium under s 12A(1) of the WPA, because he had obtained a valuable qualification which he permanently retained.<sup>12</sup>

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<sup>12</sup> *Holman, above* n3.

[70] The Court identified two requirements for a payment to be a premium under s 12A(1) of the WPA, namely:<sup>13</sup>

- (a) The payment was a condition for the obtaining of employment, so the employment will not be obtained without making the prior payment; and
- (b) The payment did not benefit the employee in any way other than obtaining employment.

[71] Mr Holman's payment of training fees did not satisfy the first requirement. It was not the payment that was a condition which needed to be met prior to accepting employment. The payment was associated with the costs of Mr Holman obtaining the C-Cat qualification itself, not as a payment for employment.

[72] Mr Holman had to obtain his C-Cat qualification before CTC Training could employ him, so the qualification had to come first. As part of the commercial training contract, CTC Training received payment as consideration for providing the training that had enabled Mr Holman to gain the C-Cat qualification. CTC Training was entitled to recover its costs and to make a profit from training Mr Holman for his C-Cat qualification.

[73] CTC Training had guaranteed Mr Holman employment as a flight instructor once he had gained the necessary qualification. However, Mr Holman was not bound to accept that offer of employment. There was no bond arrangement attached to the offer of employment, and the arrangement the parties had agreed whereby CTC Training would deduct the balance of the training fees from Mr Holman's wages, was merely a convenience to him. The agreed arrangement simply meant Mr Holman did not have to look elsewhere for financial sources to fund his C-Cat training.

[74] The Court in *Holman* held the payment arrangement had substantially benefited Mr Holman. At the completion of Mr Holman's training course, the benefit flowed only one way, and that was to him. Once Mr Holman had the C-Cat qualification he had paid for, that was something he retained permanently which was of substantial use to him in pursuing his desired career as an airline pilot.

[75] If Mr Holman had not accepted CTC Training's offer of employment, then the deduction of wages issue would never have arisen, but he still would have been required

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<sup>13</sup> *Holman* above n3, at [20].

to pay the training fees for his C-Cat qualification to CTC Training, as the training provider.

[76] If the payment was a premium for employment, then Mr Holman upon paying it would have been entitled to have insisted on being employed, which was not what the parties had agreed. Mr Holman had to pay for his training for the C-Cat qualification regardless of whether CTC Training employed him.

[77] Mr Holman retained the full benefit of the training and C-Cat qualifications he had gained in return for the training fees he had paid, so it was not a premium for employment, even though he was subsequently employed by CTC Training which had provided him with the training.

[78] The benefits of the payment run one way and that was to Mr Holman only. The obtaining of a C-Cat instructor qualification, and experience as an instructor, advanced Mr Holman's ability to obtain employment as a commercial airline pilot, which was one of his objectives.

(iii) The *Kazemi* decision

[79] In *Kazemi v RightWay Ltd* the employer, RightWay Limited (RightWay), required the employee (Ms Kazemi, who was an accountant) to pay a \$125,000.00 "buy in fee" to join its Regional Partner Programme. Ms Kazemi successfully argued (among other things) that the buy in fee was a premium that was prohibited by s 12A(1) of the WPA.<sup>14</sup>

[80] Ms Kazemi was given an employment agreement (that stated employment was subject to the payment of the buy in fee), a Deed Poll that established the Programme, and draft Deed of Adherence which she signed. The buy in fee had to be paid by the end of October 2015 and her employment with RightWay started on 7 December 2015.

[81] Although the Deed Poll stated that participation in the Programme was "separate and independent of a regional partner's employment relationship with the Company" the Employment Court found that other provisions showed there was in fact a direct link between the buy in fee and Ms Kazemi's employment by RightWay.

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<sup>14</sup> *Kazemi*, above *n4*.

[82] The Court did not accept RightWay's arguments that the buy in fee:

- (a) Had been paid to acquire a commercial interest, because it did not provide any ongoing benefit to Ms Kazemi once her employment had ended.<sup>15</sup>
- (b) Was not a condition of Ms Kazemi's employment, because her employment was subject to her paying the required buy in fee.

[83] The Court examined the true nature of the arrangement to ascertain whether Ms Kazemi obtained benefits that were separate from the benefits of employment, and concluded she did not. The Court described Ms Kazemi as having paid \$125,000.00 to obtain the right to receive monetary reward for her work.<sup>16</sup> Accordingly, the buy in fee was a premium for employment in accordance with s 12A(1) of the WPA.

### **The regulatory environment**

[84] Because Jetconnect operates aircraft that are registered to the Qantas Group in Australia, it operates under the regulatory authority of CASA, including by operation of Part 1A of the Civil Aviation Act 1990 (NZ) (the CAA90).

[85] Jetconnect's pilots operate planes used in commercial flights for QAL which held the AOC on aircraft that Jetconnect pilots operate. This AOC is regulated by CASA (not CAA NZ).

[86] Part of CASA issuing an AOC to an operator involved CASA having approved the operator's proposed exposition, which is one of the documents required under CASR. Each airline has its own CASA approved training, which is required in order for the airline to comply with its AOC.

[87] Holding a type rating for a particular aircraft (as Mr Nicholas and Mr Rosser had for the B737) did not allow that individual to fly that aircraft type commercially. It would therefore have been unlawful for Mr Nicholas and Mr Rosser to have flown B737s under the QAL AOC without having undergone the mandated First Officer initial training that Jetconnect was required by CASA (the regulator) to have their pilots successfully complete.

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<sup>15</sup> *Kazemi*, above n4, at [81].

<sup>16</sup> *Kazemi*, above n4, at [83].

