

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 683  
3296779

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:	On the papers
Submissions and Other Information Received:	11 October 2024 from the Applicant 15 October 2024 from the Respondent 17 October 2024 from the Applicant
Determination:	18 November 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The first applicant, Mr Mark Nicholas, and the third applicant, Mr Benjamin Rosser, have been employed as pilots by the respondent, Jetconnect Limited (Jetconnect). Jetconnect is an airline that operates flying Trans-Tasman mid-haul passenger air transport services.

[2] The New Zealand Air Line Pilots Association Industrial Union of Workers Incorporated (NZALPA) is a union, which Mr Nicholas and Mr Rosser are members

of. NZALPA and Jetconnect are parties to a collective agreement dated 11 October 2021 (the CA) that was in force or applicable at the material time.

[3] The applicants claimed Jetconnect has breached s 12A of the Wages Protection Act 1983 (the WPA) by offering the Mr Nicholas and Mr Rosser employment conditional upon them entering into similar First Officer repayment/bonding agreements (the bonding agreements).

[4] Mr Nicholas' bonding agreement stated:

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/bonding agreement by signing this agreement and returning a signed copy to Jetconnect.

[5] The bonding agreement set out a specific bond amount for Mr Nicholas and Mr Rosser (which differed), but it did not specify the actual training costs incurred by Jetconnect or any further details.

[6] The applicants claimed Jetconnect breached clause 3.3 of the CA by requiring the bond agreement for pilots who had already completed endorsement training on the aircraft type before they received their offers of employment.

[7] On 10 April 2024 NZALPA raised an issue with Jetconnect regarding its application of the CA in which it had required pilots who had obtained type ratings/endorsements on the B737 prior to employment to enter into bonding agreements.

[8] The applicants sought a declaration from the Authority that:

- (a) Jetconnect's application of clause 3.3 of the CA to pilots who already hold an endorsement on the relevant aircraft was a breach of the collective agreement; and
- (b) A declaration that applying clause 3.3 of the CA to pilots who already hold an endorsement on the relevant aircraft breached s 12A of the Wages Protection Act 1983 (the WPA); and
- (c) An order that Jetconnect reimburse the bond amount that Mr Nicholas has paid.

[9] The applicants applied to the Authority to remove this matter to the Employment Court to hear and determine in the first instance, on the ground that this matter involved important questions of law that would arise other than incidentally.

[10] Jetconnect has not yet lodged a statement in reply, because its requirement to do so has been placed on hold pending the outcome of this removal application.

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

[11] This removal application was determined on the papers. The applicants lodged submissions. Jetconnect advised it did not wish to be heard. It did however helpfully provide the Authority with copies of the cases that the applicants had cited in their submissions.

### **Legal framework**

[12] The Employment Relations Act 2000 (the Act) sets out four grounds on which the Authority may order removal of a matter to the Employment Court in the first instance:

#### **178 Removal to Court**

- (1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.
- (2) The Authority may order the removal of the matter, or any part of it, to the court if—
  - (a) an important question of law is likely to arise in the matter other than incidentally; or
  - (b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or
  - (c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
  - (d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

[13] If a removal application satisfies one or more of the grounds set out in s 178 of the Act, then the Authority must exercise its residual discretion by considering whether there may be a good and sufficient reason not to remove the particular matter despite the establishment of one or more of the grounds for removal in s 178(2) of the Act.<sup>1</sup>

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<sup>1</sup> *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at [29]-[31].

[14] Relevant to this application are the two phases of the ground concerning important questions of law. Firstly, an important question of law must be likely to arise. Secondly, that question must arise “*other than incidentally*”, in the sense of being a minor or chance connection. The nature or character of such important questions has been summarised in this way:<sup>2</sup>

A question of law need not be complex, tricky, or novel to warrant use of the descriptor “important”. It may be important if the answer to the question is likely to have a broad effect, or assume significance in employment law generally. Previous cases have made it clear that it is not necessary for resolution of the question to have an impact beyond the particular parties. Rather, a question may be regarded as important if it is decisive of the case or some important aspect of it, or strongly influential in bringing about a decision in the case or a material part of it. The latter point cannot, of course, be taken too literally. For example, a legal question as to whether a dismissal is justified under s 103A may well not suffice. Nor is it necessary for there to be an absence of previous authority on the particular point.

