

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 399
3013276

BETWEEN	UNITE UNION INCORPORATED First Applicant
AND	PRINCE KHOBRADE ASHLEY TOETU Second Applicants
AND	CHAD NICHOLSON KALO PRESCOTT Third Applicants
AND	QANTAS AIRWAYS LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Duncan Allan for Applicants Michael O'Brien for Respondent
Investigation Meeting:	17 November 2017
Submissions Received:	17 November 2017 from Applicant 17 November 2017 from Respondent
Further Information Received:	19 November 2017 from Respondent
Date Determination	22 December 2017

DETERMINATION OF THE AUTHORITY

- A. Qantas breached the terms of the collective agreement and its statutory duty of good faith.**

- B. The parties are directed to attend mediation within 2 months of the date of this determination.**

C. Qantas is ordered to pay penalties of \$6,000 to the second and third applicants within 1 month of the date of this determination.

D. Costs are reserved.

Employment relationship problem

[1] Unite Union Incorporated and Qantas Airways Limited are parties to a collective agreement dated 3 April 2015 to 2 September 2017. The second and third applicants are covered by the terms and conditions in the collective agreement.

[2] Qantas operates a Contact Centre in Auckland which employs over 250 employees. It is one of five Contact Centres operated by Qantas worldwide. The purpose of the Contact Centre is to manage bookings and customer enquiries. There are multiple channels of communication including voice, chat and social media. Qantas has a global customer base.

[3] Leading up to June 2015 employees were employed on rotating rosters of 12 lines with three different bands. The bands were morning, afternoon and night. Each line in the roster represented a working week. Employees worked each of the 12 weeks sequentially and at the end of week 12 they reverted back to week one.

[4] In June 2015 Qantas asked its employees to vote on two options to change the roster system. The options were for a preference based roster pattern or the original rotating roster pattern.

[5] The preference based roster pattern was the preferred option receiving the highest number of votes. It was implemented on 4 December 2015. Employees who did not vote for the preference based roster pattern stayed on their existing rotating roster pattern. Under the preference based roster pattern employees worked five fixed days in a row followed by two days off.

[6] Qantas recognised that during the transition period of the implementation of the preference based roster a number of gaps in shifts would need to be filled. To resolve that issue employees were rostered to work their preferred shifts for 5 weeks and for the sixth week were expected to work a non-preferred shift.

[7] Following a review of the preference based roster patterns in October 2016 Qantas proposed a change back to a rotating roster pattern in March 2017. This proposal was rejected by the Union and the second and third applicants. Despite there being no agreement Qantas advised the union it intended to proceed with the change to a 24/7 roster and it did so on 22 May 2017. The roster was a 9 line roster and not the 12 line roster that was in place prior to the change to preference based rosters.

[8] The applicants claim that when Qantas implemented the roster changes in 2017 it did so without agreement and that this constitutes a breach of the collective agreement including any additional terms and conditions applicable to the second and third applicants.

[9] The applicants claim Qantas breached the terms of the collective agreement and its obligations of good faith when it proceeded to implement the changed rosters when the parties were in dispute over the interpretation, application and operation of the terms of the collective agreement.

Issues

[10] In order to resolve this employment relationship problem I must determine the following issues:

- a) What were the applicable terms of employment relating to hours of work as at 5 May 2017?
- b) Was the 2015 preference based roster a “trial”?
- c) Did Qantas breach the terms and conditions of the collective agreement?
- d) Did Qantas breach its obligations of good faith?
- e) If there has been a breach should compliance orders be made and/or penalties imposed?

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the

applicants and Qantas but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Roster Patterns

[12] As already set out, prior to the change in 2015, employees were employed on rotating rosters of 12 lines with three bands. The bands were morning, afternoon and night. Each line in the roster represented a working week. Employees worked each of the 12 weeks sequentially and at the end of week 12 they reverted back to week one. After a period of work employees were rostered off for two consecutive days.

[13] Under the 12 line roster the two rostered days off occurred on five consecutive complete weekends. Employees were rostered to work six consecutive days five times during the 12 week roster. The six consecutive days were split so that employees worked three lots of six days in a row, followed by five days, which was then followed by a further two lots of six days.

