DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Jetstar Airways Pty Limited
v
Ms Monique Neeteson-Lemkes
(C2013/5863)

VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT DRAKE
COMMISSIONER RIORDAN SYDNEY, 13 DECEMBER 2013

Appeal against decision [2013] FWC 5840 of Commissioner McKenna at Sydney on 16 August 2013 in matter number U2013/27.

Introduction

[1] On 21 December 2012, Ms Monique Neeteson-Lemkes was dismissed from her employment as a domestic flight attendant with Jetstar Airways Pty Limited (Jetstar). Jetstar's reason for the dismissal was that Ms Neeteson-Lemkes was unable to perform the inherent requirements of her role, then or in the future, and that there were no reasonable adjustments which could be made to allow her to perform her role, which Jetstar characterised as "safety critical". Ms Neeteson-Lemkes subsequently lodged an application for an unfair dismissal remedy under s.394 of the *Fair Work Act 2009* (the Act). On 16 August 2013, Commissioner McKenna issued a decision[1] (Decision) in which she found that Ms Neeteson-Lemkes's dismissal was harsh, unjust and unreasonable, and determined that Ms Neeteson-Lemkes should be reinstated to her employment with Jetstar. The Commissioner issued an order[2] (Order) to effect the reinstatement on the same day.

[2] On 8 September 2013, Jetstar filed a Notice of Appeal against the Decision and Order, which included an application for permission to appeal, under s.604 of the Act. The Notice of Appeal also sought a stay of the reinstatement order pending the final determination of the appeal. By consent, a stay order was made on 5 September 2013.

History of Ms Neeteson-Lemkes's employment and the dismissal

[3] Before turning to Jetstar's grounds of appeal, it is convenient to set out in summary form a history of Ms Neeteson-Lemkes's employment with Jetstar, including the events which led to her dismissal. The Decision at paragraphs [3] to [23] sets out that history in a

[1] [2013] FWC 5840, PR540392, 16 August 2013

[2] PR540393

manner which was largely uncontroversial, and our summary is partly based upon that part of the Decision.

[4] Ms Neeteson-Lemkes commenced employment with Jetstar on 17 May 2006. On 19 January 2010 she made a workers' compensation claim for a psychological injury arising from alleged bullying and harassment by a supervisor at work. The injury caused Ms Neeteson-Lemkes to be off work for some months. She was treated by her general practitioner, Dr Alan Saunders, a psychologist, Ms Maria Tzoumacas, and a consultant psychiatrist, Dr Ricardo Farago. The claim, initially disputed, was settled after proceedings were commenced in the Workers' Compensation Commission of NSW. A medical report prepared for the purpose of the workers' compensation proceedings by Dr Farago and dated 4 February 2011 stated that Ms Neeteson-Lemkes had originally been diagnosed with Major Depression caused by her "work issues". This report further stated that at "last review" she was still suffering from "episodes of low mood" and was taking anti-depressant medication, and that "...[c]urrently her ability to perform normal duties is impaired by her psychiatric condition at episodic periods as evidenced by her sick leave". The report (which referred to Ms Neeteson-Lemkes by her then married name of Sornsiri) concluded by saying:

> "Ms Sornsiri's prognosis is positive, as she has several factors that support a complete recovery ... It is also possible that the relationship with her employer has been damaged so that working for the same company may contribute to a relapse."

[5] It is clear from the evidence that Ms Neeteson-Lemkes had not fully recovered from her 2010 psychological injury by the time that she suffered a further psychological injury on 11 August 2011. Dr Saunders's clinical notes disclose that she was still reporting adverse psychological symptoms to Dr Saunders up until July 2011 and was being prescribed anti-depressant medication.

[6] The further psychological injury was the result of an incident which occurred on a flight on which Ms Neeteson-Lemkes was working. In the Decision the Commissioner described, in a way which was not in issue in the appeal, what occurred:

> "[6] On 11 August 2011, the applicant was performing duties on Flight JQ 672 from Sydney to Darwin. In the course of cleaning and re-stocking the lavatories, the applicant noticed something in a toilet bowl. It was a type of green circuit board embedded in a plasticine-like substance, with protruding wires and a cylindrical battery ("the device"). A photograph of the device was in evidence and it fairly can be described as having every appearance of being a bomb. After finding the device, the applicant attended to matters that were professionally expected of a flight attendant while the plane continued flying. When the plane landed, the applicant again attended to those matters that were professionally expected of her as a flight attendant, including preparation of documentation and the like concerning the incident.
>
> [7] Apart from the understandably (put at its lowest) upsetting experience of finding the device, which the applicant also understandably feared would explode while the plane continued on its journey, the applicant was also upset, concerned and angered by what she considered to be the inappropriate conduct of the respondent following the discovery of the device, including, but not limited to, the failure to divert the plane or request an emergency landing and a range of other matters in the aftermath.

> [8] Following the events concerning finding the device, the applicant developed a psychological injury and was, following periods of forms of leave, unable to work from about January 2012."

[7] Although there was apparently an investigation into this incident, the evidence does not disclose anything of substance about what the "device" that was discovered actually was or how it came to be where it was on the aircraft. Ms Neeteson-Lemkes made a workers' compensation application with respect to the injury, for which liability was accepted by Jetstar.

[8] Ms Neeteson-Lemkes was again treated by her general practitioner, Dr Saunders, in respect of the injury. It may be noted at this point that Dr Saunders has been qualified by the Civil Aviation Safety Authority as a "Designated Aviation Medical Examiner". In the period January 2012 to May 2012, Dr Saunders issued a series of WorkCover medical certificates which collectively deemed Ms Neeteson-Lemkes "unfit" for work for the period 7 January 2012 to 2 June 2012. These certificates diagnosed Ms Neeteson-Lemkes as suffering from "anxiety depression (exacerbation of previous condition)". They also refer to Ms Neeteson-Lemkes having been referred to a psychologist, Mr Andrew McKinley, for ongoing treatment.

[9] In a letter dated 19 March 2012 which, we infer from the evidence, was sent to Dr Saunders, Mr McKinley said (underlining added):

> "Thank you for referring this patient under workcover to treat her condition following the situation in her workplace. We have continued with some CBT and counselling.
>
> I have attached <u>a psychological management plan with an emphasis on retraining and redeployment into a new role and employer</u>. I concur with you that she will be better off doing something positive.
>
> Her progress has been hindered by re-experiencing the trauma during the numerous assessment and phone interviews she has been having that have no emphasis on treatment. It is anticipated that we will now be able to continue with treatment."

[10] The "psychological management plan" referred to as being attached was not put into evidence.

[11] On 30 May 2012 Dr Saunders filled out a request for information sent to him by Allianz, which was engaged by Jetstar to assist with its management of workers' compensation claims. In answer to the question "Do you believe a return to pre-injury duties is an appropriate return to work goal for Ms Neeteson-Lemkes?", Dr Saunders replied (underlining added):

> "A return to working as a flight attendant is appropriate, although <u>I doubt she can return to Jetstar. She still has outstanding issues regards safety on Jetstar flights which seem difficult to get an answer to</u>."

[12] On 22 June 2012, Dr Saunders issued a further WorkCover certificate in which he continued his diagnosis of "anxiety depression (exacerbation of previous condition)", and also indicated that his present opinion was that Ms Neeteson-Lemkes was not "fit for pre-injury duties", but was "fit for suitable duties" from 1 July 2012 to 31 August 2012. Those suitable

duties were identified in the certificate as "fit for pre injury duties as a flight attendant, different employer including Qantas". We note that Jetstar is a subsidiary of Qantas. In a letter dated 16 July 2012 from Mr Michael Coffey, Jetstar's Occupational Health and Safety Manager, to Dr Saunders, Mr Coffey among other things requested that Dr Saunders provide "urgent clarification" of the following matters:

> "(1) What is the likelihood of Ms Neeteson-Lemkes returning to pre-injury duties as a flight attendant role with Jetstar in the foreseeable future? To this end I have attached a list of routine tasks undertaken by a flight attendant for your reference. Due to safety related aspects of the role, all crew must be free from ant restrictions prior to returning to operational flight duties;
>
> (2) If the answer is yes to the above, what is the likely timeframe for an unrestricted return to work at Jetstar?
>
> (3) Is there an underlying condition that is predisposing Ms Neeteson-Lemkes to future prolonged absences from work and that will place her at a greater risk of injury in carrying out the role of a flight attendant?
>
> (4) Is there a greater risk that her medical condition may re-occur or be aggravated if Ms Neeteson-Lemkes attend Jetstar workplaces, particularly those in near proximity to aircrafts and in general?
>
> (5) In light of recent events Jetstar is seeking clarity on Ms Neeteson-Lemkes capacity to attend Jetstar's premises for purposes that may not be associated directly to or indirectly with Jetstar. Can you please provide an updated opinion on her fitness for performing duties in this regard?"