[15] The Court of Appeal in *A Labour Inspector v Gill Pizza Ltd & Others* recognised that removal under s 178(1) of the Act is “contemplated in relatively limited circumstances, with particular caution expected in cases that have not been fully investigated by the Authority”.<sup>3</sup>

[16] The Employment Court in *Jackson v The Aorere College Board of Trustees* recognised that the Act “generally requires proceedings to be filed in the Authority, and for matters to be dealt with in that forum with rights of challenge to the Court”.<sup>4</sup>

[17] However, the Act recognised there will be some limited circumstances where matters may be appropriately removed to the Court in the first instance. Those circumstances are identified in s 178(2) of the Act. At least one of the four possible grounds of removal must be met before the Authority may remove a matter to the Court. The Authority retains a residual discretion to decline removal, even if one or more of the s 178(2) grounds for removal have been met.

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<sup>2</sup> *Johnston v The Fletcher Construction Co. Limited* [2017] NZEmpC 157 at 80 [22].

<sup>3</sup> *A Labour Inspector v Gill Pizza Ltd & Ors* [2021] NZCA 192 at [48].

<sup>4</sup> *Jackson v The Aorere College Board of Trustees* [2021] NZEmpC 109.

[18] A question may be regarded as important if it is decisive of the case or some important aspect of it, or strongly influential in bringing about a decision in the case or a material part of it.<sup>5</sup>

[19] Section 178(2)(a) of the Employment Relations Act 2000 (the Act) does not refer to whether important questions of law can be determined by established precedents, but rather the test is whether the question of law is likely to arise in the matter (which is the first limb of the test) and if so whether it will do so “other than incidentally” (which is the second limb in the test).<sup>6</sup>

### **The issues**

[20] The following issues are to be determined:

- (a) Does this matter involve an important question of law that arises other than incidentally?
- (b) If so, should the Authority exercise its discretion not to remove this matter to the Employment Court?
- (c) Should costs be awarded?

### **Does this matter give rise to an important question of law other than incidentally?**

#### *The questions of law*

[21] The applicants in their submissions identified the important questions of law as:

- (a) Whether seeking to recoup a cost required to meet the regulatory requirements for an employee to perform their role is a breach of s 12A of the WPA; and
- (b) Whether training and “currency” are benefits in any other way than obtaining employment (sic).

[22] The applicants said that many professions had continuing development and licencing regiments where it was common for the employer to pay the costs of the training and licencing. They therefore said that a decision on whether an employer was

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<sup>5</sup> *Hanlon v International Educational Foundation (NZ) Inc.* [1995] 1 ERNZ 1; *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at [44].

<sup>6</sup> *Flight Attendants and Related Services (NZ) Association Inc.* [2013] NZEmpC 125 at [27]-[28].

entitled to charge an employee to keep a particular type rating current would have implications for professions beyond pilots.

*Relevant case law*

[23] The applicants' position was that a cost imposed by law on an employer in relation to employing workers was a cost, that in accordance with the Full Employment Court's decision in *A Labour Inspector v Tech-5 Recruitment Limited* and *Tech 5 Recruitment Limited (Tech 5)*, would ordinarily be borne by the employer.<sup>7</sup>

[24] *Tech 5* involved consideration by the Full Employment Court of whether or not the recruitment of carpenters from the Republic of the Philippines (the Philippines) by Tech 5 Recruitment Limited (T5RL) breached s 12A(1) of the WPA, by seeking or receiving a premium in relation to their employment.<sup>8</sup>

[25] The premium arose within the context of what was entitled a "Philippines Relocation and Prepaid Expenses Agreement for Carpenters". Costs sought to be recouped by the employer included flights, accommodation, immigration medicals, insurance cover, visa processing fees, trade testing, site safe testing and kit.

