

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV 2019-404-001504  
[2023] NZHC 1005**

BETWEEN

ANJELA SHARMA  
Plaintiff

AND

AIR NEW ZEALAND LIMITED  
Defendant

Hearing: 10-14, 17 19 October 2022

Appearances: R J B Fowler KC for the Plaintiff  
J Q Wilson, A M Boberg & T M J Shiels for the Defendant

Judgment: 2 May 2023

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**JUDGMENT OF TAHANA J**

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*This judgment was delivered by me on 2 May 2023 at 3.00pm  
Pursuant to Rule 11.5 of the High Court Rules*

.....  
*Registrar/Deputy Registrar*

Solicitors:  
Bartlett Law, Wellington  
Bell Gully, Auckland

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## Introduction

[1] In July 2019 Ms Anjela Sharma was banned from flying with Air New Zealand (Air NZ) for 12 months and was refunded her booked travel.

[2] Air NZ says Ms Sharma's ban followed a pattern of consistent "rude" and "abusive" behaviour towards Air NZ staff and its decision was necessary to protect staff welfare. Air NZ maintains that it acted in accordance with its terms of carriage and exercised a reasonable discretion when banning Ms Sharma.<sup>1</sup>

[3] Ms Sharma disputes Air NZ was entitled to ban her travel and says Air NZ acted capriciously, arbitrarily and in bad faith and its decision was unreasonable.<sup>2</sup> Ms Sharma recorded her interactions with Air NZ staff and describes those recordings as "her truth."

[4] The issues I need to determine are:

- (a) Did Air NZ breach its terms of carriage by failing to exercise reasonable discretion in banning Ms Sharma?
- (b) If yes, did Ms Sharma suffer stress and/or anxiety as a result, for which damages should be awarded?
- (c) Did the Koru lounge access rules or Air NZ's conduct in allowing the family into the Koru lounge on 1 December 2018 constitute misleading or deceptive conduct in contravention of s 9 and/or s 11 of the Fair Trading Act 1986 (the FTA)?
- (d) If yes, should relief be granted to Ms Sharma under s 43 of the FTA?

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<sup>1</sup> Air New Zealand Conditions of Carriage, art 7.1.

<sup>2</sup> Unreasonable in the sense that no reasonable contracting party could have so acted.

## **BACKGROUND**

### **Travel from Nelson to India**

[5] On 1 December 2018, Ms Sharma embarked on a family holiday to India with her husband (Mr Christopher Leaper) and her six children, aged from 15 to 26 years at the time (the family). Ms Sharma and Mr Christopher Leaper were Koru members.

[6] The family was flying business class and had purchased their tickets from Singapore Airlines, which is a member of the Star Alliance along with Air NZ and other airlines. The first leg of the trip was from Nelson to Auckland on an Air NZ flight.

[7] Ms Sharma's son, Mr James Leaper, said that prior to flying he went on the Singapore Airlines' website which referred passengers to the Star Alliance website. That website included a search tool which returned Nelson Airport as having lounge access for Singapore Airlines' business class customers flying from Nelson. The family understood they could access the Koru lounges at Nelson and Auckland Airports.

[8] The family arrived at Nelson Airport two hours prior to departure and checked their luggage in with Air NZ based on their business class allowance. The attendant told the family to go to the Koru lounge and to collect their international boarding passes in Auckland as they were unable to be printed at Nelson Airport.

#### *Entering the Koru lounge*

[9] Entry was initially declined when the family's boarding passes were scanned on the electronic pod at the Koru lounge. Mr Christopher Leaper did not initially enter the lounge as he was outside on a phone call.

[10] Ms Kara Matuszewski was the Koru lounge host that day. Ms Matuszewski allowed the family to enter the lounge and then went to check the internal Air NZ handbook to see whether lounge access was allowed.

[11] The Air NZ handbook confirmed that the family were not entitled to enter the Koru lounge. This is despite the international flight from Auckland to Singapore being business class and despite Ms Sharma and Mr Christopher Leaper being Koru members travelling on an Air NZ operated flight from Nelson to Auckland.