[13] The list of "routine tasks undertaken by a flight attendant" attached to Mr Coffey's letter was as follows:

> **"Flight Attendant - examples of duties**
>
> - Working hours of 188-199 hours per 8 weeks. Up to 9 days away from home
> - Ability to carry and lift one's own luggage
> - Reaching into overhead stowage
> - Bending and squatting to check trays
> - Pushing and pulling carts on a 3 degree slope on carpeted floor. Carts may weigh up to 100kg
> - Repetitive stooping/ bending/ leaning/ reaching and whole body twisting
> - Static load of the upper limbs and back
> - Pouring coffee from a 2 kg pot across passengers in 3 seats
> - Standing for long periods.
> - Assisting passengers with disabilities as required
> - Able to get between seats to assist sick passengers
>
> **Emergency procedures**
>
> - Power grip to grasp handles/ levers

- Elbow flexion/extension and pronation/supination to operate levers and push/pull doors
- Frequent upper limb reaching/ stretching to access door handles and overhead equipment
- Frequent bending/stooping to check hazards
- Lifting a 28kg aircraft window exit
- Dealing with emergencies in smoke filled simulator
- Swimming and assisting people in the water
- Descending an escape slide 9 metres above the ground
- Fighting fires with a full face mask
- Controlling people in panic situation
- Moving disabled people in evacuations."

[14] Dr Saunders did not reply to this letter until 24 September 2012, when he faxed back to Jetstar a copy of the letter with his responses handwritten upon it. On the copy of this document put in evidence, the answers are almost entirely illegible.

[15] On 4 September 2012, Dr Saunders issued two further WorkCover certificates. They both contained the same diagnosis as in the earlier certificates, and neither indicated that Ms Neeteson-Lemkes was fit for "pre-injury duties". However, the first certificate indicated that Ms Neeteson-Lemkes was "fit for suitable duties" for the period 1 September 2012 to 30 September 2012, such duties being "pre injury duties as a flight attendant, different employer including Qantas, fit for union duties". The second indicated that Ms Neeteson-Lemkes was also "fit for suitable duties" from 1 October 2012 to 17 November 2012. Those duties were now identified as "fit to return flying, to resume 8 hours per week, with gradual increase in hours when certified". There was no issue that this certificate was referring to suitable duties with Jetstar. This certificate indicating suitable restricted duties from 1 October 2012 represented the first time since Ms Neeteson-Lemkes had ceased work in January 2012 that she had been certified as fit to return to work at Jetstar in any capacity.

[16] Jetstar did not make any arrangement for Ms Neeteson-Lemkes to return to work in accordance with Dr Saunders's certificate. As the evidence of Ms Audrey Pajmon, Jetstar's Head of Customer Service, made clear, Jetstar was not satisfied that Ms Neeteson-Lemkes was fit to return to flying duties, and formed the view that she should be referred to an independent specialist for assessment. The bases for Jetstar's view in this respect were summarised in the Decision as follows[3]:

"• two medical certificates concerning the applicant were received on the same day;
• the applicant's medical certification had moved straight from being unfit for any duties with the respondent, including any administrative duties, to being fit to return to flying;
• the safety-critical nature of a flight attendant's flight duties determining the applicant's fitness for work before returning her to flying duties; and
• given the nature of the applicant's condition, having an independent opinion of a specialist psychiatrist, not just a general practitioner."

[3] Decision at [13]

There was no issue that Jetstar was capable of providing Ms Neeteson-Lemkes with work as a flight attendant on the basis of restricted hours, provided she was otherwise fit to perform those duties.

[17] In a letter dated 13 September 2012, Ms Kylie Gardner, Jetstar's People Manager - Customer Services & Ground Operations, directed Ms Neeteson-Lemkes to attend an appointment with Dr Kipling Walker, a Forensic Psychiatrist, on 19 September 2012. Included in this letter was the following statement:

> "Following this appointment we will arrange a meeting with you to discuss the contents of the medical report received from Dr Walker. Present at this meeting will be myself as your HR Business Manager, and your manager Kerin Oswin you are also welcome to bring a support person to this meeting if you wish [sic]. I will be in touch shortly to confirm the time and location of this meeting."

[18] The same day, Ms Gardner sent a letter of instruction to Dr Walker for the purpose of the assessment of Ms Neeteson-Lemkes. This letter included the list of the "routine tasks undertaken by a flight attendant" that had been included in Mr Coffey's letter of 16 July 2012 which we have earlier set out.

[19] In a letter also of the same date (13 September 2012) addressed to Mr Coffey, Dr Saunders elaborated upon the conclusions he had expressed in the two WorkCover certificates of 4 September 2012:

> "I had a consultation with Monique Neeteson-Lemkes on 4th of September 2012. As part of this consultation, we discussed her return to work as a flight attendant at Jetstar. It was agreed at the time that we would work towards a return to work from October 2012. If possible, this would commence with a limit to eight hours flying time per week, to allow her to readjust to the rigors of work.
>
> The only underlying condition that is preventing her from returning to work is her post traumatic stress and her perception as to the way she is being treated during her employment at Jetstar. I do not believe there is now any risk that her condition could be aggravated by attending Jetstar workplaces or from being in the proximity to aircraft or other Jetstar facilities. I believe she has attended the airport twice this year, once to farewell friends and once to attend the crew room to check for any mail. I do not see that this in any way going to contribute to her remaining off work, but may help to facilitate her return to work."

[20] Ms Neeteson-Lemkes did not attend the appointment with Dr Walker in accordance with the direction. By letter dated 28 September 2012 Ms Gardner issued a further direction for Ms Neeteson-Lemkes to attend a further appointment with Dr Walker on 17 October 2012, and made it clear that no suitable duties would be provided to her until then, and that disciplinary action, which might include termination of employment, would follow if she did not attend. Ms Neeteson-Lemkes attended this appointment, and provided Dr Walker with some documentation concerning her employment and medical history.

[21] Dr Walker subsequently provided Jetstar with a report dated 31 October 2012. His report stated (underlining added):

> "Ms Neeteson-Lemkes meets diagnostic criteria for an adjustment disorder with anxiety, rather than posttraumatic stress disorder. Her symptoms and impairment are greater than expected.
>
> ...
>
> Ms Neeteson-Lemkes has a personality disorder. She has an enduring pattern of abnormal emotions and behaviour, out of keeping with social norms. She is angry and hostile towards Jetstar.
>
> ...
>
> Ms Neeteson-Lemkes will not become fit for work as a flight attendant. Because of her personality disorder, she will remain angry with Jetstar, and continue to blame her employer and other staff for her emotional problems. She has little insight into the role she plays in her negative emotions. Psychological treatment has been intermittent, and will not make her fit for work as a flight attendant."

[22] Ms Gardner subsequently requested a supplementary report from Dr Walker concerning Dr Saunders's opinion of Ms Neeteson-Lemkes's capacity to return to work as a flight attendant. On 7 December 2013, Dr Walker sent a supplementary report to Ms Gardner which included the following (underlining added):

> "On 20 November 2012, I spoke with Dr Alan Saunders, general practitioner... Dr Saunders agreed that Ms Neeteson-Lemkes has adjustment disorder with anxiety, and a personality disorder. Dr Saunders would be surprised if Ms Neeteson-Lemkes became fit for full-time flight attendant duties, even with a graduated return to work. Dr Saunders noted that Ms Neeteson-Lemkes had a lot of anger and at times hostility towards Jetstar. Dr Saunders noted that Ms Neeteson-Lemkes was possessed with pursuing Jetstar and had testified against Jetstar before a Senate hearing.
>
> On 3 December 2012, I spoke with Dr Alan Saunders, general practitioner. Dr Saunders was unsure whether Ms Neeteson-Lemkes was psychologically fit to work for Jetstar. Dr Saunders was unsure how she would react in an emergency situation as a flight attendant, and unsure whether she would accept non-flight attendant duties with Jetstar.
>
> **SUMMARY AND OPINION**
>
> Dr Saunders and I agree about Ms Neeteson-Lemke's psychiatric diagnoses. Dr Saunders is unsure whether Ms Neeteson-Lemkes is fit for any duties with Jetstar.
>
> I believe that Ms Neeteson-Lemkes is permanently unfit for any duties with Jetstar. Her symptoms prevent her from carrying out emergency procedures as a flight attendant. Such duties include controlling people in an emergency situation. Her anger and hostility prevent her from performing other duties with Jetstar. She has been off work for approximately one year. Returning her to work with Jetstar will aggravate and prolong her anxiety. Her personality disorder will persist indefinitely, as will her anger and hostility towards Jetstar."

[23] Dr Walker also recorded in that report that he had spoken to Mr McKinley about Ms Neeteson-Lemkes's condition, and that Mr McKinley said that he had been treating Ms Neeteson-Lemkes for symptoms of anxiety and depression, and that a diagnosis of post-traumatic stress disorder was considered.