[26] The Labour Inspector had sought a declaration from the Employment Court that T5RL had breached the WPA in connection with its recovery of "trade testing costs" from the carpenters it recruited from the Philippines. T5RL'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 occurred in the Philippines.

[27] Each successful candidate was offered an individual employment agreement and was provided with a letter headed "Confirmation of Fixed Term employment" which, together with the document described which, together with a document described as T5RL's "Standard Terms of Employment", comprised the employment agreement. Three addenda were attached to the letter provided to each carpenter. Addendum 1, labelled "Philippines Relocation and Prepaid Expenses Agreement for

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<sup>7</sup> *A Labour Inspector v Tech 5 Limited* and *Tech 5 Recruitment Limited v A Labour Inspector (Tech 5)* [2016] NZEmpC 167.

<sup>8</sup> *Tech 5* above n7.

Carpenters”, contained the requirements that had caused the material dispute between the parties.

[28] T5RL offered each carpenter a three year fixed term contract and it stated that if the employee did not complete the three year term then T5RL would be entitled to recover costs associated with the carpenter’s recruitment, immigration, relocation and training. In the event that the carpenter’s contract was terminated (including termination by the employee) for any reason other than a lack of work before the expiry of the minimum three year period of continuous service then the employee had to repay \$6,650.00 relocation costs, salary advance and related tooling and clothing expenses incurred by T5RL. There was a schedule that set out what those costs consisted of for each employee.

[29] T5RL undertook its own “trade testing process” because it considered that around 20 percent of candidates from the Philippines for employment with it had fraudulently overstated their practical, theoretical or global experience. T5RL did not undertake this trade testing when it recruited tradespeople in New Zealand with New Zealand qualifications or from other western countries.

[30] There were two parts to T5RL’s trade testing. Part one was an interview, followed by the first trade test. This involved checking the candidate’s English language skills and that was followed by a practical test to demonstrate the candidate could use it safely.

[31] Those who passed part one were invited to participate in part two of the trade testing, which involved an assessment by a New Zealand licensed building practitioner T5RL had flown to Manila to conduct the testing of the candidates. The builder practitioner outlined a workplan to the candidates and a time limit was imposed for the task to ascertain each candidate’s ability to work safely under pressure. The work that had been completed was marked, and the mark determined whether the candidate was offered a job in New Zealand by T5RL.

[32] The trade testing costs involved the cost of flights between New Zealand and the Philippines for the T5FL directors and staff who participated in the trade testing of potential employees, the salaries of the Tech 5 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.

[33] The Full Employment Court considered that the definition of “premium” in the WPA extended beyond those situations where payment had been made for a job, to also apply to an employer who was recouping, or attempting to recoup, recruitment-related costs or other expenses that would ordinarily be borne by an employer.<sup>9</sup> The Court noted that “each case will be fact-specific”, but also commented that the lack of any benefit to the employee, other than getting the job, would be indicative of a premium.

[34] In T5RL, the sole purpose of the trade testing was to enable T5RL to be satisfied that the carpenters presenting themselves as candidates for employment possessed the necessary skills and experience. The benefit of the trade testing therefore flowed one way, namely to T5RL.

[35] The candidates in the Philippines did not obtain any benefit from paying the trade testing costs, other than being given job offers. The carpenters had no choice but to accept that cost, and pay it, if they wanted to be employed by T5RL. The evidence had also established that T5RL would ordinarily have borne those recruitment costs, had the candidates not been from the Philippines.

[36] The Court observed there may be arrangements between employers and employees that allowed for reimbursement of appropriate costs incurred, such as for advancing the purchase price of tools that would eventually be owned by the carpenters, and their airfares to New Zealand.