[12] Ms Matuszewski then contacted Ms Sheryl Whyte who was the Air NZ Nelson Team Leader on duty that day. Ms Whyte then went to the Koru lounge to speak with Ms Sharma.

[13] Ms Whyte asked Ms Sharma to speak outside the Koru lounge, but Ms Sharma would not agree so Ms Whyte spoke to Ms Sharma inside the lounge. Ms Sharma says she explained to Ms Whyte that they were travelling business class on Singapore Airlines and showed her their travel documentation. Ms Whyte says she was surrounded by Ms Sharma and three of her sons who insisted they were entitled to be in the lounge.

[14] There is a 20 second video, recording the point at which another Koru lounge guest approaches Ms Sharma, Ms Whyte and three of Ms Sharma's sons. The video records the following was said:

Male 1: The issue is that the equity.

Ms Sharma's daughter: How do you know if it's –

Male 1: The next one comes in as economy despite the fact –

Ms Whyte: That's fine.

Lounge guest: Excuse me, this is really loud –

Ms Whyte: Yeah, I know. I know

Lounge guest: – and it's really disturbing

Ms Whyte: I know. I understand.

Lounge guest: – so I'd really appreciate it if you'd quieten it down or take it somewhere else.

Ms Whyte: So we'll leave it be. That's lovely folks.

Male 2: Yeah, do you want to take it out –

Male 3: I'd agree that they shouldn't discuss... in the customer lounge.

Ms Sharma: Yeah, I know. They shouldn't make it so public for us.

Male 4: It's embarrassing.

Ms Sharma's daughter: It's humiliating.

[15] Ms Whyte then left the lounge and allowed the family to remain.

[16] Ms Matuszewski gave evidence that the family had made derogatory comments about her when they were in the lounge including calling her "stupid" and a "German racist." All of the family (except Ms Sharma's daughter and Mr Timothy Leaper) gave evidence and denied that they had said any derogatory comments about Ms Matuszewski.

[17] Mr Jonathan Cameron, a friend of the family, entered the lounge after Ms Whyte had left and says that he did not hear any comments from the family about Ms Whyte or Ms Matuszewski.

[18] On arrival in Auckland, the family entered the Koru lounge without incident.

*Ms Whyte's shift report*

[19] At the end of her shift that day, Ms Whyte emailed her shift report to Ms Lisa Stewart, the Passenger Services Manager, who had recently been employed at Nelson Airport. The shift report recorded that:

Note for shift: Had yet another incident with [Ms] Sharma and her charming family in the Koru Lounge. She was travelling business class with SQ AKL/SIN and assured us everyone else D class but 3 sons were U class, also not allowed in Regional lounge if booked SQ.

Caused quite a stir in lounge when I spoke with her as Kara questioned if her and her 6 children were allowed in there.

I phoned AKL Lounge and spoke to them and they are aware she will try to enter up there as well.

We have some sort of trouble every time this woman travels from Nelson unfortunately and she accuses us of being racist, which is totally unfounded.

[20] Ms Stewart responded to Ms Whyte's shift report indicating that she would follow up to "have something formal put into place so this cannot happen again in the future." She also asked Ms Whyte for details about historical incidents involving Ms Sharma.

*Ms Stewart investigates*

[21] Ms Whyte and Ms Matuszewski then spoke to Ms Stewart who captured Ms Whyte's and Ms Matuszewski's recollections in an email dated 4 December 2018. Ms Matuszewski's recollection was that the family had made comments about her, including the following:

"why do they hire stupid people"

"She is racist"

"We always get targeted"

"they should retrain all the stupid people who don't know what they are doing"

One of the sons commented "I am going on to My Voice and will leave a review saying she's just a racist"

Later one of the sons had lost their boarding pass and said "I wonder if Kara can reprint it, probably not she's too f\*\*king stupid she probably doesn't know how so I'll go down stairs"

At one point they described Kara as a "German racist" – Kara has a Polish last name which was on the bar managers licence sign

Every time that Kara welcomed a guest into the lounge the family would pretend to be her, mock her voice, and mimic her very loudly. Kara felt extremely humiliated because everyone could hear.