[88] The focus of this initial training was on how Jectconnect wanted its B737 aircraft to be operated by its pilots and on how Jetconnect pilots were required to comply with the Qantas Group requirements. It was therefore highly specific to each operator (airline).

[89] The CASR are made pursuant to the CAA88. Because Jetconnect operated aircraft registered in Australia under the CASR, for the purposes of employment law New Zealand law applied, but for regulatory purposes Australian law applied.

[90] CASR 61.395 sets out recency requirements which require a pilot (even if they hold the type rating) in order to be authorised to fly a particular category of aircraft to have within the preceding 90 days conducted a certain number of take-offs and landings in that aircraft (either in the aircraft or a simulator).

[91] This is a regulatory obligation which forms part of the operator's training and checking system which must have current approval from CASA. It is therefore not approval of anything specific to the individual pilot but involves CASA approval of the airline's (operator's) training and checking system. Pilots must continue to meet these requirements in order to continue to operate aircraft.

[92] CASR 61.685 sets out the requirement that pilots must have either recent experience or have successfully completed a relevant operator proficiency check. The latter requires the pilot to be successfully participating in the operator's training and checking system for which the operator has received CASA's approval. In which case, the check is taken to be valid only for operations conducted by that operator. That meant new training had to occur when the pilot changed employer, even though they would be flying the same aircraft, because they would be operating aircraft that were under a different AOC.

[93] CASR 61.770 authorises the holder of a pilot licence and a pilot type rating to exercise the privileges of the licence in an aircraft of the type covered by the rating.

[94] The CASR sets out a clear requirement for ongoing and repeated assessment of a pilot's proficiency. That is satisfied by either completing a flight test (which usually follows initial training), by participating in an employer's CASA-approved training and checking system (which varies between AOC operators), or by completing a regular check.

[95] CASR Part 121 sets out the regulatory obligations imposed on operators (airlines) with regard to their operation. To pass the various checks pursuant to CASR Part 121, the pilot has to demonstrate knowledge, skills and behaviours to the Qantas standard. Qantas' pilot training programmes are in excess of the regulatory minimum.

[96] A pilot undertaking the initial and conversion training mandated by CASR Part 121 does not receive any written qualification, with the outcome in this case being an internal (AOC-level) certification to be deployed as an active airline pilot in the Qantas operation. Qantas obtained that for its compliance records, not the individual pilot.

[97] That certification is not a transferrable benefit for the pilot as it remains specific to Qantas only, so is not portable to a new employer which is not operating under the QAL AOC. Any future employer would still have to conduct training and checking for their own operation, as required by CASR Part 121.

[98] CASR Rule 121.475 states:

(1) The operator of an aeroplane for a flight contravenes this sub regulation if, when the flight begins, a requirement mentioned in sub regulation (2) is not met.

(2) The requirements are as follows:

(i) each flight crew member must meet the initial training requirements under regulation 121.555 for the operator;

...

(l) each flight crew member must meet the recurrent training and checking requirements under sub regulation 121.570(1) for the flight;

...

[99] CASR Rule 121.555(1) states:

For the purposes of paragraph 121.475(2)(i), a flight crew member meets the initial training requirements for an operator of an aeroplane if:

(a) the flight crew member has completed the operator's initial training for a flight crew member; and

(b) the initial training meets the requirements prescribed by the Part 121 Manual of Standards; and

(c) the flight crew member has successfully completed an initial training check in accordance with the operator's exposition.

[100] CASR Rule 121.570(1) states:

For the purposes of paragraph 121.475(2)(1), a flight crew member meets the recurrent training and checking requirements for a flight of an aeroplane if the flight crew member:

- (a) holds the following for the aeroplane operator and the aeroplane:
  - (i) a valid Part 121 proficiency check under regulation 121.575;
  - (ii) a valid refresher check under regulation 121.595;
  - (iii) a valid annual emergency and safety equipment check under regulation 121.605;
  - (iv) a valid 3 yearly emergency and safety equipment check under regulation 121.615; and
- (b) has completed, within the previous 12 months, recurrent flight training, in accordance with the requirements prescribed by the Part 121 Manual of Standards, for an aeroplane of that kind.

[101] On the whole, CASR requires operators to ensure that pilots complete training that is provided by that operator. Even though a pilot has all the relevant qualifications under CASR Part 61, CASA still expects them to undergo training from each new employer that may employ them.

[102] That training is required by an employer (as an operator) under CASR Part 121, because it is up to the operator to ensure the pilot has passed checks that are specific to the operator, and the aeroplane the pilot has been employed to fly. A pilot would therefore not be qualified to operate a Jetconnect B737 unless they had successfully completed Jetconnect's initial training, regardless of the amount of previous flying hours they have had on the B737.

[103] The initial training is designed to provide pilots with the basic knowledge that is necessary for operating under an operator's particular procedures. This was the regulatory operator training that Jetconnect required Mr Nicolas and Mr Rosser to enter into Bond Agreements for as a condition of their employment. This is the training Jetconnect wanted to recoup its costs for.

[104] Pursuant to s 11B of the CAA 1990, the holder of an Australian AOC with ANZA privileges is entitled to conduct air operations in Australia and New Zealand.

[105] Jetconnect operates a service level agreement with QAL. QAL maintained an air transport category AOC under s 27 of the Civil Aviation Act 1998 and Part 119 of the Civil Aviation Safety Regulations 1998 with CASA. The AOC requires the operator

to comply with all conditions CASA has placed on the AOC and with regulations including the CASRs. It is QAL's duty to ensure the AOC standards are met.

