IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2025] NZEmpC 136
EMPC 167/2024
EMPC 264/2024

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
BETWEEN	PHILIP TIGHE-UMBERS Plaintiff
AND	JETCONNECT LIMITED Defendant

Hearing: 11-12 March 2025
(Heard at Auckland)

Appearances: R McCabe, counsel for plaintiff
M O'Brien and J Plunket, counsel for defendant

Judgment: 4 July 2025

JUDGMENT OF JUDGE M S KING

---

[1] In 2005, Captain Phillip Tighe-Umbers commenced employment with Jetconnect Limited as a pilot. Captain Tighe-Umbers was dismissed from his employment on 24 April 2022 for non-compliance with the COVID-19 Public Health Response (Vaccinations) Order 2021 (the vaccination order). Captain Tighe-Umbers unsuccessfully pursued a personal grievance claim in the Employment Relations Authority (the Authority) claiming that he was unjustifiably dismissed by Jetconnect.

[2] Captain Tighe-Umbers challenges the Authority's determinations.[1] He says that he was unlawfully dismissed from his employment with Jetconnect and that Jetconnect breached the terms and conditions of his employment. He claims that Jetconnect breached the notice period provision in the parties' employment agreement. He also claims it breached sch 3A cl 3(4) of the Employment Relations Act 2000 (the Act) when it failed to consider his proposal and put him on leave without pay (LWOP) as an alternative to dismissal. He also claims that sch 3A is an implied term of his employment agreement and if it is breached, so too are terms of his employment.

Captain Tighe-Umbers was employed as a pilot

[3] Jetconnect supplies pilots and cabin crew to Qantas Airways Ltd (QAL) to operate some of its commercial trans-Tasman flights that QAL operates out of Auckland International Airport.

[4] Captain Tighe-Umbers' terms and conditions of employment were contained in a collective employment agreement between the New Zealand Airline Pilots Association IUOW Inc (NZALPA) and Jetconnect Limited dated 10 August 2021–9 August 2024 (the CEA).

[5] The COVID-19 pandemic significantly impacted the airline industry with border closures and a near cessation of travel.

[6] On 30 March 2020, the CEA was varied to place NZALPA members on special LWOP until 31 May 2020, but the term was ultimately extended until 6 December 2021.

Impact of vaccination order and role requirements

[7] At midnight on 30 April 2021, the vaccination order came into force. This required certain workers to be vaccinated against COVID-19.

---

1 *Tighe-Umbers v Jetconnect Ltd* [2024] NZERA 234 (substantive); *Tighe-Umbers v Jetconnect Ltd* [2024] NZERA 406 (costs).

[8] On 14 July 2021, the vaccination order was amended to include "aircrew members" in the groups of persons whose work was affected by the vaccination order. The vaccination order prohibited affected persons from carrying out certain work unless they were vaccinated or exempt from vaccination. Specifically, the vaccination order required affected persons to receive their first COVID-19 vaccine dose by the close of 30 September 2021, and their second COVID-19 vaccine dose no later than 35 days after their first.

[9] Captain Tighe-Umbers was an affected person under the vaccination order. He was required to be vaccinated to perform his role as a pilot of Jetconnect.

Consultation process undertaken

[10] Between August and November 2021, Jetconnect communicated with Captain Tighe-Umbers about his non-vaccinated status and the requirement for him to be vaccinated to carry out work and comply with the vaccination order.

[11] During this period, Captain Tighe-Umbers provided a medical certificate, which advised that he had previously experienced adverse effects with multiple vaccinations, and as a result his doctor had considered it prudent to excuse him from being vaccinated. Communication between Captain Tighe-Umbers' representative and Jetconnect explored whether it would apply on Captain Tighe-Umbers' behalf for a medical exemption from the vaccination order. However, ultimately no exemption was sought.