[37] In some trades it was a custom for the tradesperson to own and use their own tools. There was no difficulty in an employer agreeing to meet the initial cost of purchasing tools ordinarily owned and supplied by an employee tradesperson, with the agreement the employer would be repaid for the tools by the employee out of their wages, over time.

[38] That same reasoning was applied to the airfares in the T5RL matter. However, the Court said it would have been different if the employer had sought to gain a profit from such a transaction, or sought to pass on costs the employer was required to bear by law.

[39] The Court did not accept TRL5’s argument that the trade testing costs were like a bond which fell outside the ambit of s 12A of the WPA, because a bond would usually

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<sup>9</sup> *Tech 5* above n7, at [54].

have mutual benefits as a feature of it. With a bond the employer would obtain a benefit from the employee working in exchange for the support provided by the employer. The Court stated:<sup>10</sup>

A bond where the employer paid for the employee to complete a recognised course of training, leading to a qualification for the employee and to a better qualified employee for the employer, would be a legitimate bond.

[40] There would need to be a proper connection between the job and the reason for the bond, if it was to fall outside the ambit of s 12A of the WPA. A bond where the employer paid for the employee to complete a recognised course of training, leading to a qualification for the employee and to a better qualified employee for the employer, would be a legitimate bond.

[41] Provided the duration of the bond was reasonable, and the other features of it were in proportion to the commitment made by the employee, the Court did not consider that would breach the WPA. Likewise, a payment which just allowed the intended employee to be considered for employment would not be a bond, but would be an employment premium, that breached the WPA.

[42] The Full Court in *Tech 5* found that the trade testing costs amounted to an employment premium, because the benefit flowed only to the employer.

[43] The Employment Court in *Holman v CTC Aviation Training (NZ) Limited* considered whether an aviation training bond provided by an aviation training organisation to a flight instructor was a premium in terms of s12A of the WPA.<sup>11</sup> In *Holman*, the employer required Mr Holman to enter into a bond for the provision of a C-Category instructor rating qualification recognised by the European Aviation Safety Authority (EASA).

[44] Mr Holman was required to make an initial \$5,000 payment prior to the commencement of the C-Cat course, with the remaining \$12,000 balance to be paid by fortnightly salary deduction over a four year term once he had entered into an employment agreement with his employer CTC.

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<sup>10</sup> *Tech 5* above n7, at [59].

<sup>11</sup> *Holman v CTC Aviation Training (NZ) Limited* [2017] NZEmpC 60.

[45] The letter accepting him into the course made it clear that if he decided not to complete the course or commence employment with CTC, then the balance of the fee would be payable in full on his withdrawal, removal from the course or at the completion of the course. Mr Holman had to sign the letter to record his acceptance of those terms.

[46] Mr Holman completed the course, obtained the qualification, and obtained employment within three months of its completion. He signed an employment agreement that recorded that the outstanding instalments for the training would be paid by way of deductions from his salary, so that and other correspondence meant that these deductions were made with his consent, pursuant to s 5 of the WPA.

[47] Mr Holman's employer provided pilot training to aspiring and qualified pilots as part of a multinational group providing pilot training. The employer was contracted to provide Joint Aviation Authority (JAA)/European Aviation Safety Agency (EASA) approved pilot qualifications to students who trained in New Zealand. The employer had to have JAA/EASA qualified flight instructors to provide that training.

[48] Prior to commencing his employment with CTC, Mr Holman entered into an agreement with the employer to complete an instructor training course called a C-Cat EASA course. Mr Holman claimed that the fees he was required to pay to receive that qualification amounted to an employment premium in breach of s 12A of the WPA.

[49] The C-Category Instructor Rating qualification (C-Cat), whether obtained from Mr Holman's employer or some other person or entity authorised to provide those training courses, would open up for Mr Holman the prospect of being employed as a C-Cat instructor. The obtaining of a C-Cat instructor qualification, and experience as an instructor, would therefore advance Mr Holman's ability to obtain employment as a commercial airline pilot, which was one of his objectives.