[14] The 2015 preference based roster allowed employees to work their preferred shifts on a fixed basis with the requirement that every sixth week they would be rostered to work a non-preferred shift. Employees were rostered to work their preference of either eight or 10 hour shifts on either five or four days respectively.

[15] The roster implemented in May 2017 was split into bands and was 9 lines (although this has or is about to change to 10 lines). Each employee is allocated to a band; either a morning, afternoon or night band. Employees are rostered to work eight hour shifts. Employees are rostered to work any time within their particular band. Employees allocated to the morning or afternoon bands are rostered across both bands.

Was the preference based roster a trial?

[16] Qantas says it was entitled to review the preference based roster patterns. This is because they were a “trial”. Qantas says the process used to consult with employees in 2015 did not constitute an agreement to vary terms of employment such that no later changes could be made to roster patterns without agreement.

[17] The Union says the change to preferred rosters was a permanent change and at no time during the consultation process was the change to the roster patterns ever described as a “trial”.

[18] Simultaneously with the consultation over the changes to the roster patterns, Qantas and the Union were bargaining over a new collective agreement. Roster patterns were a topic of discussion during the negotiations. Qantas says it raised the fact that the preferred roster system was to be a “trial” at a meeting with the Union on 17 September 2015.

[19] A note made by Ms Fairlie Galt, HR Manager, Customer and Commercial, prior to the meeting records items she wished to discuss during the meeting. This included issues raised by the Union in an email communication that was copied to all Contact Centre staff. Ms Galt’s note records that she wished to discuss the Union’s stated position that they would not vote in the “trial” roster review process. Mr Treen, National Director for the Union, says that while Ms Galt’s notes may have included the word “trial” that word was not used by Ms Galt during the meeting.

[20] Mr Goran Stojanovski, Global Manager Customer Contact Centres, gave evidence that Mr Sam Youssif, Manager Resources and Operations, delivered presentations in Auckland and Hobart in 2015. Mr Stojanovski told me he attended the Hobart presentation and recalls Mr Youssif advising those present that the preference based roster pattern was being introduced as a 12-month trial and that the same thing was happening at the Auckland Contact Centre.

[21] Ms Hayley Harding, HR Manager for Qantas operations in New Zealand, told me she attended Mr Youssif’s presentation in Auckland. In her written statement Ms Harding says Mr Youssif noted the preference based pattern was a trial that would be reviewed in line with operational needs after 12 months. At the investigation meeting Ms Harding resiled from her written evidence and told me she could not recall whether Mr Youssif actually used the word “trial” or whether he just referred to a review after 12 months.

[22] For the following reasons I am not satisfied the change to the preference based roster pattern was for a limited period.

[23] The communications from Qantas to its employees and the Union during the consultation process does not support Qantas' position that this significant change to the way employees were rostered to work was a trial with a start and end date.

[24] The process used by Qantas leading up to the change was robust and extensive. It started on 10 June 2015 when Mr Youssif sent all employees a "Scheduling Consideration" form. This form was to gather information on each employee's preferred shift pattern.

[25] Next, Qantas made formal presentations to all Contact Centre staff in Auckland using a PowerPoint document. That document does not record anywhere that the change was a trial.

[26] Frequently asked question sheets were developed and made available to all employees to inform them about the change. In a document entitled "Roster/Scheduling Considering FAQ's" Qantas provided information for its employees by setting out questions and answers regarding the proposed change to the preference roster patterns. Two questions stand out which indicate that in 2015 Qantas intended the change to its roster system would be permanent (verbatim):

Question

Currently rosters 'run' for approx. 3-4 months – when will these rosters be changed?

Answer

There will be no change to preference rosters. Rotational rosters will be changed in line with operational requirements. We will not seek further or ongoing feedback as we currently do today.

Question

If someone didn't put in a preference form does that mean they stay on current roster (school mums roster)?

Answer:

If no preference has been received than it's our assumption employees are content with a current model of rotation, if employees have a specific preference then they are encouraged to advise us of that preference.

[27] Nowhere in the FAQs document is the word "trial" or "pilot" used to describe the change to the preference based roster pattern.