[24] Dr Saunders had by this time issued a further WorkCover certificate. This certificate was dated 13 November 2012, and covered the period 17 November to 17 December 2012. In that certificate, Dr Saunders stated a diagnosis similar to that contained in his earlier certificates, namely that Ms Neeteson-Lemkes was suffering from "anxiety depression (exacerbation of previous condition), post traumatic stress", and made no mention of a personality disorder. He again expressed the opinion that while Ms Neeteson-Lemkes was not fit for pre-injury duties, she was "fit to return flying, to resume 8 hours per week, with gradual increase in hours when certified, fit for union duties".

[25] Since Dr Saunders had first certified Ms Neeteson-Lemkes as fit for a return to restricted flying duties on 4 September 2012, Ms Neeteson-Lemkes had been agitating to be allowed to return to work in accordance with his certification. After a number of representations were made by her or on her behalf, Ms Neeteson-Lemkes's union made an application to this tribunal about this issue. This was listed before Commissioner Gregory on 6 December 2012. Jetstar's position was that it was awaiting Dr Walker's report before it could determine whether Ms Neeteson-Lemkes could be offered any duties as a flight attendant.

[26] On 11 December 2012, Ms Audrey Pajmon, Jetstar's Head of Customer Service, sent a letter to Ms Neeteson-Lemkes which initiated the process which led to her dismissal. The key passages of this letter were as follows (underlining added):

> "As we advised you by letter dated 6 September 2012, as part of the ongoing management of your Return to Work Program, Jetstar needed to make an assessment regarding your future capacity to undertake the duties of a Flight Attendant with Jetstar. To ensure we had the most up to date medical information when making any decisions we made an appointment for you with an independent medical specialist, Dr Kipling Walker, who is a psychiatrist.
>
> You attended an appointment with Dr Walker on 17 October 2012.
> Following your assessment, Dr Walker has advised Jetstar of his expert opinions as follows:
>
> 1. You suffer from psychological conditions, namely:
>   a. an adjustment disorder with anxiety; and
>   b. a pre-existing personality disorder.
> 2. You are not fully fit to return to work as a flight attendant with Jetstar.
> 3. Your psychological prognosis is poor and you are unlikely to become fully fit to return to work in a flight attendant role at Jetstar.
> 4. Returning you to work with Jetstar in any capacity will aggravate and prolong your anxiety.
> 5. You are not fit to deal with emergency situations on-board aircraft and such emergency situations would aggravate and prolong your anxiety.
> 6. An exacerbation of your adjustment disorder would prevent you from carrying out emergency procedures as it would affect your concentration and thought processes, overwhelming your ability to think logically and respond appropriately to an emergency situation.
>
> Dr Walker has discussed these matters with your treating GP, Dr Saunders, most recently on 3 December 2012, who:

1. Agrees with Dr Walker's diagnosis of your psychological conditions as identified in 1. above.
2. As a result of the diagnosis, would be surprised if you became fit for full-time flight attendant duties, even with a graduated return to work.
3. Is unsure how you would react in an emergency situation as a flight attendant.

On the basis of all of the information presently available to Jetstar about your present and future fitness for work, we are now considering terminating your employment on the basis that you are unable to perform the inherent requirements of your role with Jetstar now or in the future and there are no reasonable adjustments that could be made such as to allow you to perform your safety-critical role.

You are now invited to provide to Jetstar any additional material that you would like Jetstar to consider before making a decision in relation to your employment. Any such material must be provided to me in writing ... by no later than 5pm 21 December 2012."

[27] On 21 December 2012, Ms Neeteson-Lemkes's solicitors, Maurice Blackburn, replied to Ms Pajmon's letter. The letter included the following (underlining added):

"As you are no doubt aware, our client suffered a psychological injury on 11 August 2011 during the course of her employment with Jetstar. Consequently, she consulted her nominated treating doctor, Dr Saunders. Dr Saunders then referred her on to Mr Andrew R McKinley, Psychologist for further review.

Our client was diagnosed as suffering from [named conditions] which was work-related. Since the most recent work-related injury, our client has been receiving counselling and cognitive behavioural therapy from her psychologist.

As a result, she has been unfit to return to her pre-injury duties as a flight attendant with Jetstar.

As a result, Jetstar arranged for our client to attend an appointment with Dr Walker, Psychiatrist on 17 October 2012 to ascertain her capacity to return to her pre-injury duties. The outcome of the assessment led Dr Walker to opine that our client suffers from an adjustment disorder with anxiety and a pre-existing personality disorder.

We confirm that our client instructs that she has never been diagnosed as suffering from any pre-existing or current personality disorder. Our client instructs that the reason for her ongoing incapacity in relation to her employment with Jetstar as a flight attendant is entirely as a result of the most recent injury which she sustained on 11 August 2011 and the subsequent trauma that followed.

In your correspondence dated 11 December 2012, you rely upon the diagnosis of Dr Walker in relation to the psychological conditions suffered by our client in order to determine whether Jetstar will terminate her employment due to her ongoing incapacity.

> In light of the above, in particular the diagnosis of a pre-existing personality disorder, and its potential implications on our client's ongoing workers' compensation entitlements should you choose to terminate her employment, we kindly request that you provide a copy of the report of Dr Walker and any other medical information that you might have that demonstrates or confirms that our client suffers from a pre-existing personality disorder.
>
> We look forward to your response and a copy of Dr Walker's report in due course."

[28] This letter, insofar as it disputed the diagnosis of Dr Walker relied on to justify the threatened dismissal, appears to have been concerned with the effect of that diagnosis on the issue of workers' compensation liability as well as the threatened dismissal itself. Ms Pajmon's evidence at the hearing was that, having received this letter, she "...observed that no reasons had been provided as to why Jetstar should not terminate Ms Neeteson-Lemkes's employment", and considered that Ms Neeteson-Lemkes "...did not want to provide such information". We interpolate at this point that it appears that the statement that Ms Neeteson-Lemkes had never been diagnosed as suffering from any pre-existing or current personality disorder was not regarded by Ms Pajmon as relevant in this connection. Ms Pajmon sent Ms Neeteson-Lemkes a letter the same day informing her that she was dismissed for the reasons set out in the 11 December 2012 letter effective from that date, with four weeks' pay in lieu of notice.

[29] Shortly after the dismissal, Dr Saunders wrote the following letter (addressed simply to "Dear Sir", but which we assume was sent to Jetstar at some stage) giving his version of his communications with Dr Walker (underlining added):

> "In respect of Jetstar's letter of Dec 11 2012 I would make a few comments. I spoke with Dr Walker on Dec 3, and I agreed with him that Monique had depression, and also that she has ongoing issues with the way she has been treated by Jetstar which were currently contributing to her inability to return to work. She felt that on the basis of how she has been treated in the past, and her union involvement, that Jetstar was not interested in helping her and were in fact happy to see her leave Jetstar. If this is what is meant as personality disorder then so be it. I had previously suggested a gradual return to flying duties but was informed by Dr Walker that CASA rules made this impossible. A gradual return after her time off work (from her workplace injury of Aug 11 2011) would have allowed a return of trust from both parties. If this was not allowed on the basis of CASA, then it was agreed that she was not currently fit for a return to full time flying. <u>She is, however, fit for a return to part time flying which I believe would result in a timely return to full flying</u>."

The medical evidence at hearing

[30] At the hearing of Ms Neeteson-Lemkes's unfair dismissal application, she called evidence from three of her treating practitioners, Dr Saunders, Mr McKinley and Dr Farago. In his evidence, Dr Saunders referred to a brief report he had written concerning Ms Neeteson-Lemkes's health which he had written on 22 March 2013 after examining her that day. The report read:

> "As a brief report on Monique Neeteson-Lemkes, when seen today she reports that she has returned to casual work 3 days a week, and is now intending to work full time. Her

mental state is the best I have seen it, she reports resolution of most of her symptoms, and is coping very well with her day to day duties. I would expect this to continue as she returns to full time employment".

[31] Dr Saunders expressed the opinion that Ms Neeteson-Lemkes was "...currently fit to return to working full time hours, whether at Jetstar or otherwise." Dr Saunders also gave evidence of his recollection of the conversation he had had with Dr Walker on 3 December 2012 as follows:

"a. Dr Kipling Walker states his diagnosis of the Applicant.
b. Dr Kipling Walker asked: 'Is she fit for return to full time work now?'
c. I replied 'No.'
d. Dr Kipling Walker stated 'CASA will not allow flight attendants to return to work unless they are fully fit for full time duties and they will not allow a gradual return to work.'
e. I replied 'If that is the case then she is not fit to return to work'."

[32] Dr Saunders also gave evidence that, insofar as he had said anything to Dr Walker about a diagnosis of a personality disorder, the effect of what he had said was only that he "...did not believe that Ms Neeteson-Lemkes suffered from a personality disorder unless her dislike and distrust of Jetstar is described as a personality disorder".