[12] On 3 November 2021, Jetconnect wrote to Captain Tighe-Umbers informing him that as the variation to the CEA was ending, it was recalling him to active employment effective 6 December 2021. The letter advised Captain Tighe-Umbers that he was required to have received at least the first dose of the COVID-19 vaccination by this date on the grounds that:

(a) The vaccination order required his role to be performed by a vaccinated person.

(b) Australia's Victorian Government issued a COVID-19 Vaccination direction which only allowed vaccinated non-citizens to enter Melbourne. Jetconnect's recurrency training, which Captain Tighe-Umbers was required to attend, was being conducted in Melbourne and was not available in New Zealand.

(c) Auckland International Airport Limited Airport Worker Rules were being amended so as to mandate vaccination for all airside workers, including pilots.

[13] Captain Tighe-Umbers declined to be vaccinated.

[14] Between November and December 2021, Jetconnect communicated with Captain Tighe-Umbers and his lawyer, Richard McCabe, about his vaccination status and the impact this had on his compliance with the vaccination order and his ability to perform his role. On 6 December 2021, Jetconnect proposed to terminate his employment. It arranged to meet with Captain Tighe-Umbers and Mr McCabe on 13 December 2021 and 17 January 2022 to receive his responses to the proposal in person. During these meetings Captain Tighe-Umbers queried whether Jetconnect could place him on short-term LWOP as an alternative to termination. Jetconnect advised it was not in a position to approve any period of LWOP due to its current resourcing requirements for operation.

[15] On 24 January 2022, Jetconnect gave Captain Tighe-Umbers three months' notice of the termination of his employment and stated that the termination would take effect on 24 April 2022.

[16] On 31 March 2022, the Qantas Group implemented a COVID-19 vaccination policy, which applied to all of its business units within New Zealand, including Jetconnect. The policy required all roles within the Qantas Group to be performed by a vaccinated person.

[17] On 20 April 2022, Captain Tighe-Umbers wrote to Jetconnect and advised that insufficient notice had been given and requested fresh notice. On 22 April 2022 Jetconnect refused. Captain Tighe-Umbers' employment terminated on 24 April 2022.

[18] On 6 July 2022, the Australian border restrictions that prevented Captain Tighe-Umbers from flying to Australia to receive recurrency training on a simulator were rescinded.

[19] On 1 September 2022, the vaccination order which made it unlawful for Captain Tighe-Umbers to perform his role without being vaccinated was rescinded.

[20] In March 2023, the QAL Group rescinded its vaccination policy for its New Zealand based employees.

Jetconnect gave lawful notice of termination

[21] The notice period that parties must give when terminating the employment relationship is set out in the CEA at cl 3.4.1, which provides:

> Three (3) months written notice of termination of employment is required, except for a Pilot within their Probation period where two weeks applies, but dismissal without notice may occur for serious misconduct. However, pilots employed prior to the ratification of this agreement may only give two (2) months written notice of termination of employment except that Pilots accepting a Command Upgrade or appointment to a Standards Position which was advertised after ratification of this agreement will thereafter also be subject to the three (3) month notice period.

[22] The principles relating to the interpretation of contracts generally apply to employment agreements.[2] The proper approach to interpretation is an objective one, the aim being to ascertain the meaning the document would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties in the situation in which they were in at the time of the contract.[3]

---

2 *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948, [2017] ERNZ 428.

3 *Firm PI 1 Ltd v Zurich Australian Insurance* Ltd [2014] NZSC 147, [2015] 1 NZLR 432; affirmed in *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.

[23] The parties accept that Jetconnect wrote to Captain Tighe-Umbers on 24 January 2022 and in that letter it stated:

> This letter is formal notice that your employment is terminated on three months' notice and will take effect on 24 April 2022.

Jetconnect paid Captain Tighe-Umbers up to and including the 24 April 2022.