[28] Qantas invited all of its employees to vote on their preferred options. An overwhelming majority of 79% of all employees who voted were in favour of the preference based roster pattern.

[29] I would have expected that if the change was to be a pilot or was a trial, the communications to employees including the information about the vote would have included information about the nature of the trial including the start and finish dates together with information on what would happen in the event that the trial was unsuccessful. No such information was provided.

[30] Contact Centre employees were advised by email on 4 December 2015 that new recruits would be hired to fill gaps in shifts. During February and April 2017, 51 new employees were recruited to fill gaps in shifts. If the change to preferred roster patterns was a trial, it is not logical that Qantas would expend all that time and resource filling shift gaps by engaging 51 new employees.

Hours of work

[31] The collective agreement provided for the hours of work in the following terms (verbatim):

Clause 6 – Hours of work and shifts

For the purpose of this Agreement, unless specified otherwise:

- (a) A “**24/7 roster**” is a situation where an employee is liable to be rostered to work a shift at any time of the day, 24 hours a day, and on any day of the week Monday to Sunday inclusive; and
- (b) “**Fixed Shifts**” are shifts that commence on or before 0630 hours or that finish on or after 2000 hours.

...

6.2 Ordinary Hours – Non-Shift Employees

- (a) For employees who are not employed in a shift role, the ordinary hours of work shall not exceed eight hours in any one day or forty hours in any one week, unless otherwise specified in this Agreement. The ordinary daily hours shall be worked between 0630 hours and 2000 hours Monday to Sunday and shall be continuous except for broken shifts, and the normal meal break, provided that only one meal break shall become due in any eight ordinary hour period of work.
- (b) This clause applies to all employees covered by this Agreement who are not engaged in the Contact Centre on a 24/7 roster or a 7 day fixed roster. For the avoidance of doubt, this clause includes airport staff.
- (c) The parties may agree to a variation of the forty hour week, provided that the work pattern or shift pattern agreed upon by the parties retains a forty hour week averaged over a rostered period.
- (d) The parties may agree to vary the way in which the forty hour week may be worked and/or vary the number and/or duration of meal breaks within the ordinary work period.

6.3 Ordinary Hours – Contact Centre Employees on a 24/7 Roster

- (a) For employees who are employed in the Contact Centre on a 24/7 roster, ordinary hours of work shall not exceed eight hours in any one day or forty hours in any one week. The ordinary hours for Contact Centre employees on a 24/7 roster and fixed shifts shall be worked between 0630 hours and 2100 hours Monday to Sunday and shall be continuous except for broken shifts, and the normal meal break, provided that only one meal break shall become due in any eight ordinary hour period of work. For work performed outside the ordinary hours of 0630 and 2100 on a 24/7 roster, the provisions of sub-clause 6.10 of the Agreement shall apply.
- (b) This clause applies to all employees covered by this Agreement who are not engaged in the contact Centre on a 24/7 roster. For the avoidance of doubt, this clause does not apply to airport or sales staff.
- (c) The parties may agree to a variation of the forty hour week, provided that the work pattern or shift pattern agreed upon by the parties retains a forty hour week averaged over a rostered period.
- (e) The parties may agree to vary the way in which the forty hour week may be worked and/or vary the number and/or duration of meal breaks within the ordinary work period.

...

6.9 Substantial Variation

Any proposal by the Employer to substantially vary existing roster patterns shall be subject to prior consultation with directly affected employees and Unite representative.

[32] The approach to interpretation of a collective agreement is an objective one. The aim is to ascertain the meaning the document would convey to a reasonable person with the background knowledge available to the parties.¹

[33] The starting point when interpreting a clause in a collective agreement is to consider the natural and ordinary meaning of the language used by the parties. Even if the words are plain and unambiguous, this does not preclude a consideration of the surrounding circumstances². This acts as a cross-check as to whether some other or modified meaning was intended.

[34] The Union says that prior to October 2015 employees covered by the collective agreement were subject to clause 6.3 which allows for employees employed in the Contact Centre to work a maximum of eight hours each day or forty hours in any one week between the hours of 0630 and 2100 Monday to Sunday. Employees who worked outside these hours on a 24/7 roster, were paid a shift allowance equal to

¹ *Firm PI 1 Ltd v Zurich Australian Insurance Ltd (Firm PI)* [2014] NZSC 147; [2015] 1 NZLR 432 at [60].