[33] Mr McKinley had, shortly after the dismissal in about February 2013[4], prepared a "Psychological/Counselling Management Plan" in which he stated that in his opinion Ms Neeteson-Lemkes would not have the capacity to return to "pre-injury activity". However, in a report which he signed on 6 May 2013 (but which also bears a date of 30 April 2013) he expressed a changed view:

"Ms Neeteson-Lemkes has been treated for symptoms of Post Traumatic Stress Disorder and Depression. Her symptoms have been greatly reduced over time so that she is now fit for a return to duties. Her work trial is going very well.

There is no evidence of any underlying personality disorder.

Her symptoms have been well-managed but the ongoing dispute process is currently increasing her levels of distress...

She has no reported physical conditions that limit her ability to perform her duties as a flight attendant; the only concern has been if her psychological condition would inhibit her ability to perform tasks in an emergency situation. However her recent work trial in a different position indicates that she has no problem handling herself in a professional manner when dealing with people and there is nothing to indicate there would be problems in emergency situations if that situation is responded to appropriately by her employer."

[34] Dr Farago affirmed the contents of a medical certificate he had issued on 30 April 2013 which said:

[4] PN1158

> "At review today there was no evidence either on history or examination of any residual symptoms of Post Traumatic Stress Disorder, Anxiety/Depression or any other psychiatric disorder. Ms Neeteson-Lemkes does not and has never shown any evidence of a personality disorder.
>
> As such Ms Neeteson-Lemkes is currently fit to resume her normal duties as a flight attendant. I see no medical/psychiatric impediment to her capacity to perform emergency procedures as part of her duties."

[35] Ms Neeteson-Lemkes also obtained an expert report from Mr Ilan Cohen, a Clinical Psychologist. Mr Cohen consulted with Ms Neeteson-Lemkes on 27 April, 30 April and 1 May 2013 before preparing his report on 6 May 2013. Part of his assessment process was carried out by the use of a psychological test, the Carlson Psychological Survey. His conclusion in his report was as follows:

> "In summary, my assessment has shown that Ms Neeteson-Lemkes does not have a diagnosis of Personality Disorder and that she is suitable to begin work again as a flight attendant at Jetstar Airways. It is the author's opinion that Ms Neeteson-Lemkes is a dynamic and authoritative individual who is highly assertive and motivated and has remained so throughout her ordeals, despite the serious reputational and financial ramifications which she reports that her ordeals with Jetstar have presented her with."

[36] Mr Cohen criticised some aspects of Dr Walker's report in which he had diagnosed Ms Neeteson-Lemkes as suffering from a personality disorder, including that Dr Walker had not specified the type of personality disorder that Ms Neeteson-Lemkes was said to have, that Ms Neeteson-Lemkes had no history of the behaviours of self-harm, drug abuse or anti-social behaviour which were indicative of personality disorder, that Dr Walker had interviewed Ms Neeteson-Lemkes on one occasion only and had not administered a psychological test, and that he had treated Ms Neeteson-Lemkes's demonstrated anger towards Jetstar as a symptom of a personality disorder rather than a justifiable reaction to her employment experiences with Jetstar.

[37] Jetstar called Dr Walker to give evidence. He affirmed the contents of his 31 October 2012 report, and the version he had given of his conversations with Dr Saunders as described in his supplementary report of 7 December 2012. In a reply statement, he responded to some of the matters raised in Mr Cohen's report, including that:

- he had not nominated the particular type of personality disorder he had diagnosed, because the terminology used in the Diagnostic and Statistical Manual of Mental Disorders, 4th edition (DSM-4) was "contentious" and could "create confusion";
- if he had specified the particular type of personality disorder, it would have been Borderline Personality Disorder;
- self-harm was not required for a diagnosis of Borderline Personality Disorder;
- for a diagnosis of Borderline Personality Disorder, it was necessary to satisfy five out of nine specified criteria (which Dr Walker set out);
- in Dr Walker's opinion, five criteria (which he specified) were satisfied, and another two were probably satisfied;
- it was permissible to make a psychological diagnosis after one assessment;
- the information he had been provided concerning Ms Neeteson-Lemkes provided him with "a sufficient longitudinal history to arrive at a diagnosis; and

- the intensity and duration of Ms Neeteson-Lemkes's anger was consistent with a personality disorder.

[38] Dr Walker also made it clear that the personality disorder diagnosis was the critical issue with respect to Ms Neeteson-Lemkes's capacity to return to her duties as a Jetstar flight attendant, saying:

> "In my opinion, the key issue was and continues to be that Ms Neeteson-Lemkes has a personality disorder, which affects her fitness for work."

The Decision

[39] The Commissioner found that the dismissal of Ms Neeteson-Lemkes was harsh, unjust and unreasonable. Her conclusions in this respect were as follows:

> "[75] The dismissal was bereft of substantive and procedural fairness. So much was effectively acknowledged by Ms Pajmon in cross-examination in evidence which, even counsel for the respondent appropriately conceded in submissions, did not assist the respondent's case. It is not necessary for the purposes of this decision to recount that evidence; the record speaks for itself. The respondent considers it had a valid reason to dismiss the applicant, but it failed to discuss Dr Walker's report with the applicant and refused to provide a copy of the report to the applicant, her union and her solicitors.
>
> [76] The only information the respondent provided to the applicant about Dr Walker's nine-page report was six short points in Ms Pajmon's letter of 11 December 2012. Further, it appears the applicant did not have any knowledge of Dr Walker's supplementary report dealing with discussions between Dr Walker and Dr Saunders. It is not clear, but it seems to be that the applicant gained access to Dr Walker's report only when a Notice to Produce was issued as part of these proceedings.
>
> [77] Ms Pajmon's letter of 11 December 2012 also referred, in three short points, to discussions between Dr Walker and Dr Saunders. As to that, however, it was common ground Dr Walker made erroneous comments to Dr Saunders during that conversation about matters concerning returning to work on a part-time basis. Further, Dr Saunders's evidence in these proceedings was that the content of the conversation was taken out of context - which I accept.
>
> [78] It cannot reasonably be contended, and nor would I accept in any event, that the letter of 11 December 2012 was sufficient to give the applicant any fair or reasonable opportunity to, using Ms Pajmon's descriptor, "show cause" why she should not be dismissed. For example, if the applicant did not know what was in the report, because the respondent refused to provide it to her or hold a meeting to discuss it, she could hardly be in a position to assess it let alone challenge it with any of her own reports from other health professionals (which is just what has occurred in the evidence since adduced by the applicant in the proceedings). In this regard, I also accept the submissions made for the applicant that it would have been be unrealistic to have expected a detailed, evidenced reply to the respondent in answer to Dr Walker's assessment, the contents and premise of which medical report were unknown to the applicant, in the timeframe that was provided for response.

> [79] I am satisfied the dismissal of the applicant was harsh, unjust and unreasonable and that the applicant should have an unfair dismissal remedy."

[40] Later in this decision we analyse in greater detail the reasoning process by which the Commissioner reached these conclusions, including the extent to which the matters identified in s.387 of the Act were taken into account. On the question of remedy, the Commissioner dealt with the medical evidence concerning Ms Neeteson-Lemkes's capacity to resume work as a flight attendant with Jetstar, including in particular the evidence of Dr Walker. The Commissioner did not accept the opinion of Dr Walker and preferred the evidence of the practitioners called by Ms Neeteson-Lemkes, saying:

> "[83] In this case, the preponderance of the evidence from the health professionals was to the effect that, contrary to the conclusions of Dr Walker, the applicant could be reintegrated to work as a flight attendant with the respondent and, indeed, that would be appropriate. I strongly preferred the evidence adduced in the applicant's case to that relied on by the respondent as to both the question of whether the respondent had a valid reason to dismiss the applicant and in relation to the question of returning the applicant to work with the respondent.
>
> [84] To the extent it is necessary to assess the competing evidence from the health professionals, I would add that aspects of Dr Walker's report were troubling in relation to his approach to the question of the applicant's fitness."

[41] The Commissioner went on to set out in detail those aspects of Dr Walker's report she found to be "troubling" and why. The Commissioner then dealt with the necessity of Ms Neeteson-Lemkes to be re-issued with an Australian Security Identification Card (ASIC), and found this was not an impediment to reinstatement, being a separate matter beyond the Commission's purview which would take its own course (underlining added):

> "[86] The order for reinstatement will take effect in accordance with its terms. Matters concerning ASIC checks, criminal checks, ASIO checks and the like have their own processes. If there are any potential issues in this respect, I would consider them to be beyond the purview of these proceedings; they will necessarily take their own course in relation to the applicant, as they would in relation to any employee in the airline industry."