[24] Both parties accepted the Court's analysis in *Pact Group v Sherridan*,[4] which provides that the date Jetconnect gave notice (24 January 2022) is not considered as the day the notice commenced, because it is not a full day of the month. It is accepted on this basis that the notice period began to run on 25 January 2022. Where the parties depart is whether the three months' notice period ends on 24 April 2022 or 25 April 2022. If the latter is correct, Jetconnect's notice period would be one day short.

[25] Captain Tighe-Umbers submits that Jetconnect's notice period was a day short. He submits that three clear months' notice is required unless the CEA provides otherwise. He acknowledges that a "month" is not defined in the CEA, but states that it is used numerous times throughout the CEA. He then observes that there is only one clause in the CEA which refers to a "calendar month"[5] and one other clause that refers to "twelve weeks".[6] He submits that those two clauses can be set apart because the language is intentional and intended to give the advantage of the different time period to the pilots. Captain Tighe-Umbers submits that means the generic use of the word month in other clauses of the CEA should be interpreted to mean a clear month. Therefore, "three-months" in cl 3.4.1 means three clear months. He submits that aligns with the plain meaning of a "month", being the period up to and including the same date of the next month.

[26] A number of time periods are used in the CEA such as 28 days,[7] the reference to consecutive days,[8] and five weeks – being the equivalent of 25 days' annual leave.[9]

---

4 *Pact v Sherridan* [2023] ERNZ 1078, [2023] ERNZ 1078 at [45].
5 Clause 3.3.3(b) of the CEA, relating to the training bond period a pilot is bound by following training.
6 Clause 3.4.4 of the CEA, relating to the period of medical unfitness before a pilot can be considered for medical termination.
7 Clause 9.2.1 of the CEA, relating to a pilot's roster period.
8 Clause 8.3.3.1 and .2 of the CEA, relating to pilot rest requirements.
9 Clause 10.1.2 of the CEA, relating to a pilot's entitlement to annual leave.

Captain Tighe-Umbers does not address how these differences affect the interpretation of the meaning of the word "month" in the CEA. I am not persuaded that the use of different time periods from two selected clauses within the CEA could reasonably lead to an interpretation that the word month in other parts of the CEA must be interpreted to mean clear months. That is particularly so given that the CEA uses a number of different time periods throughout, depending upon the terms and conditions they are dealing with; if the CEA intended the notice period to be three clear months, I would have expected it to clearly state this was the case.

[27] Jetconnect says that the CEA is clear and unambiguous, it required three months' notice to be given. Jetconnect gave notice on the 24 January 2022. The three months' notice period began on 25 January and ran as follows:

(a) 25 January to 24 February 2022 (first month);

(b) 25 February to 24 March 2022 (second month); and

(c) 25 March to 24 April 2022 (third month).

[28] It says that the final day of the three months' notice period is 24 April 2022. The CEA does not require three clear months' notice to be given. If it did it would say so.

[29] Jetconnect submits that the Legislation Act 2019 has direct application on the interpretation of time periods with relevance to both statutory time limits and those contained in employment agreements. In particular, s 56 states:

> **56 Calculating periods of months (except for commencement of legislation)**
>
> (1) A reference to 1 or more months in legislation is a reference to a period calculated as follows:
>
> (a) the period starts at the start of the relevant day in the month; and
>
> (b) the relevant number of months must then be counted to find the ending month; and
>
> (c) the period ends immediately before the corresponding day in the ending month or (if there is no such day) at the close of the last day of the ending month.

[30] There is no reference in the Legislation Act to clear months.

[31] The Legislation Act has been directly applied by the Authority in *Coe v Taranaki Truck Dismantlers Ltd*.[10] The Authority considered and applied the Legislation Act when considering the 90-day timeframe for raising a personal grievance as set out in the Act and in the parties' employment agreement. Captain Tighe-Umbers submits that the Legislation Act's purpose is to interpret legislation and not the application or operation of employment agreements.