² *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789; *Tertiary Education Union v Vice-Chancellor, University of Auckland* [2015] NZEmpC 169

40% of the ordinary hours. The shift allowance applied to all employees engaged in the Contact Centre on a 24/7 roster or 7 day fixed roster. A broken shift allowance of \$10.00 plus payment for a minimum of three hours was paid to employees who worked broken shifts.

[35] The Union says that after the change from rotating rosters to preference based rosters in October 2015, employees were covered by clause 6.2 of the collective agreement.

[36] Clause 6.2 applies to employees who are not employed in a “shift role”. After the change to preference based rosters employees were rostered to work the sixth week of their roster, on a non-preferred shift. The sixth week non-preferred shift was necessary to fill gaps between the shifts required to provide cover in the Contact Centre and the shifts allocated to employees based on their preference. This was a temporary measure to allow Qantas time to recruit new employees to fill the shifts not taken up through the preference based roster system.

[37] During the sixth week of the roster Qantas attempted to roster employees on a shift closely aligned with their preferred shifts but could and did roster employees on any shift at any time.

[38] I am satisfied employees working in the Contact Centre were at all times covered by clause 6.3 of the collective agreement. This is because clause 6.2 applies to employees not employed in a “shift” role. After the change in 2015 employees continued to work on “shifts” albeit, their preferred “shift” and non-preferred “shifts” every sixth week.

Breach of collective agreement

[39] The applicants claim the parties were in dispute over the proposal by Qantas to implement the new rosters in the absence of any agreement and therefore the dispute resolution procedures set out in Appendix 1 of the collective agreement should have been invoked. The Union claims the failure to follow the agreed dispute resolution procedures is a breach of the collective agreement and has asked the Authority to impose penalties.

[40] The Union also claims Qantas was required to get its agreement to the change in the roster pattern in 2017 and failed to do so which is also a breach of the collective agreement.

Dispute

[41] A dispute is about the interpretation, application or operation of an employment agreement.³ An employment agreement includes an employee's terms and conditions of employment in a collective agreement and/or any additional terms and conditions of employment.⁴

[42] Clause 37 of the collective agreement states that provisions set out in Appendix 1 of the collective agreement are to apply to the resolution of disputes between the parties. Appendix 1 sets out the procedures to be followed to resolve an employment relationship problem which includes a dispute. While not expressly stated the process appears to anticipate that before a problem is referred to the Authority the parties would have attended mediation.

[43] On 14 March 2017 Qantas put a formal proposal to the Union to move employees engaged in the Contact Centre from the preference based roster pattern to 24/7 rotating rosters. The proposed implementation date for the new roster pattern was 24 April. Feedback was requested by 17 March. The Union provided extensive feedback from its members. The overwhelming response was negative.

[44] On 20 March the Union told Qantas that it strongly believed the change was a restructure and requested redundancy be offered if the changes proceeded. This view was held because of the Union's belief that agreement was required before the change could be implemented and no agreement had been reached.

[45] The Union received no response to the feedback and on 26 April Qantas announced that it would implement the proposed new roster patterns. An urgent meeting was arranged for 5 May during which time the Union stated its position that the proposed changes could not take place without the agreement of the Union.

³ Employment Relations Act s 5.

⁴ Ibid.

[46] After reporting to members about the meeting on 5 May, the Union sought further feedback from its members about the proposed changes. On 12 May the Union advised Qantas that its members had overwhelmingly rejected the proposed rosters. The Union pointed out its view that the fixed rosters were contractually binding and could not be altered unilaterally by the company. The Union requested that the implementation of the rosters be postponed until matters could be discussed in mediation.

[47] Qantas asked for clarification on why the Union held the view that a change to the fixed rosters required agreement before any change could be implemented. Mr Treen, National Director for the Union advised Qantas that the implementation of the preference based rosters followed a process of discussion and agreement including a vote. He pointed out that the proposals and explanations provided at the time were that the shifts would be ongoing. The consultation over the preference based rosters was undertaken in a parallel process to the collective bargaining. Mr Treen told me the commitment made by Qantas in 2015 to implement the preference based roster system was instrumental in concluding the bargaining for the collective agreement.