[106] It is an offence under CASR 119.180 for an AOC holder not to ensure that a pilot meets the requirements of the AOC holder's exposition regarding training in "human factors principles" and non-technical skills.

[107] It is also an offence for an operator to assign flight duties to a pilot if they have not been assessed by the operator (in accordance with the operator's training and checking system) as competent to perform duties assigned to them. That is why each operator must ensure the pilots it employs have completed the operator's particular training.

[108] CASR Part 121 training requirements are operator specific and must be carried out by the operator, or a Part 142 operator with which the operator has a contract with, so are therefore non-transferable.

[109] CASR 121.540 provides for offences that may be committed by the operator and/or pilot if recency requirements are not met.

[110] The CASA Approval process therefore requires pilots to undergo training beyond their qualifications whenever they are employed by a new airline that is operating under a different AOC. This includes the new airline's initial training, and participating in the new operator's training and checking system, which is what the Bond Agreements in this matter covered.

[111] QAL's TACM combines initial training with conversion training for new entry pilots, regardless of their qualifications and experience. For QAL's own purposes (because it benefited QAL), the training it provided also went beyond CASA's regulatory scope. For example, QAL training met IATA and ISOA compliance requirements.

[112] QAL also required direct entry First Officers (as Mr Nicholas and Mr Rosser were) to undergo a Type Rating Course whether they held the type rating or not. The course will be slightly altered with a familiarization path where the type rating was already held, as it was by Mr Nicholas and Mr Rosser.

[113] That meant all pilots employed by Jetconnect were bound by the regulations and policies stipulated in QAL's approved manual suite, which included "Training Paths" found in the TACM, which sets out the approved training a pilot must complete in order to be able to fly Boeing 737's under the QAL AOC.

## **Material background**

### *Mr Nicholas*

[114] Mr Nicholas graduated from Massey University with a Bachelor of Aviation – Air Transport Pilot in 2005. He has flown different aircraft for different employers, and obtained various qualifications, since then.

[115] In 2011 Mr Nicholas obtained a job flying 737s for Virgin Australia, employed by Pacific Blue Employment and Crewing Limited which subsequently changed its name to Virgin Australia (NZ) Employment and Crewing Limited (Virgin NZ) on 7 December 2011.

[116] During 2020 Virgin Australia terminated air transport services provided by Virgin NZ between New Zealand and Australia. Mr Nicholas lost his job in April 2020, along with all of Virgin NZ's pilot workforce.

[117] On 8 June 2022 Mr Nicholas obtained a conditional offer of employment as a First Officer from Jetconnect, subject to him successfully completing or obtaining a number of requirements, which included that he:

Successfully complete the Qantas First Officer Initial Type Training, including ground training, type rating and line training components (Stage 1 and 3), as well as release to line assessment (Stage 4).

[118] The Qantas Initial Type Rating Training (the training) costs would be met by Jetconnect and covered by a bond. Jetconnect's offer was therefore conditional on Mr Nicholas:

- (a) Signing and returning the Bond Agreement.
- (b) Successfully completing the training.

[119] Mr Nicholas signed the Bond Agreement on 14 June 2022. Mr Nicholas undertook training from 15 August 2000 to 27 February 2023. It was only after he had

successfully completed the required initial training that he could fly B737s for Jetconnect as a First Officer.

[120] On 23 December 2023 Mr Nicholas resigned from his employment with Jetconnect, and his employment ended on 24 March 2024. Because Mr Nicholas' employment had ended within 36 months of its commencement, pursuant to the Bond Agreement he was required to repay Jetconnect the pro-rata amount of \$17,165.30 for his training.

[121] Mr Nicholas and Jetconnect entered into a Repayment Agreement on 23 April 2024, under which he agreed to deductions from his final pay and that he would make a final repayment amount of \$10,117.21 on or before 20 May 2025 (the Repayment Agreement). Mr Nicholas made these repayments without prejudice to his right to pursue legal proceedings regarding the Bond Agreement.

*Mr Rosser*

[122] Mr Rosser had a number of flying jobs and qualifications before he was employed by Virgin NZ in July 2017 to fly the B737. He obtained his CASA recognised type rating for B737s in August 2017. Along with all of Virgin NZ's pilot workforce, Mr Rosser lost his job in April 2020.

[123] On 1 August 2022 Mr Rosser received a conditional offer of employment as a First Officer from Jetconnect. At this time Mr Rosser had accumulated approximately 4,200 hours flying time with 1,300 being on the B737 and 2,500 being multi-crew hours.

[124] Mr Rosser's conditional offer of employment was on the same terms as Mr Nicholas' conditional offer. Mr Rosser's Bond Agreement was materially similar to Mr Nicholas' Bond Agreement. Mr Rosser signed the Bond Agreement on 4 August 2022, the terms of which are discussed later in this determination.

[125] Mr Rosser undertook Jetconnect's initial training from 12 September 2022 through to 5 April 2023, after which he could fly as a First Officer for Jetconnect.

[126] Mr Rosser said he resigned around on 6 August 2024, while Jetconnect said in its amended statement in reply (ASiR) that he had resigned on 7 June 2024. The parties

agreed that Jetconnect confirmed to Mr Rosser that his last day of work was 8 September 2024.

[127] Because Mr Rosser had ended his employment within 36 months of its commencement, Jetconnect sought to recover a pro-rata bond amount from him. Mr Rosser had 336 days remaining under the Bond Agreement, so he had an outstanding bond amount. The exact amount of bond to be recovered, and whether any of that was repaid by a deduction from Mr Rosser's final pay currently remains unclear, so that will need to be clarified by the parties.