[32] The Court in *Pact Group v Sheridan* observed that the Legislation Act could be a useful interpretative tool, but the counsel and the Court considered it was not necessary to consider based on the facts of that case.[11] I accept that the Legislation Act is a useful objective tool to assist the Court in ascertaining the meaning of "three months" in cl 3.4.1 of the CEA, particularly in circumstances where the parties cannot agree on its meaning.

[33] Accordingly, I prefer Jetconnect's analysis that the three months' notice period commenced on 25 January 2022 and ended on 24 April 2022.

[34] The parties have raised other matters which I do not consider persuasive. Jetconnect had sought to rely on anonymous resignation letters where other employees were given three months' notice of resignation consistent with its interpretation. I consider these letters can carry little weight; they are anonymised, and little is known of their circumstances, which makes it difficult to test their veracity.

[35] Captain Tighe-Umbers submits that cl 3.4.1 of the CEA has since been amended to change the time period from three months to 12 weeks' notice. He submits that the change is evidence of the parties intending the notice period to be three clear months. I am not persuaded by this argument; there is no evidence before me on the parties' reasons for the amendment. It could be just as likely that the parties amended the wording to provide clarity and prevent costly litigation on the meaning of the clause, as is currently the case.

---

10 *Coe v Taranaki Truck Dismantlers Ltd* [2023] NZERA 710.
11 *Pact Group v Sheridan* [2023] ERNZ 1078 at [49].

[36] For the reasons given above, Jetconnect gave the notice required under the CEA. This conclusion means it is not necessary to consider whether fresh notice should be given, or whether any failure to give clear notice, despite being advised of issues with its notice period, is a breach of the CEA and renders Captain Tighe-Umbers dismissal unjustifiable.

The relationship between sch 3A and s 103A

[37] Schedule 3A was enacted on 26 November 2021. It amended the Act to provide that an employer may terminate an employee's employment agreement (with paid notice) but only after all reasonable alternatives to termination have been exhausted.

> **3 Termination of employment agreement for failure to comply with relevant duties or determination**
>
> (1) This clause applies to the following employees:
>
> (a) an employee who has a duty imposed by or under the COVID-19 Public Health Response Act 2020 not to carry out work (however described) unless they are—
>
> (i) vaccinated; or
>
> (ii) required to undergo medical examination or testing for COVID-19; or
>
> (iii) otherwise permitted to perform the work under a COVID-19 order:
>
> (b) an employee whose employer has determined the employee must be vaccinated to carry out the work of the employee.
>
> (2) For the purposes of subclause (1)(b), the employer must give the employee reasonable written notice specifying the date (the **specified date**) by which the employee must be vaccinated in order to carry out the work of the employee.
>
> (3) If the employee is unable to comply with a duty referred to in subclause (1)(a) or a determination referred to in subclause (1)(b) because they fail to comply with the relevant requirements of the COVID-19 Public Health Response Act 2020 or a COVID-19 order, or they are not vaccinated by the specified date, their employer may terminate the employee's employment agreement by giving the employee the greater of—
>
> (a) 4 weeks' paid written notice of the termination:

(b) the paid notice period specified in the employee's terms and conditions of employment relating to termination of the agreement.

(4) Before giving a termination notice under subclause (3), the employer must ensure that all other reasonable alternatives that would not lead to termination of the employee's employment agreement have been exhausted.

(5) A termination notice given under subclause (3) is cancelled and is of no effect if, before the close of the period to which the notice relates, the employee becomes—

(a) vaccinated; or

(b) otherwise permitted to perform the work under a COVID-19 order.

[38] The parties accept that Captain Tighe-Umbers' vaccination status meant that he did not comply with the vaccination order. In these circumstances the parties accept that sch 3A cl 3 permitted Jetconnect to terminate his employment agreement by providing him three months' paid notice under the CEA.

[39] However, the parties dispute whether Jetconnect complied with the obligation under sch 3A cl 3(4), which required Jetconnect, before giving notice, to "ensure that all other reasonable alternatives that would not lead to termination… have been exhausted".