Ultimately as to Ms Neeteson-Lemkes's fitness to return to work, the Commissioner said:

> "[87] As to the order for reinstatement, the applicant was dismissed at a time when she was an injured worker who had been certified as being fit for a return to work only on a graduated basis. There was nothing in the evidence before the Commission to suggest the applicant would not now be fit for a return to full duties. It would seem prudent, nonetheless, for the applicant to provide a WorkCover certificate indicating whether the applicant is fit to resume full duties or, in the alternative, with any restrictions such as to hours and the like. <u>I emphasise strongly to the parties that my order for reinstatement is just that: an order reinstating the applicant to her former position as a flight attendant</u>. If there are any issues about the contents of the WorkCover certificate's full clearance for a return to work or, alternatively, a return to work with any restrictions then, I also emphasise, these are matters appropriately dealt

with in accordance with the processes in the respondent's workers' compensation policy and program and, if dispute remains, in accordance with the processes under NSW workers' compensation legislation."

[42] The Commissioner ordered Ms Neeteson-Lemkes's reinstatement, and directed the parties to confer as to the making of an order for lost pay, with liberty to apply being granted if an agreement could not be reached on the subject.

Grounds of Appeal

[43] Jetstar's Notice of Appeal contained a number of appeal grounds. Those grounds essentially involved three main propositions:

(1) The Commissioner failed to make a finding about whether Jetstar had a valid reason for the dismissal (namely that Ms Neeteson-Lemkes was incapable of performing the inherent duties of a flight attendant), and thereby failed to discharge her statutory duty under s.387(a) of the Act to take into account, in considering whether the dismissal was harsh, unjust or unreasonable, "whether there was a valid reason for the dismissal related to the person's capacity or conduct".

(2) The Commissioner erred in finding that Ms Neeteson-Lemkes had not been given an opportunity to respond to the reason for her dismissal relating to her incapacity, given that Jetstar's letter to her of 11 December 2012 set out that reason and gave her ten days to respond, and Ms Neeteson-Lemkes did in fact respond by way of the letter of her solicitors, Maurice Blackburn, of 21 December 2012.

(3) The Commissioner erred in ordering the reinstatement of Ms Neeteson-Lemkes in circumstances where, on proper analysis, the medical evidence (particularly that of Dr Walker) demonstrated that she was unable to perform the inherent duties of a flight attendant, in particular the requirement to deal with emergency situations onboard aircraft, and where no reasonable adjustment to the requirements of those duties could be made to accommodate her.

Consideration

[44] It is only necessary for us to consider the first of these appeal submissions. Section 387 of the Act requires the Commission, when considering whether a dismissal was harsh, unjust or unreasonable, to take into account a number of specified matters. The first matter is as follows:

"(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees);"

[45] The requirement to take this matter into account means that not only must it be considered but it must be treated as a matter of significance in the process of deciding whether the dismissal was unfair.[5] In this matter, as earlier stated, the reason for the dismissal relied upon by Jetstar was a capacity based one, namely that Ms Neeteson-Lemkes was unable to

[5] *Edwards v Giudice* [1999] FCA 1836, 94 FCR 561 at [5] per Moore J; *King v Freshmore (Vic) Pty Ltd* Print S4213 at [19]-[23].

perform the inherent requirements of her safety critical role then or in the future, and that there were no reasonable adjustments which could be made to allow her to perform that role. Section 387(a) therefore required the Commissioner to consider and make findings as to whether, at the time of the dismissal, Ms Neeteson-Lemkes suffered from the alleged incapacity based on the relevant medical and other evidence before her and, if so, whether there were any reasonable adjustments which could be made to her role to accommodate her. Those findings then need to be considered and treated as matters of significance in the process of deciding whether Ms Neeteson-Lemkes's dismissal was, to use the general rubric, unfair.

[46] The Commissioner's consideration as to whether Ms Neeteson-Lemkes's dismissal was unfair was set out in paragraphs [50]-[80] of the Decision. After some introductory comments at paragraphs [50]-[51], the Decision set out s.387(a) in a subheading. At paragraph [52], the Commissioner correctly identified the reason for the dismissal, but this section of the judgment then ended at paragraph [53], which states:

> "[53] Given my later conclusions concerning matters related to substantive and procedural fairness concerning the respondent's withholding of Dr Walker's report, being the report which was said to found a valid reason for effecting the dismissal, I propose to deal with the question of whether the respondent had a valid reason to dismiss the applicant more generally later in this decision."

[47] The Commissioner then, under a series of further subheadings, dealt with each of the other matters required to be taken into account under s.387 in paragraphs [54] through to [74]. Then under the heading "Harsh, unjust or unreasonable", the Commissioner stated her conclusions on this score. Although this section of the Decision opens with the proposition that "The dismissal was bereft of substantive and procedural fairness...", the gravamen of this part of the Decision is that the unfairness identified was that Jetstar failed to give Ms Neeteson-Lemkes any "fair or reasonable opportunity" to answer the matters, based on Dr Walker's reports, which Jetstar relied upon as the basis of the dismissal. The issue of "valid reason" was not considered in this part of the Decision beyond being mentioned in the following sentence in paragraph [75]:

> "The respondent considers it had a valid reason to dismiss the applicant, but it failed to discuss Dr Walker's report with the applicant and refused to provide a copy of the report to the applicant, her union and her solicitors."

[48] This section of the Decision ends with the following:

> "[79] I am satisfied the dismissal of the applicant was harsh, unjust and unreasonable and that the applicant should have an unfair dismissal remedy.
>
> [80] The applicant sought the remedy of reinstatement, to which I will next turn."

[49] In her written appeal submissions, and at the hearing of her appeal, it was not contended by Ms Neeteson-Lemkes that the Commissioner had anywhere in paragraphs [50]-[80] made any findings going to the "valid reason" consideration in s.387(a). Her counsel pointed to paragraph [83], which we have earlier set out, as containing the requisite finding. However, even if the second sentence of the above paragraph is to be read as amounting to a finding that Jetstar did not have a valid reason to dismiss Ms Neeteson-Lemkes based upon her capacity, that finding was only made in the context of the Commissioner's consideration

of the remedy to be granted, the Commissioner having already found that the dismissal was harsh, unjust and unreasonable. There is nothing in the Decision which indicates that the matter was taken into account in the Commissioner's consideration as to whether the dismissal was harsh, unjust or unreasonable.

[50] We are therefore compelled to conclude that the statutory obligation imposed by s.387(a) of the Act was not discharged. That amounts to a significant error of law.[6] In that circumstance, we consider that it is in the public interest to grant permission to appeal, and that it is necessary to quash the Decision and the Order. We so order.

[51] Rather than remit the matter to a single member of the Commission for a further hearing, we consider that the most efficient course is for us to re-determine the matter and issue a further decision pursuant to s.607(3)(b) of the Act.

Re-determination of the matter

[52] We will proceed to deal with each of the matters which we are required to take into account under s.387.

Whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees)

[53] We have earlier set out the reason why Jetstar dismissed Ms Neeteson-Lemkes. Consideration of the validity of that reason requires three interconnected elements to be considered: firstly, whether Ms Neeteson-Lemkes was capable of performing the inherent requirements of her role as at the date of dismissal; secondly, whether Ms Neeteson-Lemkes would be able to perform the inherent requirements of her role at some time in the future; and thirdly, whether there was some reasonable adjustment which could be made to her role to accommodate any current or future incapacity. In accordance with the reasoning of the Full Bench in *J Boag and Son Brewing Pty Ltd v Allan John Button*[7], a reason for dismissal based upon an injured employee's incapacity to perform the inherent requirements of his or her position or role must be assessed against the requirements of the substantive position or role, not as it may be modified or restricted in order to accommodate the employee's injury.

[54] There was no dispute on the evidence that, at the time of the dismissal, Ms Neeteson-Lemkes was unable to perform the inherent requirements of her role, being that of a full-time flight attendant with Jetstar. Although Jetstar relied upon the reports of Dr Walker of 31 October 2012 and 7 December 2012 to support that conclusion, it is not necessary for us to do so. Dr Saunders's last WorkCover certificate before the dismissal, that of 13 November 2012 for the period 17 November to 17 December 2012, made it clear he did not consider that Ms Neeteson-Lemkes was fit for "pre-injury duties", only suitable duties. We have earlier referred to there being an evidentiary contest about two conversations which occurred between Dr Walker and Dr Saunders which were referred to in Dr Walker's two reports. On Dr Saunders's version (that is, taking the position at its highest in favour of Ms Neeteson-Lemkes), when Dr Walker asked him "*Is she fit for return to full time work now?*", he replied "*No*". No other practitioner had, either at or before the time of the dismissal, expressed an opinion that Ms Neeteson-Lemkes was fit for a return to her pre-injury duties. Nor did any

[6] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, PR516282, 22 November 2011 at [14]

[7] [2010] FWAFB 4022, PR997513, 26 May 2010 at [22]-[27]

practitioner who gave evidence at the hearing before the Commissioner express the opinion that, as at the date of dismissal, Ms Neeteson-Lemkes was fit to return to her pre-injury duties.