#### *Type rating*

[128] Ratings allow a pilot to fly a specific class or type of aircraft (in this case the B737) or to perform a specific flight operation (such as an instrument flight), whereas endorsements generally are a component of a rating such as a single pilot instrument rating.

[129] A type rating is a certification that an individual has been trained to operate a certain model of aircraft. In Australia the type rating is issued by CASA. Given that Jetconnect pilots fly on B737 operated by QAL, they must hold a type rating for the B737.

#### *TACM*

[130] Even if an experienced pilot had a B737 type rating plus 20 years of flying the B737 for say American Airlines Inc. (one of the largest operators of B737s) that pilot could not fly a B737 operated by Qantas, due to the stringent requirements of the regulatory system. Specifically, CASR Part 121 required that experienced pilot would have to undertake and complete specific "initial and conversion training" to ensure safety and proficiency with the (new) employing airline.

[131] The relevant manual containing the initial and conversion training requirements for a candidate pilot holding an existing type-rating is called the TACM. The TACM is approved by CASA. It is an exposition-level document, which means it had written CASA approval.

[132] When issuing an AOC to an operator, CASA had to approve the operator's proposed exposition, which is one of the documents required under the CASR. Qantas'

exposition is a suite of documents, containing over 1,000 pages in several cooperative manuals, including the TACM.

### *Currency*

[133] Currency in the context of these proceedings includes licencing, ratings and endorsements on the ATPL as well as recency with regard to ‘time on type’.

### *Endorsement*

[134] CASA Approval was necessary to fly a B737, meaning to fly that aircraft type for the AOC holder, QAL. Without CASA Approval Mr Nicholas and Mr Rosser were unqualified to operate B737 commercial flights for Jetconnect, which was what they had been employed to do.

[135] The parties did not agree on what the reference to “endorsement” in clause 3.3 of the CA meant. The applicants said it referred to “a stamp” (meaning notation) in a pilot’s licence, which reflected a recognised qualification.

[136] Jetconnect said the reference to “endorsement training” in clause 3.3 of the CA included the “endorsement of obtaining CASA Approval”, because the parties had agreed that “any endorsement training (that is training to gain approval)” qualified for recovery by way of the training bond.

[137] The parties had not developed the term “CASA Approval” when clause 3.3 in the CA was entered into, because that shorthand was created specifically as a shorthand terms to be used in these proceedings.

[138] The reference to “endorsement” in clause 3.3 of the CA is to be read in a way that does not conflict with the minimum protections in the WPA. Accordingly, in order for the reference to endorsement to not fall within s 12A(1) of the WPA it had to result in some personally transferable benefit for the pilot other than the fact of employment.

[139] NZALPA’s interpretation of endorsement meaning a qualification noted on the pilot’s licence was preferred over Jetconnect’s wider interpretation. NZALPA’s interpretation covered training that resulted in a portable personal benefit to the pilot, which could be the subject of a training bond without being captured by s 12A(1) of the WPA.

**Are the Bond Agreements, or the recouping of the training costs under them, employment premiums, under s 12A of the WPA?**

*Overview*

[140] CASA Approval could lead to a type rating which was endorsed on the ATPL, which was a recognised qualification that could legitimately be subject to a training bond. Therefore a Bond Agreement covering that would not be an unlawful premium.

[141] However, such training would not always lead to a type rating, and where it did not, then there was no “endorsement training”, as provided for in the CA. In which case, a Bond Agreement which did not result in the pilot obtaining a qualification or individually portable benefit for the pilot (such as a type rating or other endorsement on the ATPL) would be a premium for employment, which was prohibited by s 12A of the WPA.

[142] CASA Approval arose from the operator’s own regulatory requirements (being part of running an airline business), so pilots were not required to pay those costs which are normally borne by the employer.

[143] The B737 type rating was not granted by Jetconnect, but rather formed part of the licensing regime maintained by the CASA, which was portable by the employee if they went to work for subsequent employers. Therefore, where a pilot had previously flown the B737, they would already have obtained the type rating (and endorsement) that was needed for their Jetconnect First Officer role.

[144] Mr Nicholas and Mr Rosser, despite holding the type rating for B737, were still required by law to undergo additional initial training by Jetconnect. That meant they could not fly the B737 for Jetconnect without having successfully completing this training, which was required in accordance with QAL’s TACM, as approved by CASA.

[145] An operator’s training and checking system is primarily for their own operations and it is designed to provide assurance and compliance with the operator’s own obligations to CASA, which will be unique to the operator’s own AOC and its exposition.

[146] CASA requires operators to provide pilots with operator specific initial and recurrent training, whether the pilot holds the type rating or not. Another CASA

operator cannot look to the training Jetconnect provided Mr Nicholas and Mr Rosser to establish 'a course of training' that was recognised for its own purposes. Accordingly, the training that was covered by the Bond Agreements was not portable to a future employer.

[147] Completion of initial training requirements set by CASA in accordance with CASR arose from the regulatory obligations Jetconnect had, and therefore did not provide a portable benefit to the Jetconnect employee pilot, as it simply resulted in them being legally authorised to fly the B737 for Jetconnect. That legal authorisation was also limited to their employment by Jetconnect.

[148] Any training related benefits obtained by pilots who already held the type rating/endorsement on the B737 from ground school, flight simulators and line training on the B737 aircraft were therefore the normal benefits of obtaining employment with Jetconnect.

[149] Other than holding a type or class rating for the specific aircraft, experience is generally recognised by flight time (measured in hours) on that type or class of aircraft. However, currency and Jetconnect's training records did not provide a portable benefit to an individual Jetconnect pilot that arose other than from their employment.