[40] Jetconnect submits that sch 3A cl 3(4) did not create a new and more stringent test on an employer to justify dismissal of an employee than under s 103A. It maintains that its decision to terminate Captain Tighe-Umbers' employment was what a fair and reasonable employer could have done in all the circumstances and complied with the requirements of s 103A of the Act. In particular:

(a) Captain Tighe-Umbers was prohibited by the vaccination order under the Auckland International Airport Limited Worker's Rules from performing his role as a pilot for Jetconnect.

(b) Jetconnect had several meetings with Captain Tighe-Umbers about the impact of his vaccination status on his ability to work. Captain Tighe-Umbers accepted that there were no viable options for an unvaccinated

person to work at Jetconnect. It submits that LWOP was not a reasonable alternative. It submits that if it was, it would not have been possible for any employee to which sch 3A applied to be justifiably dismissed during the period it was in force, because an employer could have allowed LWOP in all circumstances, other than where there was serious misconduct.

(c) It maintains that, throughout the relevant period, Captain Tighe-Umbers did not suggest his employment should not be terminated; his sole focus was on the adequacy of the amount of notice he was given. It says that it is only now, years after his termination, that Captain Tighe-Umbers has decided to challenge his termination on the grounds of sch 3A of the Act.

[41] Captain Tighe-Umbers submits that Jetconnect failed to comply with sch 3A cl 3(4). He says that LWOP was a reasonable alternative that was not considered, let alone exhausted, by Jetconnect before it moved to terminate his employment under sch 3A. He submits that Jetconnect's failure to comply with sch 3A is not what a fair and reasonable employer could have done in all the circumstances and renders his dismissal unjustifiable under s 103A.

Analysis

[42] The Court has considered the relationship between sch 3A and s 103A of the Act in *VMR v Civil Aviation Authority*.[12] In *VMR* the Court observed that the framework for considering terminations that occurred under sch 3A must be measured by the provisions of the Act as they stood at the time, including its emphasis on obligations to act in good faith. This obligation of good faith focuses on maintaining and preserving employment relationships rather than terminating them. In circumstances such as the present where an employee is facing termination due to their vaccination status, there was, prior to sch 3A being enacted, an active good faith obligation on an employer to constructively consider and consult on possible alternatives.

---

12 *VMR v Civil Aviation Authority* [2022] NZEmpC 5, [2022] ERNZ 22.

[43] The introduction of sch 3A provided employers with clarity of their ability to terminate an unvaccinated employee if the employee could not carry out work under a vaccination order, or because the employer determined the employee must be vaccinated under sch 3A cl 3(1)(b). Section 103A already required an employer in these circumstances to consider and consult on possible alternatives to termination; sch 3A made that obligation explicit. It clearly placed an obligation on an employer who was terminating an employee under sch 3A to ensure all other reasonable alternatives that would not lead to termination had been exhausted. While exhausted may seem like a high bar, the reality was that only reasonable alternatives needed to be exhausted, not every possible alternative, and clearly not those which were unreasonable. In effect, sch 3A cl 3(4) provided a clear direction to employers to ensure they considered all reasonable alternatives before termination; it did not create a more stringent test on an employer to justify a dismissal under s 103A.

Jetconnect's process leading up to termination

[44] Under the terms of the CEA variation, pilots had been on special LWOP for more than a year. In late October 2021 Jetconnect advised that the variation would come to an end, and it anticipated its operations would recommence in the next few months. Due to the length of their LWOP, pilots were required to undertake recurrency training before they could lawfully recommence flying. Jetconnect's capacity to retrain pilots was limited, as it only had a small number of simulator spaces in Melbourne available at any one time to train its pilots. This created a queue of pilots waiting to receive recurrency training. Training was offered to pilots in order of seniority. Captain Tighe-Umbers was one of Jetconnect's most senior pilots and was offered retraining first.