[50] The Employment Court in *Holman* stated that there are two requirements for a payment to be considered to be an employment premium:<sup>12</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

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<sup>12</sup> *Holman* above n11, at [20].

- (b) The payment did not benefit the employee in any way other than obtaining employment.

[51] The Court held that 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, because it was payment associated with Mr Holman obtaining the C-Cat qualification itself.

[52] Unless Mr Holman held the C-Cat qualification, he could not be employed by CTC as a trainer, as that would not comply with the JAA/EASA requirements. CTC also had its own requirement that trainees who had obtained their C-Cat qualification elsewhere, had to have in addition 200 hours of instructional experience. For those, such as Mr Holman, who did the C-Cat course with CTC, that additional requirement was waived.

[53] The Court recognised that CTC had to comply with the strict requirements the JAA/EASA (the applicable governing bodies) had in place governing pilot training, in order to be able to offer Mr Holman employment.

[54] The qualification had to come first. As part of the commercial training contract, CTC received payment as consideration for providing the training that had enabled Mr Holman to gain the qualification he had desired. CTC was entitled to recover its costs and to make a profit from training Mr Holman for his qualification. CTC had guaranteed Mr Holman employment as a flight instructor once he had gained the necessary qualifications.

[55] However, Mr Holman was not bound to accept that offer of employment. There was no bonding arrangement attached to the offer of employment, and the arrangement the parties had agreed whereby CTC would deduct the balance of the training fees from Mr Holman's wages, was merely a convenience to him which meant he did not have to look elsewhere for financial sources to fund his training.

[56] The payment by Mr Holman was made before the qualification was obtained, even though financing by CTC of Mr Holman's payment for his qualification had enabled him to make further instalment payments, that were secured by the arrangement the parties had agreed to that enabled CTC to make deductions for it from Mr Holman's income.

[57] The Court in *Holman* considered the mutuality, or otherwise, of the obligations the parties had, and concluded the payment arrangement had substantially benefited Mr Holman. At the completion of his training course, the benefit flowed only one way, and that was to Mr Holman. Once he had the qualification he had paid for, that was something he retained permanently and which was of substantial use to him in pursuing his desired career as an airline pilot.

[58] If Mr Holman had not accepted CTC's offer of employment, then the deduction of wages issue would never have arisen but, he still would have been required by virtue of the training contract he entered into to repay the training fees for his qualification to CTC.

[59] The Court held that if the payment was a premium for employment, then upon payment, Mr Holman would have been entitled to have insisted on being employed. However, the contract the parties had entered into showed that he did not have that entitlement. The Court also pointed out that if the payment had been an employment premium, and if Mr Holman had not taken up CTC's offer of employment, then he would have been entitled to have refused to make the payment, which was clearly not the position that applied.

[60] The Court distinguished *Holman* from the situation in *Tech 5*, in which the prospective employees had gained no material benefit from the trade testing used by T5RL. The absence of any benefit to the employees in *Tech 5* for the payments they had been required to make, meant the amounts that the employees had paid were considered to be an employment premium, in breach of the WPA.

[61] The difference with Mr Holman's case was that he got to retain the full benefit of the training and qualifications he had gained for the payments he had made. He also retained that qualification permanently, and therefore had the potential to receive a further material benefit from it, aside from just being employed by CTC. Mr Holman had therefore gained valuable consideration for the mutual transaction he had entered into, when the T5RL employees had not gained any personal benefit other than the potential job offer from T5RL.

[62] The very fact that Mr Holman had obtained the qualification itself meant that it was not a premium for employment, even though he was subsequently employed by CTC who had offered him the training. The liability for the training fees arose under a

separate preceding contract under which Mr Holman was liable to repay CTC, regardless of whether he subsequently obtained employment with them, or chose not to accept any employment he was offered by CTC.

[63] The *Tech 5* and *Holman* cases made it clear that whether a payment would be a premium involved an intensely factual inquiry, as opposed to resolving questions of law. That is also evident from the material factual disputes that lay at the heart of the applicants' claims.