[150] Currency was obtained in the course of pilots' normal work duties (similar to job experience generally) by all pilots through their general flight operations. Pilots who already had the B737 endorsement would generally have amassed experience flying the B737.

[151] In the case of Mr Nicholas and Mr Rosser, their flying hours on the B737 were extensive, so the additional 50 or so flight hours on the B737 they obtained during their Jetconnect training likely had nil or negligible effect on their future employability. The evidence did not establish that a pilot with 50 more flying hours would be employed over another pilot with 50 less flying hours, because of the number of variables that were considered as part of the usual recruitment process.

[152] Pilots are not employed solely on the basis of total flying hours. Examples were given to the Authority of pilots having many hundreds of hours of flying time being rejected in favour of those with considerably less flying hours, because the pilot with less flying hours was seen as being a better fit for the airline.

[153] The approximate 50 hours flying hours Mr Nicholas and Mr Rosser had to complete as part of their initial training before they were legally permitted to fly for Jetconnect under QAL's AOC would still have to be undertaken by them again if/when they were employed by a different employer to fly under a different operator's AOC.

[154] Because CASA imposed a mandatory requirement on Jetconnect to create and maintain training records, Jetconnect could not pass on the costs of doing so to pilots who held the B737 type rating just because they had been employed for less than three years. CASA had already placed that legal and regulatory obligation upon Jetconnect, and based on the evidence the Authority heard, all other employers bore these costs as part of the normal costs associated with running an airline and employing pilots.

[155] Requiring an individual Jetconnect pilot to pay for initial training when they already had the required type rating (B737) for the aircraft Jetconnect had employed them to fly, resulted in Jetconnect effectively transferring the obligations it had under CASA and CASR as an employer on to the pilots it had employed if they left its employ within three years.

#### *Industry practice*

[156] The evidence of the applicants and their witnesses was that the bonding of pilots to cover an operator's regulatory costs was unheard of, as such costs were ordinarily borne by an employer as part of the costs of running its business. In accordance with *Tech 5*, that is an indication of a premium for employment.

[157] Jetconnect witnesses were unable to provide even one example worldwide where that had occurred. However, training bonds for training by an operator that had resulted in a pilot obtaining a type rating was an accepted practice, so that was not the subject of any dispute.

#### *Were the Bond Agreements a condition of employment?*

[158] Jetconnect's bond practices were not a regulatory condition, but had been imposed by Jetconnect as a condition of employment by it to address the problem that too many pilots were leaving after a short period of employment.

[159] The offer of conditional employment Jetconnect made to Mr Nicholas and Mr Rosser expressly recorded that their agreement to repay a First Officer training bond

was a condition of obtaining employment. Had the two pilots not agreed to enter into a Bond Agreement, then they would not have been employed. The first limb of the *Holman* test was therefore met.<sup>17</sup>

*Relevant facts*

[160] Whether a premium has been sought or received involved an intensely fact-specific inquiry. The following facts were relevant to the Authority's determination of whether the Bond Agreements amounted to a premium in accordance with s 12A(1) of the WPA:

- (a) Mr Nicholas and Mr Rosser were not required to pay upfront for the initial training Jetconnect gave them. They only had to reimburse part of their training costs (capped at \$37,000.00) on a pro-rata basis if their employment ended within 36 months. They were also paid a salary while they underwent their training, which was a condition of their offer of conditional employment.
- (b) Mr Nicholas and Mr Rosser held the required type rating that enabled them to fly B737s commercially, subject to them having undergone the required airline specific training that CASA Approval required.
- (c) The CASA Approval process therefore required Mr Nicholas and Mr Rosser to undergo additional training beyond the qualifications they already held or endorsements they already had recorded on their ATPLs.
- (d) The obtaining of CASA Approval was a pre-requisite for employment as a pilot by Jetconnect to operate commercial flights on a B737 aircraft operated by the AOC holder, QAL.
- (e) In order to obtain CASA Approval, Mr Nicholas and Mr Rosser had to successfully complete the QAL training set out in the TACM which CASA had approved. This consisted of Ground School, Flight Simulators and Line Training which was specific to Jetconnect B737 aircraft and other training that was specific to the Qantas Group.
- (f) The initial training Mr Nicholas and Mr Rosser received that had resulted in CASA Approval to fly Jetconnect's B737 was specific to

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<sup>17</sup> *Holman*, above n3.

Jetconnect aircraft. When Mr Nicholas and Mr Rosser left Jetconnect and became employed by another airline they could not transfer the CASA Approval they had obtained via their Jetconnect initial training or employment to their new employer. Therefore they still had to obtain CASA Approval again (from the start) to fly on aircraft operated under the AOC holder of the new airline operator, being their new employer.

- (g) In Mr Nicholas' case, he had to comply with Air NZ's manual suite. That included the training paths CASA had approved in Air NZ's TACM which was a prerequisite for its pilots being able to fly commercially under Air NZ's AOC. The same was true for Mr Rosser, but as applied to Virgin Australia, and the TACM of its AOC holder.
- (h) Jetconnect's assertion that Mr Nicholas and Mr Rosser would be able to undertake "significantly abbreviated training schedule" was not supported by the evidence, so was not accepted by the Authority. To the contrary, the evidence established that each airline had their own way of doing things on their own aircraft and in compliance with their own TACM, group policies and procedures. There was likely to be no (or at best minimal) reduction in the training Mr Nicholas and Mr Rosser needed to complete in order to obtain CASA Approval with any new airlines they worked for.
- (i) CASA Approval did not result in Mr Nicholas or Mr Rosser obtaining any associated benefits that would enhance their prospects of potential employment beyond the benefit of obtaining employment under the QAL AOC. The fact that the training permitted Mr Nicholas and Mr Rosser to lawfully fly as First Officers for Jetconnect was not a benefit that was distinct from them obtaining (and retaining) employment by Jetconnect in their First Officer roles.
- (j) The CASA Approval Mr Nicholas and Mr Rosser obtained as a result of the initial training Jetconnect provided them was not a personal benefit because it was non-transferable. It was a regulatory requirement of their employment by Jetconnect only, so it was only relevant to that specific employment.