[45] On 3 November 2021, Jetconnect wrote to Captain Tighe-Umbers confirming the variation to the CEA was to be lifted on 6 December 2021 and that he was required to be vaccinated to comply with the vaccination order and to meet the requirements of his role.

[46] On 17 November 2021, Jetconnect wrote to Captain Tighe-Umbers advising that it had reviewed the Border Worker Testing Register and it indicated that he was

not vaccinated. Once again it advised that he was required to be vaccinated to meet the requirements of the vaccination order. Captain Tighe-Umbers was invited to meet with Jetconnect to discuss the impact of his vaccination status on his ability to return to work.

[47] On 6 December 2021, Jetconnect wrote to Captain Tighe-Umbers advising that his vaccination status meant he was not compliant with the requirements of the vaccination order and was unable to perform his role for Jetconnect. It advised that it was considering terminating his employment and that given its current resourcing levels it was not considering any LWOP arrangements. It stated that redeployment was not an option, as all roles in its organisational structure were required to be vaccinated under the vaccination order, and it was not aware of any redeployment opportunities within Jetconnect or the Qantas Group in New Zealand.

[48] On 13 December 2021, Captain Tighe-Umbers met with Jetconnect's representatives to discuss his vaccination status and its proposal to terminate his employment. Captain Tighe-Umbers referred to his 17 years of "clean, professional service" with Jetconnect and whether he could be put on short-term LWOP. He advised that he was open to any other suggestions. Jetconnect acknowledged that Captain Tighe-Umbers was a "great" employee, that he was one of the most senior pilots in the company. Jetconnect's representatives at the meeting advised Captain Tighe-Umbers that if he wanted Jetconnect to consider LWOP he would need to make a formal application. They then went on to say that all recent applications for LWOP had been declined based on resourcing levels. Under cross-examination, Jetconnect confirmed that its resourcing team manager had made it clear that any application for LWOP would not be granted. The representatives at the meeting with Captain Tighe-Umbers did not have any discretion to grant any application he may have made for LWOP.

[49] In an email dated 17 January 2022, Mr McCabe requested Jetconnect pause its process and postpone a meeting scheduled that day, where Jetconnect had advised it was intending to give its preliminary outcome of its process. Mr McCabe sought to pause the process to allow Captain Tighe-Umbers time to become vaccinated with the Novavax vaccine, which was about to become available in New Zealand. Mr McCabe

also observed that Jetconnect was not currently operating flights and requested that any decision to terminate be delayed until flying resumed. Jetconnect declined to pause its process or postpone its meeting.

[50] On 17 January 2022 Captain Tighe-Umbers met with Jetconnect's representatives to receive its preliminary outcome. During the meeting Captain Tighe-Umbers' lawyer, Mr McCabe, reiterated that Captain Tighe-Umbers may be willing to receive the Novavax vaccine but needed more information about the vaccine. He requested that any notice of termination be delayed until Jetconnect resumed its flying operations, and that, if notice was to be given, for it not to be paid out in lieu of Captain Tighe-Umbers working out the notice. That would keep the employment relationship alive during the notice period and give Captain Tighe-Umbers time to consider receiving the Novavax vaccine.

[51] In an email dated 18 January 2022, Mr McCabe once again reiterated the request for notice to be given as opposed to being paid in lieu, to give Captain Tighe-Umbers time to "enable him to become vaccinated (eg Novavax), to take advantage of other opportunities (eg apply for alternative duties if they become available) or otherwise keep the door open pending COVID-19 developments".

[52] On 24 January 2022, Jetconnect wrote to Captain Tighe-Umbers' giving him three months' notice of the termination of his employment. The letter confirmed that Captain Tighe-Umbers had advised that he was open to suggestions and that he had suggested short-term LWOP as an alternative to termination. However, the letter went on to say that no application for LWOP was made, and that nevertheless Jetconnect had advised Captain Tighe-Umbers during the 13 December 2021 meeting that, due to its current resourcing requirements, it was not in a position to approve any period of LWOP.