[48] On 16 May Qantas advised Mr Treen that while it was prepared to attend mediation to discuss matters further the new rosters would be implemented the following Monday.

[49] Mr Treen responded the following day setting out his view that implementing the changes in the face of a dispute, prior to attempting to resolve the dispute, would be a breach of the collective agreement. Mr Tree requested Qantas to cease the implementation of the new rosters until mediation could be attempted.

[50] Despite the parties being in dispute the rosters were implemented on 22 May 2017.

[51] I find there was a genuine dispute between the parties as to whether Qantas could implement the new rosters without the agreement of the Union. Qantas had formed a clear view of its rights which were not shared by the Union. This is an example of a dispute that cried out for an attempt at resolution.⁵

⁵ *Sky Network Television Ltd v Duncan* [1998] 3 ERNZ 917 at 924.

[52] Qantas has not adequately explained why it could not postpone the implementation of its new rosters to allow it time to meet in mediation to resolve the dispute between the parties. At the time the dispute arose and the Union sought attendance at mediation the new rosters had not been implemented. Qantas told me it was not required to hold off implementing its proposed roster change until the dispute was resolved and so it went ahead with implementing the new roster.

[53] Qantas has failed to follow the requirements of clause 37 of the collective agreement that requires parties to attend mediation to resolve disputes. Clause 37 reflects the statutory obligations set out at s 129 of the Act, which allows any party to an agreement to pursue a dispute in accordance with Part 10 of the Act. Part 10 of the Act sets out the procedures for resolving employment relationship problems including by way of mediation.

[54] The Union has established to my satisfaction that Qantas has breached the terms of the collective agreement by failing to attend mediation to attempt to resolve a dispute before implementing the new roster patterns.

Was Qantas able to unilaterally alter the roster patterns in 2017?

[55] Qantas says it was entitled to impose the new rosters in May 2017 following a period of consultation. It relies on clause 6.9 to support its decision to implement the new rosters without gaining the agreement of either the Union or its Members. Qantas says it consulted with its employees and the Union from October 2016 to March 2017.

[56] Clause 6.3(c) and (e) gives discretion for the parties to the collective agreement to agree on variations to the hours of work provisions. Clause 6.3(c) expressly allows the parties to agree to a variation of the forty hour week subject to "...the work pattern or shift pattern agreed upon by the parties..." retaining a 40 hour week averaged over a rostered period.

[57] This means that while the general provision under clause 6.9 requiring consultation on a proposal to substantially vary existing roster patterns it does not go so far as to allow implementation. The work pattern or shift pattern was subject to agreement under clause 6.3(c).

[58] Clause 6.3(e) allows the parties to vary the way in which the 40 hour week is worked. This means it was open for the Union and Qantas to agree to employees working 10 hour days on four days each week rather than the eight hours per day specified in clause 6.3(a). This of course happened with the change to preference based rosters in 2015. In 2015, based on his preference, Mr Khobragade was rostered to work four x 10 hour shifts and from September 2016 Ms Toetu was, by agreement between herself and Qantas, rostered to work four x 10 hour night shifts.

[59] The failure by Qantas to reach agreement with the Union about the work pattern or shift pattern applying to employees covered by the collective agreement before implementing the new roster patterns in 2017 was a breach of the collective agreement.

Breach of additional terms and conditions of employment

[60] The second and third applicants' claim the change to the new rosters in May 2017 were implemented in breach of their individual terms and conditions of employment which, they say, were additional to the terms and conditions in the collective agreement. This is an alternative argument put forward by the applicants so I have addressed this for the sake of completeness.

[61] Section 61 of the Act allows for terms and conditions of employment for an employee bound by a collective agreement to include additional terms and conditions that are mutually agreed by the employer and employee and which are not inconsistent with the terms and conditions in the collective agreement.

[62] The applicants say their individual agreement to work their preference based rosters was an agreement which was not inconsistent with the collective agreement. The collective agreement does not prohibit their agreement to work fixed hours and days of work and the terms were more favourable and therefore less likely to be inconsistent with the collective agreement.