[55] The issue of the validity of that part of the reason for dismissal concerning Ms Neeteson-Lemkes's future capacity to perform the inherent duties of her role involves greater complexity. It essentially involves an assessment of the validity of a prediction concerning Ms Neeteson-Lemkes's future work capacity made at the time of dismissal. At the hearing before the Commissioner, Dr Farago, Dr Saunders, Mr McKinley and Mr Cohen as earlier set out all gave evidence that in their opinion Ms Neeteson-Lemkes was fit to resume her duties as a flight attendant with Jetstar. That evidence was in each case based upon an assessment of her state of health at a time well after the occurrence of the dismissal. Dr Farago assessed her as at 30 April 2013, Dr Saunders as at 22 March 2013, Mr McKinley on or about 30 April 2013, and Mr Cohen as at 27 April, 30 April and 1 May 2013. On one view, those post-dismissal expert opinions, if accepted, would demonstrate that at the time of the dismissal Ms Neeteson-Lemkes did have a future capacity to return to her full role, and to that extent Jetstar did not have a valid reason to dismiss her based upon a prediction otherwise. However, it is well-established that, although the validity of a reason for dismissal may be determined by reference to facts discovered after the dismissal, those facts must have existed at the time of dismissal.[8] Thus in *Dundovich v P&O Ports*[9] - a case which concerned the dismissal of an injured employee who was dismissed because, for the foreseeable future, he would not be able to perform all the duties of his position - a Full Bench of the Commission found that it was necessary to take into account a court judgment that the employee's injury was work related, even though that judgment post-dated the dismissal, because the judgment was declaratory of facts and legal rights in existence at the time of dismissal.[10] Applying this principle, we do not consider it permissible to take into account the expert opinions to which we have referred in assessing the validity of Jetstar's reason for dismissal because they were clearly founded upon a factual situation which came into existence well after the date of Ms Neeteson-Lemkes's dismissal, namely her state of health at the time she was assessed. The validity of that part of Jetstar's reason for dismissal which concerned her future capacity to perform her duties must be assessed by reference to her state of health, and the expert opinions expressed as to her state of health, as they were at the time of her dismissal.

[56] The evidence does not demonstrate that any health professional had positively expressed the view that Ms Neeteson-Lemkes, based upon her state of health at or before the dismissal, would be able to return to full duties at a future time. Dr Walker's view, to which we have earlier referred, was that she was permanently incapable of returning to her full duties. His opinion was of course contested at the hearing, but even those practitioners who took a contrary view concerning Ms Neeteson-Lemkes's diagnosis and prognosis had not at the time of dismissal advanced the position that, based on her state of health at that time, she would be able to perform her full role at some future time. As earlier stated, the "Psychological/Counselling Management Plan" prepared by Mr McKinley in about February 2013[11], shortly after the dismissal, stated that in his opinion Ms Neeteson-Lemkes would not have the capacity to return to "pre-injury activity", although of course by the time of the

---

[8] *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 430 per Brennan CJ and Dawson and Toohey JJ; *Australia Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1 at 14; *Paech v Big W Monarto Warehouse* [2007] AIRCFB 1049 at [8].

[9] PR923358

[10] Ibid at [78]-[79]

[11] PN1158

hearing before the Commissioner he had changed his opinion based upon a later assessment of Ms Neeteson-Lemkes. Dr Saunders had recommended a return to work based on restricted hours, with "gradual increase in hours when certified", but never gave a positive prognosis for a full return to work prior to the dismissal. Dr Farago did not see Ms Neeteson-Lemkes between 2011 and 2013, and Mr Cohen did not see her before 2013. Therefore it can at least be said that Jetstar's view at the time of dismissal that Ms Neeteson-Lemkes would not be able to return to work her full duties as a Jetstar flight attendant was not contrary to any medical opinion in existence at or about that time.

[57] The evidence did not identify that there was any reasonable modification to the role of a full-time flight attendant that could be made to facilitate Ms Neeteson-Lemkes's return to that role. It was the emergency and safety-critical aspects of that role which were of most concern given Ms Neeteson-Lemkes's work and medical history, and there was no suggestion that any modification in that area was possible.

[58] Therefore we are satisfied that Jetstar had a valid reason for the dismissal of Ms Neeteson-Lemkes based upon the medical advice it had received or which existed at the time of the dismissal. We note that in *J Boag and Son Brewing Pty Ltd*, the Full Bench said[12]:

> "An inability to perform the inherent requirements of a position will generally provide a valid reason for dismissal. But this will not invariably be so."

[59] That proposition was not expressed as a hard and fast rule for every case, because as the Full Bench went on to acknowledge there may be particular facts in particular cases which dictate a different conclusion. The nature of the unfair dismissal jurisdiction is such that it is generally not appropriate to try to express binding rules about what conclusions should be reached in respect of the s.387 matters in relation to generalised factual scenarios. That having been said, we consider that the Full Bench's proposition in *J Boag and Son Brewing Pty Ltd* can reasonably be applied to the facts of this case.

Whether the person was notified of that reason

[60] Ms Neeteson-Lemkes was informed of the reason relied upon by Jetstar to justify her dismissal in Ms Pajmon's letter of 11 December 2012.

Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person

[61] We agree with and adopt the Commissioner's conclusion that Ms Neeteson-Lemkes was not given an opportunity to respond to the reason relied upon by Jetstar to justify her dismissal. The "opportunity" referred to in s.387(c) must be a fair and adequate opportunity, being one which in a practical commonsense way ensures that the employee is treated fairly.[13] We do not consider that Ms Pajmon's letter of 11 December 2012 afforded such an opportunity, taking into account the way in which the reason was communicated and the subsequent events prior to dismissal.

---

[12] [2010] FWAFB 4022 at [29]

[13] *Royal Melbourne Institute of Technology v Asher* (2010) 194 IR 1 at [26]; *Osman v Toyota Motor Corporation Australia Ltd* PR910409 at [69].

[62] The letter of 11 December 2012 was essentially a "show cause" letter primarily based upon Dr Walker's diagnosis and prognosis of Ms Neeteson-Lemkes's medical condition, with a secondary reliance upon what Dr Saunders purportedly conveyed to Dr Walker about his opinion concerning Ms Neeteson-Lemkes. Dr Walker's reports were not supplied with the letter, and indeed Ms Neeteson-Lemkes saw them for the first time only after she had commenced her unfair dismissal proceedings. The letter gave a summary of Dr Walker's conclusions, but no explanation of the basis upon which he had reached those conclusions.

[63] In order for Ms Neeteson-Lemkes to have a fair chance to respond to Ms Pajmon's letter in a way which might displace Ms Pajmon's *prima facie* conclusion that dismissal was justified, she needed to have a reasonable opportunity to rebut Dr Walker's diagnosis and prognosis. Realistically she could only do that if she had a copy of Dr Walker's reports and the opportunity to obtain the opinion of another medical specialist in response. This can particularly be demonstrated by reference to Dr Walker's diagnosis that Ms Neeteson-Lemkes was suffering from a pre-existing personality disorder apparently unrelated to the incidents which occurred during her employment with Jetstar. As both Dr Walker's report of 31 October 2012 and his subsequent evidence before the Commissioner made clear, the diagnosis of a personality disorder was critical to his prognosis that Ms Neeteson-Lemkes would never be able to return to her role as a Jetstar flight attendant. None of Ms Neeteson-Lemkes's treating practitioners had ever diagnosed her as having a personality disorder. This was the first time this issue had arisen. The only way in which Ms Neeteson-Lemkes could properly respond to this would be, firstly, to get a copy of Dr Walker's reports so that the basis of the diagnosis and its consequences could be identified, and secondly obtain an alternate specialist opinion on the subject. A bare denial on her part that she had a personality disorder would hardly constitute a proper response to a diagnosis by a psychiatrist.

[64] The letter sent by Ms Neeteson-Lemkes's solicitors, Maurice Blackburn, on 21 December 2012 not surprisingly requested a copy of Dr Walker's report. Ms Pajmon's letter of dismissal of the same date rejected this request. Ms Neeteson-Lemkes's union had, even before the letter of 11 December 2012, been requesting that Dr Walker's report be provided to her, but Jetstar had failed to do this despite having had the primary report for some time. The evidence of Ms Pajmon did not disclose any reasonable basis for refusing to supply Ms Neeteson-Lemkes with Dr Walker's report. The situation here is very similar to that in *Ambulance Victoria v Ms V*, in which the Full Bench determined that a failure to provide the employee with medical reports which formed the basis of the decision to dismiss the employee meant that the employee "...had no informed basis upon which she could have contested the decision".[14]

[65] We further note that Jetstar, when it directed Ms Neeteson-Lemkes to attend an appointment with Dr Walker for the purpose of a medical assessment, undertook to her that a meeting would be held with her (and a support person) to "...discuss the contents of the medical report received from Dr Walker". This never occurred. Ms Pajmon was unable to explain this omission beyond saying that it was an "oversight". This oversight contributed to the failure of Jetstar to provide Ms Neeteson-Lemkes with an opportunity to respond as referred to in s.387(c).

Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal

[14] [2012] FWAFB 1616, PR520567, 15 March 2012 at [51]-[52]

[66] As earlier stated, there were no discussions related to the dismissal, so the matter identified in s.387(d) does not arise for consideration.

If the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal

[67] Ms Neeteson-Lemkes's dismissal did not relate to unsatisfactory performance, so that the matter identified in s.387(e) is not relevant.

The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal/the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal

[68] We agree with and adopt the Commissioner's conclusions about this matter.[15] Jetstar (both in its own right and as a subsidiary of the Qantas Group) is a substantial employer. It has dedicated human resources personnel and access to high-level legal advice. In those circumstances, there was no reason for it not to follow fair procedures in considering whether Ms Neeteson-Lemkes ought be dismissed because of her medical condition.

Any other matters the Commission considers relevant

[69] There are two interconnected matters which we consider relevant to the assessment of whether the dismissal was harsh, unjust or unreasonable, and which weigh in favour of a finding that the dismissal was harsh, unjust or unreasonable.

[70] The first is that Jetstar relied upon Dr Walker's diagnosis that Ms Neeteson-Lemkes suffered from a personality disorder without making any proper attempt to consult with her treating doctors about this matter and take account of their opinions. As the evidence at the hearing demonstrated, Dr Walker's diagnosis was highly controversial. Each of Ms Neeteson-Lemkes's treating practitioners - Dr Saunders, Dr Farago and Mr McKinley - denied that Ms Neeteson-Lemkes had ever had a personality disorder. In addition Mr Cohen, the expert engaged by Ms Neeteson-Lemkes for the purpose of the hearing before the Commissioner, also disagreed with the diagnosis having assessed her by the use of a psychological test which he described as being "highly sensitive in detecting personality disorder". Dr Walker did not, in his pre-dismissal reports, identify the nature of the personality disorder he had diagnosed, nor did he identify the criteria by which he had determined that Ms Neeteson-Lemkes suffered from that personality disorder. It was only in his reply statement of evidence that Dr Walker disclosed that the diagnosis was one of Borderline Personality Disorder, and identified which of the nine criteria for this disorder specified in DSM-4 were in his opinion satisfied in Ms Neeteson-Lemkes's case.

[71] As earlier stated, it was Dr Walker's diagnosis of a personality disorder (rather than his other diagnosis of adjustment disorder with anxiety) which was critical in his conclusion that Ms Neeteson-Lemkes would be unable to return to her role as a flight attendant with Jetstar. Jetstar, as a self-insurer for workers' compensation purposes, had received earlier reports from Ms Neeteson-Lemkes's treating practitioners concerning her mental condition,

[15] Decision at [69]-[70]

including from Dr Saunders and Mr McKinley. It also seems likely that Jetstar had received Dr Farago's 2011 report prior to the dismissal, although the evidence is not entirely clear on that score. None of those reports had diagnosed Ms Neeteson-Lemkes with a personality disorder. In that circumstance, we consider that as a matter of fairness to Ms Neeteson-Lemkes, Jetstar should have obtained an informed response from these practitioners, and taken those responses into account, before making any decision to dismiss her based on an incapacity derived from that disorder.

[72] Jetstar did not do this. Dr Walker, in preparing his report of 31 October 2012, did speak to Mr McKinley and Dr Saunders. He recorded in that report that Mr McKinley had been treating Ms Neeteson-Lemkes for symptoms of anxiety and depression, and that a diagnosis of post-traumatic stress disorder was considered. He does not record that he ever obtained the views of Mr McKinley as to whether Ms Neeteson-Lemkes had a personality disorder, and of course Mr McKinley's evidence at the hearing (the issue having been raised with him after the dismissal) was that she did not suffer from such a disorder.

[73] The position is a little different with Dr Saunders. After Jetstar received Dr Walker's first report of 31 October 2012, it requested Dr Walker to "contact Dr Saunders and provide a supplementary report". The evidence does not make clear why it took this course instead of contacting Dr Saunders directly and asking him to either prepare his own report or to respond to Dr Walker's first report. Dr Walker reported that he had two conversations (on 20 November and 3 December 2012), in the first of which Dr Saunders purportedly "...agreed that Ms Neeteson-Lemkes had an adjustment disorder with anxiety, and a personality disorder". Dr Saunders gave a significantly different version of this in his evidence, saying he could only recall one conversation in which he communicated his view that he "...did not believe that Ms Neeteson-Lemkes suffered from a personality disorder unless her dislike and distrust of Jetstar is described as a personality disorder". If that is what was said, that was clearly not, properly speaking, an agreement to a diagnosis of a personality disorder. Dr Saunders's further WorkCover certificate of 13 November 2012 had repeated his diagnosis of "anxiety depression (exacerbation of previous condition), post traumatic stress", with no mention of a personality disorder. Dr Saunders's letter of 24 December 2012 explained the proper context of his conversation with Dr Walker concerning whether Ms Neeteson-Lemkes had a personality disorder in terms consistent with his later evidence at the hearing. Having regard to these matters, we do not consider that the evidence demonstrates that Dr Saunders ever diagnosed, or agreed with a diagnosis, that Ms Neeteson-Lemkes suffered from a personality disorder. The approach taken by Jetstar in having Dr Walker ring Dr Saunders and then report back to it about what Dr Saunders had said was inappropriate and almost bound to lead to a miscommunication of Dr Saunders's actual opinion.

[74] The appropriate course would have been to request Dr Saunders and Mr McKinley to prepare reports giving their response to Dr Walker's first report. If this had occurred, then the fact that Dr Walker's critical diagnosis of a personality disorder was rejected by Ms Neeteson-Lemkes's treating practitioners would have become clear. The failure by Jetstar to take this course meant that Ms Neeteson-Lemkes was dismissed substantially in reliance upon a highly controversial diagnosis, and that no proper account was taken of the opinions of her treating practitioners.

[75] Secondly, this failure by Jetstar led to the further result that Ms Neeteson-Lemkes did not obtain the benefit of the policy requirements of Jetstar's "Return to Work Program" (Policy), noting that the policy adopted by Jetstar is that of the Qantas Group as a whole. The

Policy, which presumably was among other things intended to satisfy Jetstar's statutory obligations under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW), relevantly provided as follows (underlining added):

> "**6. The Qantas Group Return to Work Philosophy**
>
> At Qantas we believe that our employees are our most important and valuable assets. When an employee suffers a workplace injury or illness, it affects not only the employee but the Qantas Group as well. Return to work has been proven to help employees recover more quickly and for this reason the Qantas Group is proud to offer the benefit of return to work to our valuable employees.
>
> **7. Return to Work Policy**
>
> The Qantas Group will ensure that the return to work process is commenced as soon as possible after an injury in a manner consistent with the employee's medical fitness for work. The Qantas Group is committed to ensuring that early return to work by an injured employee is a normal practice and expectation.
>
> **8. Return to Work Commitment**
>
> The Qantas Group is committed to the return to work of injured employees and will:
> ...
> - Provide the injured employee with support to minimise the effects of the injury and to ensure that an early return to work is a normal practice and expectation;
> - Participate in the development of an injury management plan and ensure that injury management commences as soon as possible after an employee is injured;
> - <u>Provide suitable duties for an injured employee as soon as is safely possible, and after seeking appropriate medical information</u>.
> - Consult with our employees and any union representing them to ensure that they are regularly informed of their rights and responsibilities and of company policies on return to work."

[76] The Policy clearly committed Jetstar to make reasonable efforts to return injured employees to work, on suitable duties if necessary, as soon as was safely possible. We do not consider that Jetstar made reasonable efforts to give Ms Neeteson-Lemkes the benefit of that commitment, in that Jetstar failed to act on Dr Saunders's opinion that Ms Neeteson-Lemkes was fit to return to work on restricted duties as part of a graduated return to work plan, failed properly to obtain and take into account the opinion of Ms Neeteson-Lemkes's treating practitioners as to whether she had a personality disorder before acting upon Dr Walker's diagnosis and prognosis, and failed to give her an opportunity to provide a proper response to Dr Walker's report. Having regard to the evidence concerning Ms Neeteson-Lemkes's health which was adduced at the hearing before the Commissioner, there is a reasonable prospect that Ms Neeteson-Lemkes could have been returned to work on restricted or alternative duties, and that upon further assessment of her capacity and performance might ultimately have returned to full pre-injury duties, had Jetstar done otherwise.