- (k) The training Jetconnect provided Mr Nicholas and Mr Rosser was a normal benefit of being employed by Jetconnect, because it was specific to Jetconnect and Qantas Group pilots.
- (l) CASA approved requirements for the training and checking of all pilots that must be conducted before a pilot can fly commercially for the Qantas group. Operating an aircraft commercially for Jetconnect without having met those training requirements would be illegal. Mr Nicholas, Mr Rosser and Jetconnect would therefore have committed an offence had either pilot flown Jetconnect's B737 commercially without having successfully completed Jetconnect's initial training.
- (m) Jetconnect's submission that Mr Nicholas and Mr Rosser therefore obtained a personal benefit because completing Jetconnect's initial training meant they avoided committing an offence was not accepted. Ensuring pilots had obtained the CASA necessary approval was simply part of Jetconnect's regulatory obligations.
- (n) CASA Approval was a regulatory matter, so it did result in a recognised qualification or an endorsement on the ATPL. Nor did it confer a qualification on Mr Nicholas or Mr Rosser that would be recognised as a benefit by other future employers.
- (o) CASA Approval and the associated "currency" pilots gained by being employed by Jetconnect did not benefit Mr Nicholas or Mr Rosser personally. That is, it did not enhance their prospects of potential employment with other airlines, including by operators of B737s, in any way other than the normal recognition by the marketplace that they had previously been employed by other airlines to fly B737s.
- (p) The training bond did not result in Mr Nicholas or Mr Rosser paying for any benefit that they could take with them, as Mr Holman had in the *Holman* case. The only benefit these two pilots obtained was the legal authorisation to have work assigned to them by Jetconnect so they could do the job they had been employed to do.
- (q) There was no connection between the training Jetconnect provided and the Bond Agreement other than the wage/work bargain.

*Did the Bond Agreements benefit Mr Nicholas and Mr Rosser in any way apart from obtaining employment with Jetconnect?*

[161] The second limb of the premium test in *Holman* required the Authority to assess to what extent (if any) the Bond Agreement had resulted in Mr Nicholas and Mr Rosser receiving a benefit other than obtaining employment. This required the Authority to identify any personally transferable benefits they obtained independently of their employment.

[162] Ms Robinson said the training required for CASA Approval was a “permanent and portable benefit” as it had involved approximately 50 hours of flying time (both simulator and on aircraft) and it showed proficiency (noting a pilot could be current but not proficient). She therefore considered the training had made Mr Nicholas and Mr Rosser more attractive candidates for having flown Qantas B737s than they would have been had they not flown since being made redundant by Virgin Airlines in April 2020.

[163] Ms Robinson’s evidence was that Mr Nicholas and Mr Rosser obtained a transferrable personal benefit from the training Jetconnect had provided them because “being current is often a minimum requirement to advance a candidate in the recruitment process.” She based that on her experience of pilots who were not current or who had lost currency (as many pilots did due to the Covid-19 pandemic) who had found it difficult to meet minimum requirements for application or to be successful in securing roles on jet with commercial airlines.

[164] Ms Robinson said that in her experience Mr Nicholas and Mr Rosser would have been significantly more attractive candidates due to having been employed by Jetconnect and flown B737s for Qantas than if they had not flown since April 2020. She therefore described the flying the two pilots had been able to do due to Jetconnect’s initial training of them as “an added and distinct benefit from their existing type-ratings” on the B737 aircraft.

[165] Jetconnect’s evidence that Mr Nicholas and Mr Rosser benefited by agreeing to repay the First Officer training costs was not accepted. The currency the two pilots obtained by working for Jetconnect was a normal part of their employment. Mr Nicholas and Mr Rosser had both paid to obtain their employment with Jetconnect, because they did not obtain a recognised qualification that was portable or a valuable benefit that could be used in their future employment.

[166] Because Mr Nicholas and Mr Rosser already held the B737 type rating there was no mutuality of benefits, because the benefit flowed only one way, to Jetconnect. Mr Nicholas and Mr Rosser did not retain any permanent benefit which was of use to them in their future employment. The only tangible benefit was their employment by Jetconnect which enabled them to gain work experience in terms of flying hours.

[167] The initial training Jetconnect funded for Mr Nicholas and Mr Rosser was not transferrable. The evidence did not support Jetconnect's claim in the ASiR that any training Mr Nicholas or Mr Rosser did for a new employer would result in a "significantly abbreviated training schedule" because they had completed Jetconnect's First Officer initial training. To the contrary.

[168] Both pilots obtained new employment without their Jetconnect funded initial training having any effect on the training requirements of their new employers. Prior to their employment by Jetconnect, Mr Nicholas and Mr Rosser both previously worked for Virgin Australia on the B737, which meant they would have obtained the necessary CASA Approval in their previous employment.

[169] However, that did not result in Jetconnect giving Mr Nicholas or Mr Rosser "significantly abbreviated training" to obtain the CASA Approval required under the QAL AOC. They did the same training other Qantas pilots who held the B737 type rating did.

[170] The sole purpose of the initial training was to enable Jetconnect to meet its mandated TACM regulatory obligations, so it was Jetconnect that had benefited from funding, and bonding, of its First Officer initial training costs.