*The applicants' claims*

[64] Because Jetconnect operated aircraft registered in Australia under the Civil Aviation Safety Regulations set by the Civil Aviation Safety Authority (Australia) (CASA) for the purposes of employment law New Zealand law applies, for regulatory purposes Australian law applies.

[65] Some of NZALPA's members (including Mr Nicholas and Mr Rosser) had previously flown on the Boeing 737 aircraft before being offered employment by Jetconnect. The applicants said that pilots who had obtained type ratings/endorsements on the B737 prior to employment by Jetconnect should not have had to enter into bonding agreements as a condition of their employment.

[66] Clause 3.3 of the NZALPA Jetconnect Limited collective employment agreement dated 10 August 2021 – 9 August 2024 dealt with a training bond. Clause 3.3 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. Bonding 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 bonding agreements signed prior to ratification, the signed bonding 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.

[67] Jetconnect's position was that the bonding agreements did not breach the WPA, because the fact that a person held a type rating for a specified aircraft did not allow that person to operate the same aircraft in a commercial setting. Jetconnect said its pilots operated planes used in commercial flights for Qantas Airways Limited (QAL), which holds the Air Operating Certificate (AOC).

[68] That AOC is regulated by the Australian Civil Aviation Safety Authority (CASA). Pursuant to s 11B Civil Aviation Act 1990 (CAA1990), the holder of an Australian AOC with ANZA privileges is entitled to conduct air operations in Australia and New Zealand.

[69] Jetconnect operated 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.

[70] All pilots employed by Jetconnect were bound by the regulations and policies stipulated in QAL's approved manual suite, including training paths found in the

training and checking manual (TACM) which sets out the approved training a pilot must complete to fly Boeing 737's under the QAL AOC.

[71] Jetconnect therefore said that even though an individual pilot may hold a type rating for a Boeing 737, to be able to fly a Boeing 737 on QAL operated services the individual must have completed training as specified by QAL to perform a flying role for Jetconnect.

[72] Jetconnect therefore said that the training bond was not a payment for obtaining employment, but rather the "payment" (through the bond) was for the obtaining of the endorsement qualification, which was a prerequisite for employment as a pilot by Jetconnect. Without the first and third applicants holding that qualification they could not be employed by Jetconnect as a first officer, as that would not comply with CASA requirements.

[73] Jetconnect said that by having the endorsement, and the associated "currency" (meaning flying experience), substantially benefited the first and third applicants, because it meant they could obtain employment with other operators, for example, those within the Australasian environment who also operated Boeing 737s. Jetconnect also pointed out the actual cost of training for the pilots was in excess of the amount reflected in the training bond agreements.

[74] The applicants did not accept that. NZALPA said that currency (including recurrent training and checking) was obtained by all Jetconnect pilot employees. Pilots who had passed initial training were not required to reimburse Jetconnect for this currency, therefore NZALPA said that 'currency related costs' are costs that were ordinarily borne by the employer, so should not be seen as providing a benefit to the employee in any way other than allowing them to obtain employment.

[75] NZALPA also said that completion of initial training requirements set by Civil Aviation Safety Rules (AUS) arose from the regulatory obligations Jetconnect had, and therefore did not provide a benefit to the employee pilot over and above their obtaining a job with Jetconnect.

[76] The applicants therefore said that any 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 the normal benefits of obtaining employment with Jetconnect.

[77] The applicants said that the type rating was not granted by Jetconnect, but rather formed part of the licensing regime maintained by the Civil Aviation Authority (AUS) (CASA) and was portable by the employee to work for subsequent employers. Therefore, where a pilot had previously flown the B737, they would have already obtained the rating type (and endorsement).

[78] The applicants did not agree that currency and training records provided a benefit to the pilot because the currency was obtained in the course of work (similar to job experience generally) by all pilots during the course of their general operations. Pilots who already had the B737 endorsement would generally have amassed experience flying the B737.