Conclusion

[77] Having taken into account the matters identified in s.387 of the Act, we find that Ms Neeteson-Lemkes's dismissal was harsh, unjust and unreasonable. In summary, although at the time of the dismissal Ms Neeteson-Lemkes was unfit to return to her full duties as a flight attendant and there was no positive prognosis that she would be fit to return to full duties at some future time, her dismissal was harsh, unjust and unreasonable because Jetstar:

(1) relied on Dr Walker's diagnosis of a personality disorder in circumstances where such a diagnosis was highly controversial as demonstrated by the evidence at the hearing, none of Ms Neeteson-Lemkes's treating practitioners had ever made such a diagnosis, and Jetstar made no proper attempt to obtain and take into account the views of the treating practitioners in response to Dr Walker's report;

(2) failed to give Ms Neeteson-Lemkes a proper opportunity to respond to the reason for dismissal and Dr Walker's report before dismissing her; and

(3) failed to make reasonable efforts to afford Ms Neeteson-Lemkes the return to work benefits of the Policy.

Remedy

[78] Ms Neeteson-Lemkes seeks the primary remedy of reinstatement under s.390 of the Act. The critical issue in this connection is whether Ms Neeteson-Lemkes is medically fit to resume her duties as a Jetstar flight attendant, particularly having regard to the issue of whether she has a personality disorder. In the Decision the Commissioner accepted the evidence of Mr Cohen, Dr Saunders, Dr Farago and Mr McKinley that Ms Neeteson-Lemkes "could be reintegrated to work as a flight attendant" and that "that would be appropriate", and did not accept the evidence of Dr Walker to the contrary.[16] However we consider that the medical evidence taken in its entirety is unsatisfactory, and is not such as to permit us to form a final conclusion on the question of whether Ms Neeteson-Lemkes should be reinstated to her employment with Jetstar as a flight attendant, for the following reasons:

(1) Any determination we make as to reinstatement must be based on Ms Neeteson-Lemkes's current state of health. The medical evidence as a whole is now considerably out of date. The most recent assessment of Ms Neeteson-Lemkes upon which any of that evidence was based occurred over seven months ago.

(2) Dr Walker, who was the only practitioner to diagnose Ms Neeteson-Lemkes with a personality disorder, carried out his assessment of her in October 2012. He did not examine her again at any time after her dismissal. The other practitioners, who all assessed Ms Neeteson-Lemkes at a considerably later point in time in 2013, were all of the view that her health had improved considerably since the time of her dismissal. It is difficult therefore to consider fairly whether to accept or reject Dr Walker's evidence vis-a-vis that of the other practitioners in circumstances where his assessment was apparently based on a significantly earlier and different presentation of symptoms.

[16] Decision at [81]-[84]

(3) In respect of the personality disorder issue, the practitioners appeared to be at cross-purposes as to the appropriate criteria for and method of diagnosis. For example, Dr Walker assessed Ms Neeteson-Lemkes on the basis of nine criteria derived from DSM-4, of which he said five had to be satisfied in order to support a positive diagnosis. He also proceeded on the basis that a diagnosis could be made on the basis of a single assessment session supported by material going to Ms Neeteson-Lemkes's previous medical and personal history. However Mr Cohen appeared to consider that three behavioural criteria, namely self-harm, drug abuse and anti-social behaviour or extreme animosity were critical to a diagnosis of a personality disorder. He also expressed the opinion that assessment should occur over more than one assessment session, or else that a psychological test should be used. Thus the conclusions expressed by these practitioners cannot be assessed against commonly agreed criteria and methodology.

(4) Dr Walker in his reply statement of evidence identified which of the nine DSM-4 criteria he considered were satisfied in Ms Neeteson-Lemkes's case. However what was not identified was the factual material he had before him which enabled him to reach the conclusion that particular criteria were satisfied. For example, Dr Walker said that the following criterion was satisfied: "Impulsivity in at least two areas that are potentially self-damaging (e.g. spending, sex, substance abuse, reckless driving, binge eating)". We cannot readily identify in the material before us anything in Ms Neeteson-Lemkes's behavioural history which would meet this criterion. At the hearing of the appeal, counsel for Ms Neeteson-Lemkes submitted that, with the possible exception of one criterion, there was no factual material to support the conclusion that any of the criteria were satisfied. But, as counsel for Jetstar pointed out, Dr Walker was never cross-examined about his conclusions as to the DSM-4 criteria, and thus was not given the opportunity to explain and defend his conclusions in this respect. We cannot therefore determine on the material before us whether there was a proper factual basis for Dr Walker's conclusions as to those criteria.

(5) The evidence does not provide us with sufficient information about the nature of personality disorders, including when and how they originate and whether they are capable of amelioration or resolution. We consider such information is necessary to assist us in at least three respects. Firstly, although Dr Walker diagnosed Ms Neeteson-Lemkes as having a "pre-existing" personality disorder, he did not explain when this disorder may have developed or what (if anything) may have caused it. This is significant, given that Ms Neeteson-Lemkes appears to have worked satisfactorily as a flight attendant at least until the time of her first psychological injury if not afterwards; it raises the question of why, if she had the personality disorder at this time, it did not impact upon her work as a flight attendant. Secondly, given that Ms Neeteson-Lemkes's health has apparently improved significantly in the early part of 2013, it raises the further question of whether, if she ever had a personality disorder, it has been ameliorated or resolved in a way that would no longer preclude her from performing work as a flight attendant for Jetstar. Thirdly, even if Ms Neeteson-Lemkes does have a personality disorder, it is unclear to us on the evidence why and how that would affect her capacity to perform flight attendant duties in the future. The medical evidence concentrated on the question of whether Ms Neeteson-Lemkes should be diagnosed as having a personality disorder, but paid little attention to the symptomology of such a disorder and its relationship, if any, with the capacity to perform flight attendant duties.

[79] In those circumstances we consider it necessary for there to be a further hearing on the question of remedy. That further hearing should involve additional expert medical opinion to address the difficulties in the existing evidence we have identified. We consider that the most desirable course would be for the parties to jointly instruct an independent forensic psychiatrist, nominated by agreement, to prepare a new report based on a current assessment of Ms Neeteson-Lemkes and a review of all the health reports, records and other material to date. The instructions to this expert should ensure that the issues we have raised in these reasons for decision are dealt with. If the parties cannot agree upon the nomination of a new expert, this Full Bench would be prepared to nominate one from an agreed list or otherwise if necessary. It will of course be necessary for Ms Neeteson-Lemkes to cooperate in this process by undergoing an assessment by the nominated forensic psychiatrist.

[80] We would also expect that further evidence would be adduced from Ms Neeteson-Lemkes herself concerning her current perception of her health and her work capabilities, having regard to her employment and personal history since the date of her dismissal.

[81] There is one other thing. Under s.590(1) of the Act, the Commission may inform itself in relation to any matter before it in such manner as it considers appropriate, except as otherwise provided for by the Act. Although no mention at all was made about it by the parties in these proceedings, it has not escaped our attention that it has been reported in a number of Australian media outlets that law enforcement authorities in the Republic of South Africa have made allegations of criminal conduct of the most serious kind concerning Ms Neeteson-Lemkes and have stated an intention to take steps to have Ms Neeteson-Lemkes extradited to South Africa. We emphasise that we have formed no view whatsoever of the truth of the media reports, let alone the truth of the criminal allegations referred to in those reports. However, we do not consider that the fact that these matters have not been raised by either party in the proceedings entitles us simply to ignore them. We are required in this matter to determine whether Ms Neeteson-Lemkes should be reinstated to the role of flight attendant in a major Australian airline - a role which is safety-critical, and the performance of which requires the holding of an ASIC. It would put us in an entirely invidious position if we had to decide that question completely uninformed as to the very serious matters alleged in the media. The potential for detriment to the public interest in that situation is obvious. Significant questions also arise about any relationship between the airing of these allegations and Ms Neeteson-Lemkes's current mental health, and whether Ms Neeteson-Lemkes will in future be able to obtain the security clearances necessary to make reinstatement practicable. Therefore we would expect at the further hearing of the matter to receive from the parties any available and reliable information about the reported matters, and submissions based on any such information, so that we may decide this matter in a way which is properly informed and not contrary to the public interest.

[82] We will call the matter on for a directions hearing shortly, at a time to be advised. We would expect that the parties will before that time confer as to the further disposition of the matter including the nomination of an independent psychiatric expert as earlier discussed. The parties may also wish to consider whether the matter can be settled having regard to our reasons for decision. If in that connection the parties consider that the assistance of a member of the Commission would be of utility, such assistance will be provided on request.

VICE PRESIDENT

Appearances:

F. Parry SC with *J. Darams* of counsel for Jetstar Airways Pty Limited
J. D'Abaco of counsel with *M. Dawson* solicitor for Ms Monique Neeteson-Lemkes

Hearing details:
2013.
Sydney:
22 October.

Printed by authority of the Commonwealth Government Printer

<Price code G, PR544705>