[171] Neither Mr Nicholas nor Mr Rosser obtained any benefits that were separate from the normal benefits associated with their employment. There was nothing they could take with them, such as a recognised qualification. The training they had done, which was covered by the Bond Agreements, did not provide any ongoing benefit to Mr Nicholas and Mr Rosser after they had left Jetconnect. It was not transferable because it was specific to B737, that were being operated under the QAL AOC.

[172] A different airline that employed Mr Nicholas or Mr Rosser in Australia would still have to demonstrate to CASA (or the applicable regulator for airlines outside Australia) that the pilots it employed met the applicable regulatory requirements/obligations. The fact that Jetconnect via its initial training had established

that, did not absolve another airline from also having to do that when they employed these two pilots.

[173] Mr Nicholas and Mr Rosser had both had a break from flying due to the Covid-19 pandemic, so they needed training to restore them to currency on the B737, but that would have been required regardless of which airline they worked for. Each airline's approach to that would have been different. No other airlines charged pilots who already held the applicable type rating for that.

[174] When Mr Nicholas left Jetconnect to work for Air NZ, he did not have to show his Jetconnect training records and the number of hours he had flown for Jetconnect was not a factor in his recruitment or employment. He also had to undergo similar initial training to what he had already done with Jetconnect that was funded by Air NZ to be able to fly aircraft that fell under Air NZ's AOC. Air NZ did not require a bond from him for that.

[175] Mr Rosser returned to work for Virgin Australia. Again, his Jetconnect First Officer training was irrelevant to his employment as was the number of hours he had flown during his initial training by Jetconnect. Virgin Australia did not require a bond from Mr Rosser for that.

[176] The evidence established that airlines have different requirements regarding the level of experience (being the total number of hours they require pilots to have flown), or other skills they want prospective job applicants to have. Changing market conditions result in volatility regarding what was required by a particular airline at any given time. When there is a surplus of pilots a higher number of minimum flying hours may be required with the converse also being true.

[177] The key difference between type rating and currency is that the number of hours an airline will look for a pilot to have achieved before they are considered for employment fluctuates. Airlines also usually assess a potential candidate against a matrix of factors, which means that the pilot who has flown the most hours will not necessarily be employed ahead of a pilot with less hours flying time. Specific examples of that were given to the Authority by witnesses at the investigation meeting.

[178] In terms of a potential new employer, the airline was likely to be interested in Mr Nicholas' and Mr Rosser's logbooks, licence, instrument rating and the number of hours flown. The specifics of the training they had done with Jetconnect would not be

relevant, because the new employer airline would have to provide its own training to pilots it employed to ensure it met its own regulatory requirements.

[179] Every aircraft operator employing pilots has a duty to provide certain training to their pilots before those pilots fly the operator's aircraft, regardless of whether a pilot holds the relevant qualifications for the aircraft they have been employed to fly.

[180] A pilot's "qualification" consists of their ATPL licence and the various ratings they have had endorsed on it or in their logbook. Mr Nicholas and Mr Rosser both received their ATPL and type rating before they were employed by Jetconnect.

[181] These qualifications were transferable personal benefits, because the pilots could use them in any future employment. The change in their employment from Virgin NZ to Jetconnect was an example of that. Even though both pilots had not been flying commercially due to Covid-19 they retained these qualifications.

[182] QAL's documentation shows that its requirements for the intake of pilots are limited to holding an ATPL (or CPL), an instrument rating, a type rating and a current check.

[183] Given the time that had elapsed between when Mr Nicholas and Mr Rosser left their employment by Virgin NZ and when they were employed by Jetconnect, they would not have had a valid (current) check at that point. However, holding a valid check is not a matter of qualification, but is rather a function of the recurrent checking that is carried out for all pilots during the course of their career, in compliance with CASR 121.570.

*Who did the Bond Agreements benefit?*

[184] The reality of the situation was that the Bond Agreements did not result in a mutuality of benefits to both parties. Jetconnect did not get a better qualified pilot as the two pilots already had the qualifications and licence endorsements they needed for their First Officer role.

[185] What did occur was that the Bond Agreement allowed Jetconnect to claw back the regulatory costs it had incurred for the initial training that it was legally required to provide to all new pilots in order to comply with QAL's AOC.

[186] Accordingly, Jetconnect solely benefited from the training bond because it was able to recoup training costs it had incurred for a pilot who had left its employment without having completed three years' continuous work for it.

[187] The benefit of the training bond therefore runs one way, namely to Jetconnect only. The flying hours Mr Nicholas and Mr Rosser gained were a natural consequence of their employment as commercial pilots, so did not arise from a recognised qualification or transferable benefit they should have paid for. Jetconnect benefited because it generated revenue from the two pilots flying its B737s.

*Did Jetconnect seek or receive a premium?*

[188] Jetconnect sought and/or received a premium, in accordance with s 12A(1) of the WPA, as per the Full Employment Court's decision in *Tech 5*, because it:

- (a) Made entering the Bond Agreement a condition of employment;
- (b) Included a recovery mechanism that permitted it to recoup the bond from the two pilots' wages and/or final pay; and
- (c) Required Mr Nicholas to enter into a Repayment Agreement.

*Finding*

[189] The training bond Jetconnect sought and/or received from Mr Nicholas and Mr Rosser was a premium for employment, in accordance with s 12A(1) of the WPA.

**Has Jetconnect breached clause 3.3 of the CA by requiring Mr Nicholas and/or Mr Rosser to enter into a training bond as a condition of their employment?**

[190] There was no dispute that when a pilot comes to Jetconnect without the relevant type rating there is a proper connection between the offer of employment (with the associated new type rating) and the reason Jetconnect requires the bond.