All other reasonable alternatives were not exhausted

[53] Jetconnect submits that LWOP was not a reasonable alternative to dismissal for two reasons. Firstly, because Captain Tighe-Umbers failed to apply for it. Secondly, because, despite the lack of an application by Captain Tighe-Umbers,

Jetconnect nevertheless did consider whether LWOP was a reasonable alternative and determined it was not due to its "current resourcing requirements".

[54] I do not consider the failure by Captain Tighe-Umbers to apply for LWOP to have any effect on Jetconnect's obligations under sch 3A cl 3(1)(b) to ensure all other reasonable alternatives to termination have been exhausted. The wording of sch 3A cl 3(4) places this obligation squarely on the employer and not Captain Tighe-Umbers. Further, Jetconnect were aware that Captain Tighe-Umbers wanted to explore LWOP as an alternative to dismissal. Captain Tighe-Umbers had raised whether Jetconnect would be open to the possibility of LWOP on a short-term basis repeatedly in his meetings with Jetconnect in December 2021 and January 2022, and in email communications from his representative.

[55] It is reasonable that Captain Tighe-Umbers did not formally apply for LWOP in the face of Jetconnect clearly and repeatedly conveying to him in meetings that it considered any application for LWOP would be unsuccessful. Jetconnect confirmed at the hearing that due to a companywide directive set by its resourcing team, no application for LWOP would have been granted, even if it was made. During the hearing Jetconnect confirmed that it did not grant LWOP to any unvaccinated pilot.

[56] In a letter dated 24 January 2022, Jetconnect wrote to Captain Tighe-Umbers giving him notice of his termination. It stated:

> Although no formal application for Leave Without Pay (LWOP) has been made, during the meeting it was confirmed that due to the current resourcing requirements for the Jetconnect operation, the Company was not in a position to approve any period of LWOP.

[57] Captain Tighe-Umbers submits that Jetconnect failed to consider LWOP as a reasonable alternative to dismissal. He submits granting him short-term LWOP would not have impacted on Jetconnect's resourcing requirements. Captain Tighe-Umbers submitted that if he was placed on LWOP, another more junior pilot would have taken his place at the front of the pilot training queue, and he would have effectively been moved to the back of the queue by agreement. At the time notice of termination was issued, Jetconnect's training resources were being used at full capacity to provide recurrency training for its existing pilots. It did not have the resources to train a new

pilot to take over Captain Tighe-Umbers' role during this period. This arrangement would have allowed Captain Tighe-Umbers to remain employed by Jetconnect for at least the period during which recurrency training was being undertaken. The evidence before the Court was that Jetconnect's training continued for more than five months after Jetconnect had terminated Captain Tighe-Umbers' employment.

[58] If Jetconnect had granted Captain Tighe-Umbers LWOP for the period while its resources were being fully utilised to train other pilots, that would have allowed him to remain employed by Jetconnect and provided him with additional time to explore whether he was prepared to receive the Novavax vaccine, which became available in New Zealand on 14 March 2022. It also would have otherwise kept the employment relationship alive through COVID-19 developments, until he was able to resume flying, and would have allowed time for redeployment options to have arisen in the changing COVID-19 landscape.

[59] Captain Tighe-Umbers observed that by 1 September 2022, when the vaccination order was lifted, and Australian border restrictions had then been removed, Jetconnect had not yet finished retraining its pilots. While the Court is cautious of having the benefit of hindsight, the COVID-19 pandemic was of a changing and developing nature. While it may have been unreasonable to predict that the vaccination order would have lifted by this point in time, it was not unreasonable to expect that, within a five-month period, there very well may have been developments which could have given rise to alternative duties, and which could have kept the employment relationship on foot.