[63] As part of the change process in 2015 all employees were asked to complete and return a Scheduling Consideration Form. This form required employees to provide their name, staff number, work location and their work day preference structure. The work day preference structure included identifying the days the employee wished to be rostered to work, the number of hours to be worked and the

employees preferred start time. The options provided on the form for work hours were 5 days x 8 hours or 4 days x 10 hours. The form was signed by the employee before being submitted to Qantas.

[64] The communications from Qantas leading up to the 2015 change from rotating rosters to the preference based roster strongly indicated that this was a one-off exercise with a high level of commitment from the entire leadership team who Mr Youssif told all employees in an email dated 9 October, were "...absolutely committed to delivering this initiative...".

[65] The new rosters were seen as a new way of working and even after the preference based rosters had been implemented Qantas was open for employees to move back to their old rotating roster.

[66] Qantas says that the 2015 roster change was not an individual agreement with its employees because no letters were written and no forms were signed. That is not correct. As set out earlier, all employees were required to complete and sign a Scheduling Consideration Form which set out their preferred working hours options. They were then placed on the roster to accommodate either their first or second choice.

[67] Ms Toetu and Ms Prescott were both hired in 2016 specifically to fill the gaps in the preference based rostered shifts. Both employees were employed on a permanent basis.

[68] Ms Toetu started working for Qantas on or about 2 February 2016. She was hired to fill a gap in the shift numbers to work a fixed shift Tuesday to Saturday inclusive with a start time of 1530 and a finish time of midnight.

[69] In September 2016 Ms Toetu requested a move to the night shift for family reasons. This request was granted and she started working four days a week for 10 hours each day Wednesday to Saturday inclusive from 1900 – 0530.

[70] At the time of her employment Ms Prescott was told she was being employed to work on a fixed roster to cover shifts with gaps. Her hours of work were Sunday to Thursday from 1000 – 1830.

[71] Ms Prescott's previous job involved a rotational shift roster and she was looking specifically for a day job where her hours were fixed. Ms Prescott has other commitments at night and the fixed hours of work allowed her to catch public transport to and from work. The promise of fixed hours of work was a strong inducement for Ms Prescott to accept the offer of employment with Qantas.

[72] It is strongly arguable that the agreement between Qantas and its employees as to the fixed shifts they would work was in addition to the terms and conditions set out in the collective agreement and therefore could not be changed without their agreement.

Breach of good faith

[73] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith. Specifically that requires the parties to be active and constructive in maintaining a productive employment relationship by being responsive and communicative.⁶

[74] The Union submits that the way in which Qantas implemented the new rosters in May 2017 was the antithesis of being constructive. In his evidence Mr Treen told me the refusal by Qantas to postpone the implementation of the new rosters until they had attempted mediation showed a lack of respect for its employees and for the good faith relationship that had existed at that time.

[75] I am satisfied the failure by Qantas to enter into constructive dialogue with the Union at the time it implemented the rosters was a breach of its duty to act in good faith.

Compliance orders and penalties

[76] The applicants seek compliance orders and the imposition of penalties for the breaches of the collective agreement and good faith.

Compliance orders

[77] The applicants have asked the Authority to order compliance with the terms of the collective agreement. It seems to me that horse has bolted. The new rosters have been in place since May 2017.

⁶ Above n 4 s 4(1A)(b).

[78] The impact of the new rosters has had a significant impact on the second and third applicants which is ongoing. Throughout its communications with its employees in 2015 Qantas promoted the change to preference based rosters as a way to achieve work life balance.

[79] Mr Khobragade has a three year old son. He told me that since the change he is constantly altering childcare arrangements to fit with his rostered hours. He has only one full weekend off approximately every six weeks. For five weeks in a row he is required to work six days continuously. He told me this is exhausting and it is taking a toll on his health.

[80] Mr Nicholson has been rostered to work on the morning and afternoon bands on the new roster. He works on average six days in a row and has one full weekend off approximately every six weeks. He told me the impact of the new roster has left him feeling fatigued and has led to an increase in him taking sick leave.