[79] NZALPA did not accept that the imposition of the bonding practices was not a condition of employment, but was rather a regulatory condition. The applicants claimed that CASA imposed a mandatory requirement on Jetconnect to create and maintain training records, so Jetconnect could not characterise itself as having facilitated the pilots to comply with CASA obligations by virtue of their having created and maintained those records, because that was an obligation already placed upon Jetconnect by CASA.

[80] The applicants' position was that requiring a pilot to pay for training when they already had that type of rating had transferred the obligations of the employer under the Civil Aviation Safety Regulations (AUS) 1998 121 (CASR) to the Jetconnect pilots. CASR Part 121 was described as applying to "the operation of a multi-engine aeroplane for an Australian air transport operation ...", in other words it set out the requirements on the operators of those aircraft.

[81] CASR required each flight crew member to meet initial training requirements and recurrent training and checking requirements. The CASA mandated that a pilot met the CASR 121.475 requirements. The mere holding of a type rating does not allow a pilot to fly that aircraft type commercially. The applicants claimed the details of what was required in the initial and recurrent training of a pilot were therefore specific to the operator under whose training and checking programme they operated.

[82] The applicants' submission that determining what costs would ordinarily be borne by the employer in this case was not a question solely of fact, but "was cause for further legal analysis by the Court" was not accepted by the Authority.

[83] The analysis of the dispute between the parties and various material factual conflicts that would need to be resolved, indicated the matter was an intensely factual one, that did not rely important questions of law being decisive of the claims.

[84] This matter involves the sort of factual inquiries the Authority has specifically been set up to undertake, consistent with s 143(fa) of the Act that states one of the objects of the Act is to “*ensure that investigations by the specialist decision making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations*”.<sup>13</sup>

### **Summary**

[85] The s 178(2)(a) ground for removal has not been met. Whether or not the bonding agreements for the first and third applicants amount to an employment premium contrary to s 12A of the WPA was a mixed question of fact and law.

[86] However, the Authority was not satisfied that it involved an important question of law, because the outcome of the claims would be dependent on the factual findings that were made in light of the legal test identified by the full Employment Court in *Holman v CT Aviation Training (NZ)*.<sup>14</sup>

[87] The Employment Court in *Tech 5* also provided comments regarding training bonds which indicated that they would be legitimate and not amount to a premium where the employer paid the employee to complete a recognised course of training, leading to a qualification for the employee and to a better qualified employee for the employer.

[88] A factual inquiry will therefore need to be undertaken into what qualifications and training was required, what ongoing training was required, what the applicable regulations required, what the training bond was for, who it benefited, whether the duration of the bond was reasonable, and whether the other features of it were in proportion to the commitment made by the employee.

[89] These are just some of the purely factual issues that would need to be determined, and which would be determinative of the case. The legal question of

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<sup>13</sup> *A Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd & Others*[2021] NZCA 192 at [54] – [55]

<sup>14</sup> *Holman* above n11, at [20].

whether the bonding agreements amounted to an employment premium in terms of s 12A of the WPA would therefore be subordinate to the factual findings that were required in this matter.

[90] Accordingly, the Authority was not satisfied this matter involved an important question of law that would arise other than incidentally. The focus in this case will be on the particular facts of this matter and the necessary factual findings will be determinative of the claims, not the identified questions of law.

[91] To conclude that this matter involved an important question of law would effectively have meant that every case that involved an alleged premium under s 12A of the WPA would involve an important question of law in terms of s 178(1)(a) of the Act, merely because it involved consideration of s 12A of the WPA. That cannot be the case.

[92] The Authority did not need to consider whether there are any discretionary factors which weigh against removal, because the applicants were unable to establish the ground for removal in s 178(1)(a) of the Act had been met.

### **Outcome**

[93] The applicants' removal application did not succeed. Accordingly, removal of this matter is declined.

### **What costs should be awarded?**

[94] Costs should lie where they fall.

Rachel Larmer  
Member of the Employment Relations Authority