[22] Ms Stewart then forwarded that email to the Security, Fraud and Koru Loyalty teams with an email stating:

Please note that the 'husband' Mr Christopher Leaper was not seen in the lounge on Saturday by Kara (lounge host) or Sherry (team leader) – but was swiped in.....hence someone was using his name/boarding pass for entry. This has apparently happened in the past and one of the family members was denied boarding in WLG I believe. Their names are all similar and one of the sons was travelling as the father (something like this). I will continue to get information from my staff re previous incidents but I this single situation has left my staff feeling intimidated and rattled to the point that they have questioned their safety. I am hoping that there may already be records re this



family and dodgy behaviour with Airpoints numbers and use of other names to gain points.

To be perfectly honestly, Mrs Sharma and her family are not welcome in the Nelson Koru Lounge in the future. I am seeking action from the loyalty team to prevent this behaviour from happening again in NSN and anywhere across the Air New Zealand network.

I am available to discuss this incident and I look forward to working with you to ascertain a suitable outcome that I can share with those involved.

[23] Mr Jason Legge who was the Air NZ Security Manager at the time was copied into Ms Stewart's email of 4 December 2018. He responded recommending that Ms Stewart submit an operational safety report (OSR) in Air NZ's KoruSafe system.

[24] Ms Stewart completed an OSR as suggested by Mr Legge. Ms Karon Martin, a security adviser, was responsible for investigating the incident.

[25] Ms Stewart obtained information about two previous incidents and provided this information to Ms Martin. One incident concerned a complaint from Ms Sharma about how she had been treated in the Koru lounge when she had been asked for a voucher for her daughter in April 2017. The other concerned an incident in September 2017 when one of Ms Sharma's sons had travelled on a ticket issued in his brother's name (Mr Charles Leaper). An internal Air NZ email dated 20 September 2017 records that Mr Charles Leaper's Koru membership might have been used by "other members" of the family. It notes they have similar names and that a staff member had spoken to Mr Charles Leaper about it. The email told staff to ask for identification and if there were any concerns, to raise the issue with the Koru Loyalty and/or Fraud teams.

[26] Ms Martin asked the Koru Loyalty team about lounge access rules and they acknowledged that the rules may be confusing for Koru members and "a bit more confusing" for business class travellers. Despite Koru membership and business class, the family were not entitled to lounge access because the domestic flight from Nelson to Auckland had not been bought from Air NZ, despite being operated by Air NZ.

*2018 unruly passenger report*

[27] Ms Martin then prepared an “unruly passenger report” based on the information she was provided (2018 unruly passenger report). The executive summary stated:

Mrs Sharma and family walked in to Koru Lounge in NSN refusing to show boarding passes to Lounge Host

As the family were travelling on SQ they did not have their SQ boarding passes

Mrs Sharma and family became aggressive with the Lounge Host when they were asked questions about their membership and how their membership numbers needed to be in the system

Mrs Sharma and family went and sat in the lounge when the Team Leader re-read the entry requirements for passengers travelling on Singapore Airlines in Business Class

The Team Leader approached Mrs Sharma and asked to speak to her outside the lounge to advise her that they were all not entitled to lounge access

Mrs Sharma became very argumentative and aggressive directing her anger at the Lounge Host

Another lounge passenger became very concerned and told Mrs Sharma to leave the lounge as she was being disruptive

The Team Leader left the lounge to investigate Mrs Sharma’s lounge entry claims, leaving the Lounge Host on her own

Mrs Sharma and her children became extremely abusive towards the Lounge Leader, called her a German Racist, swore at her and mimicked her voice each time she welcomed someone in the lounge

The concerned Lounge passenger continued to check on the Lounge Host as she was concerned about her

NSN Security were called and offered to call the Police, however the Lounge Host declined the offer which in hindsight she regretted as she was more concerned about the experience the other lounge members would have

During boarding, Mrs Sharma was abusive again towards Kara and the Security officer at the gate

[28] The family’s behaviour was assessed against the Air NZ “decision support matrix” as meeting criteria 4 for “behaviour” and “severity.” Criteria 4 includes behaviour that is intimidating (frightens into acquiescence, scares, unnerves, bullies,

is menacing) and that has a major impact (causing staff or passenger(s) significant distress).