[81] Ms Prescott told me that working weekends and six days a week has impacted on her family time and she feels fatigued and tired. Her shift times change significantly from week to week, for example in one week she will be on a morning shift starting at 0600 then the following week she will have a 1400 start time. She told me she has been unable to continue participating in her chosen sport at a representative level.

[82] Ms Toetu is a mother to three children and says being on fixed shifts allowed her to plan her days. Under the preference based roster Ms Toetu was working nights and so was able to be home with her children before and after school. While at work, her partner was at home to look after the children.

[83] Ms Toetu told me the rotational roster is draining and she is now working six nights in a row. The week before the investigation meeting Ms Toetu had to work seven nights in a row because Qantas changed her roster. One of Ms Toetu's children was in day care for two days each week, but since the change this has had to be increased to allow her to get some sleep on the first of her two rostered days off.

[84] Given the evidence from the applicants I am strongly of the view that the parties would benefit from further mediation to discuss the roster patterns and attempt to reach agreement on suitable shift patterns to accommodate the needs of the business and its employees.

[85] The parties are directed to attend mediation within a period of 2 months from the date of this determination.

Penalties

[86] The applicants have applied for penalties to be imposed in respect of the breach of the collective agreement and for a breach of the statutory good faith obligations. I am satisfied a penalty is appropriate for these breaches.

[87] The factors to be taken into account in determining an appropriate penalty are set out at s 133A of the Act. Qantas and the Union had agreed through the collective agreement that mediation would be attempted to resolve disputes. Mediation is promoted in the Act as the primary problem-solving mechanism.⁷

[88] By the time mediation occurred the new rosters had been implemented and Qantas had formed its view that it was entitled to implement the new rosters and there was no going back from that.

[89] After implementing the new rosters Union members sought advice from the Union as to whether they should be working their preference based roster or whether they were contractually bound to work to the new rosters. The Union's view remained that the employees were not required to work the new rosters unless there was agreement.

[90] In one case that I have been made aware of an employee attended work at her preference based roster time and was instructed to go home because under the new roster it was a rostered day off. The employee was told to return to work according to the new roster. The employee has recorded in an email to the Union that she was told if she did not obey the instruction Qantas would send out a possible letter of expectation or take further legal action.

⁷ Employment Relations Act 2000 s 3(a)(v).

[91] The risk Qantas took in not following the dispute processes set out in the collective agreement means any such instructions given to its employees could be unlawful. The approach taken by Qantas seems to me to be high handed and to threaten possible legal action against an employee who was acting on the advice of her Union was unreasonable.

[92] The better course of action was to work quickly with the Union to resolve the matter rather than ignoring it.

[93] Qantas was aware, at the time it implemented the new rosters the Union had raised a dispute and mediation was an option. Despite this Qantas made its decision to forge ahead with the new rosters rather than postpone its implementation to allow time for the dispute to be resolved.

[94] The second and third applicants have given compelling evidence as to the effect the changed roster patterns have had on them personally and their work/life balance. Work/life balance was a factor Qantas promoted when consulting over the 2015 preference based rosters.

[95] The breach of the collective agreement and the breach of the statutory duty of good faith are two separate breaches. Potentially the breaches affected all five applicants meaning penalties of up to \$100,000 for each breach.

[96] I consider each of the two separate breaches as a single course of conduct, thus being two one-off breaches. The breaches were serious and of some gravity. The terms and conditions of employment in a collective agreement and any additional terms and conditions are made to be kept. A penalty is warranted to deter other parties from breaching such terms in future.

[97] Balancing all of the factors and considering the range of penalties awarded in comparable cases, \$3,000 is an appropriate and proportionate penalty for Qantas to pay for each breach. This equates to total penalties of \$6,000.

[98] The applicants sought an order directing any penalty to be paid to the second and third applicants.⁸ This is an appropriate case for the penalties to be paid to the

⁸ Ibid s 136.

second and third applicants and not to the Crown. This will equate to 25% of the total penalties being paid to each of the second and third applicants.

[99] Qantas is ordered to pay penalties of \$6,000 to the second and third applicants within 1 month of the date of this determination.

Costs

[100] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the applicants will have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Qantas will have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

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

Vicki Campbell
Member of the Employment Relations Authority