[60] Further, Captain Tighe-Umbers submits that the assessment of whether LWOP was a reasonable alternative to termination does not appear to be based on any costs savings. The evidence during the hearing was that the cost to Jetconnect for training a new pilot to be type rated to fly its 737 aircrafts was significantly more than the cost of retraining Captain Tighe-Umbers, a senior pilot, to fly its aircrafts. Jetconnect also confirmed during the hearing that it is still hiring pilots as at the date of the hearing.

[61] In the circumstances, Jetconnect's company-wide position, that it would not grant LWOP due to its resourcing requirements, was an inflexible one, inconsistent

with its obligation under sch 3A to consider all other reasonable alternatives to termination. It is also inconsistent with the duty of good faith, which is focused on maintaining and preserving employment relationships. Such an approach prevented its representatives from considering whether it was reasonable in the circumstances for Captain Tighe-Umbers to be placed on LWOP while other, more junior pilots received training. LWOP, in these circumstances, would not have adversely affected Jetconnect's resourcing requirements, as Jetconnect's training resources were at full capacity retraining its existing pilot workforce. Moving Captain Tighe-Umbers from the beginning of the training queue to the end of the queue, while he sat on LWOP, would not have had a significant impact on Jetconnect's resourcing requirements. Further, the cost of retraining Captain Tighe-Umbers was significantly less than training a new pilot, and had his employment been preserved, Jetconnect would have saved training costs and resources. For these reasons, I find that, in these circumstances, a reasonable alternative to termination was offering to place Captain Tighe-Umbers on LWOP while Jetconnect retrained its existing pilot workforce.

[62] Jetconnect submitted that if the Court found that LWOP was a reasonable alternative to dismissal, it would have been almost impossible to dismiss anyone under sch 3A. I do not consider this submission to be persuasive. What is reasonable in any one situation depends on the circumstances at hand. Jetconnect relied on resourcing requirements to decline granting Captain Tighe-Umbers LWOP. For the reasons given above, the Court does not accept that in these circumstances there were any resourcing requirements which reasonably prevented Jetconnect from granting Captain Tighe-Umbers short-term LWOP. The circumstances in other employment situations that engaged sch 3A would have varied widely and may have rendered LWOP arrangements unreasonable in some instances. This is merely one example where a LWOP arrangement was reasonable.

[63] In summary, I have found that, in its decision to terminate Captain Tighe-Umbers, Jetconnect failed to ensure that all other reasonable alternatives to termination were exhausted, thereby breaching sch 3A cl 3(4). No fair and reasonable employer could have said it was not in a position to approve any period of LWOP in the above circumstances. Jetconnect's decision to refuse to grant Captain Tighe-Umbers LWOP and instead move to terminate his employment was unjustified.

[64] Captain Tighe-Umbers made an additional argument in support of his claim, specifically that sch 3A was an implied term and condition of his employment. Schedule 3A was a legislative test, imposing on employers the obligation to consider other reasonable alternatives to termination. Having found that Jetconnect breached sch 3A cl 3(4), I do not make a finding on whether it was an implied term of the terms and conditions of employment.[13]

The issue of remedies remains

[65] Following the conclusion of evidence, during closing submissions, Captain Tighe-Umbers sought leave to amend his statement of claim, to include seeking the remedy of reinstatement. The remedy had been mistakenly omitted by his counsel. Jetconnect objected on the grounds that it would be prejudiced if the Court were to grant leave at such a late stage of the proceedings. After hearing from the parties, a ruling was made that the Court would first determine the issue of liability. Depending on the Court's findings, it would then determine the application for leave and consider submissions on the issue of remedies. This matter is likely to sound when the issue of costs is to be determined by the Court.

[66] Given my finding above, the Registrar is to convene a directions conference to allow the Court to timetable the determination of the application for leave and remedies.

[67] Costs are reserved.

M S King
Judge

Judgment signed at 2.55 pm on 4 July 2025

[13] Employment Relations Act 2000, ss 102, 160(3).