[191] In such circumstances, Jetconnect provides the pilot with a recognised qualification that will be endorsed on their pilot's licence, demonstrating their competence with a particular aircraft type that will be visible to and noted by other operators should the pilot choose to apply for employment elsewhere.

[192] However, the situation is different where the pilot does not receive the type rating, or an ATPL or some other kind of endorsement in their licence (making it

transferable and therefore visible to other employers) from the training Jetconnect has provided and paid for.

[193] Where the type rating or other endorsement has been entered on the pilot's licence prior to their employment by Jetconnect, then the training costs Jetconnect incurs do not result in the pilot obtaining a recognised qualification or transferable personal benefit. This training is a regulatory cost that would normally be borne by the employer.

[194] Clause 3.3 of the CA permits Jetconnect to enter into a training bond to recover some of the actual training costs from an employee who obtained a qualification that was endorsed on their licence, such as a type rating, from the training Jetconnect funded if that employee did not complete three years of continuous employment. A training bond entered into in these circumstances was not a premium, so did not breach the WPA.

[195] By requiring Mr Nicholas and Mr Rosser to enter into Bond Agreements as a condition of their employment, that required them to repay Jetconnect's training costs if their employment ended within three years, Jetconnect had sought, and in the case of Mr Nicholas received, a premium for employment, which was prohibited by s 12A(1) of the WPA. It was unclear whether any premium had actually been received by Jetconnect from Mr Rosser's final pay for his initial training costs.

[196] Jetconnect implemented clause 3.3 of the CA regarding Mr Nicholas and Mr Rosser in a way that breached the WPA, because it had effectively sought and/or received a premium for employment from them, in breach of s 12A(1) of the WPA.

[197] Accordingly, Jetconnect's interpretation, application and operation of clause 3.3, regarding pilots who already held the B7378 type rating prior to being employed by Jetconnect, breached the CA.

### **Can Jetconnect recover the outstanding bond amount(s)?**

[198] Because the Bond Agreements for Mr Nicholas and Mr Rosser breached the minimum code protections in the WPA, they were unenforceable. Accordingly, Jetconnect cannot recoup or recover the training bonds Mr Nicholas and Mr Rosser entered into as a contractual term of their employment.

**Can Mr Nicholas and/or Mr Rosser recover from Jetconnect the bond repayments they have made?**

[199] Mr Nicholas is entitled under s 12A(2) of the WPA to recover the premium he paid Jetconnect pursuant to the Bond Agreement and Repayment Agreement he entered into. Contradictory information has been provided to the Authority about the exact amount Mr Nicholas has paid Jetconnect.

[200] Contradictory information was also provided to the Authority about what if any premium Mr Rosser has actually paid. Jetconnect said he had not paid anything, but it also did not dispute Mr Rosser's evidence that it had deducted \$5,155.55 from his final pay as part repayment under the Bond Agreement. The ASoP recorded Mr Rosser's outstanding bond as \$36,427.88 while other documentation recorded the amount owed was \$12,2434.72.

[201] If \$5,155.55 has been paid (via payroll deduction) by Mr Rosser to Jetconnect in reliance of the Bond Agreement, then that payment was an unlawful employment premium, which pursuant to s 12A(2) of the WPA he can recover from Jetconnect.

[202] Because of the lack of clarity about what Mr Nicholas and Mr Rosser have actually paid to Jetconnect as a premium for their employment, the Authority has not fixed that amount in this determination.

[203] Instead, within 14 days of the date of this determination, the Authority directs the parties to attempt to agree on the total amount of premium Mr Nicholas and Mr Rosser have actually paid Jetconnect. The amount of the premium the two pilots have each actually already paid is the amount they are entitled to individually recover from Jetconnect.

[204] If agreement on the amount of premium Mr Nicholas and Mr Rosser have already paid cannot be reached, then within 21 days of the date of this determination the parties can apply to the Authority to fix the amount of premium Mr Nicholas and Mr Rosser are each to be repaid by Jetconnect pursuant to s 12A(2) of the WPA. Any such application must be accompanied by affidavit evidence which attaches the relevant documentation as exhibits.

**Should interest be awarded on the bond amounts to be repaid?**

[205] By seeking and obtaining an employment premium from Mr Nicholas, Jetconnect deprived him of the use of his own money. Mr Nicholas should therefore be awarded interest to reflect that. If Mr Rosser had \$5,155.55 of the employment premium deducted from his final pay, then that same reasoning also applies to him.

[206] Accordingly, Jetconnect is ordered to pay Mr Nicholas and Mr Rosser (if he has actually paid a premium) interest on the amount of the premium they have paid. Interest is to run from the date their respective employment ended until any premium they have already paid Jetconnect (plus the interest they have been awarded in this determination) has been repaid to them in full.

[207] Within 14 days of the date of this determination, the Authority directs the parties to attempt to agree on the amount of interest Mr Nicholas and Mr Rosser have been awarded in this determination. If agreement cannot be reached, then within 21 days of the date of this determination the parties can apply to the Authority to fix the amount of interest owed.

[208] Interest is to be calculated using the Civil Debit Interest Calculator on the Ministry of Justice website.

**Does the costs presumption, that applies to a dispute about the interpretation of a collective agreement, apply to this matter?**

[209] This matter involved a dispute about the interpretation, application or operation of clause 3.3 of the CA. The presumption that costs should lie where they fall therefore applies to these proceedings.

[210] Accordingly, the parties should bear their own costs, so although the applicants were successful no costs are awarded.

Rachel Larmer  
Member of the Employment Relations Authority