[29] Air NZ Security reviewed the 2018 unruly passenger report and considered there were a number of “security red flags” to justify sending a warning letter.

*Warning letter*

[30] A warning letter was sent to Ms Sharma on 21 December 2018, which stated:

... The Lounge staff advised that you and your family did not meet the Lounge terms and conditions of entry however you and your family subsequently entered the lounge without permission. Upon entry, you and your family displayed loud and aggressive behaviour which was unacceptable, inappropriate and upsetting for our Air New Zealand staff and other passengers.

I remind you of the Lounge terms and conditions and the Air New Zealand conditions of carriage:

<https://www.airnewzealand.co.nz/lounge-access-terms-of-use>

<https://www.airnewzealand.co.nz/conditions-of-carriage>

To give further clarity to Lounge access availability, in order to access Koru membership benefits, all travel must be on Air New Zealand operated and ticketed flights, regardless of class of travel. On this occasion, as your travel is booked on a Singapore Airlines ticket you and your family are not eligible for Lounge entry in Auckland when flying home to Nelson on 1<sup>st</sup> January.

Failure to comply, breach or non-acceptance of these conditions will result in you not being permitted to enter the lounge, board a flight at the time of check-in/boarding, being off-loaded, and/or being banned entirely from flying on Air New Zealand’s services in the future.

The above commentary and conditions are without prejudice to any other rights Air New Zealand or its employees may have against you in relation to this matter.

[31] On 27 December 2018, Ms Martin forwarded a copy of the warning letter to other Air NZ staff. Her cover email repeated that Ms Sharma and her family had entered the lounge without permission. This was incorrect. They had been allowed in.

[32] On 31 December 2018, prior to the family returning to New Zealand, Ms Stewart also sent an email to Nelson Airport front of house team leaders attaching the warning letter and giving them guidance on how to deal with Ms Sharma.

[33] Ms Sharma contacted Air NZ Customer Relations indicating the family were “very upset” and requesting an “urgent response.” Air NZ Customer Relations responded on 28 December 2018 confirming that the family were not entitled to lounge access for their flight from Auckland to Nelson.

[34] Ms Sharma responded again continuing to dispute eligibility.

### **Travel from India to Nelson**

[35] The family went to the Koru lounge at Auckland Domestic Airport. Mr Christopher Leaper says they went because he had discussed the issue with Singapore Airlines and Ms Sharma had spoken to an Air NZ attendant in Auckland and they were advised that they were entitled to enter the Koru lounge.

[36] The family recorded the conversation at the Koru lounge without informing the Air NZ staff. The transcript of the conversation indicates that:

- (a) Air NZ again confirmed the position that to gain access to the Koru lounge the tickets needed to be “ticketed” Air NZ tickets, that is, purchased from Air NZ.
- (b) The family said that the situation explained to them by Singapore Airlines was different.
- (c) The family felt like Air NZ staff had been briefed and would not allow them into the Koru lounge.

- (d) Ms Sharma asked for a contact so that they could respond to the warning letter. Air NZ confirmed she could email the Chief Executive, Mr Christopher Luxon.<sup>3</sup>

[37] An email from a flight attendant on the family's flight from Auckland to Nelson records that Ms Sharma came onboard "quite angry" and "upset" but once settled the family were "very nice and apologetic to us." The flight attendant's account was provided to Ms Stewart.

### **Monitoring the family's travel**

[38] After the warning letter, the Nelson Airport closely monitored the family's travel. The Fraud team notified Ms Stewart when the family were travelling and confirmed that restrictions had been placed on their check-in. The decision to do this appears to have been made during the investigation of the December 2018 incident when Ms Stewart contacted the Koru Loyalty and Fraud teams.

[39] There is an email from Ms Sarah Turner, Koru Loyalty Specialist, on 6 December 2018:

... can we place something on all of these members accounts to prohibit kiosk check-in in the interim, so the check-in teams can process manual identification at the service desks.

[40] Ms Andrea Paul from the Fraud team responded noting that placing restrictions on the family may "inflamm" the situation.

[41] These restrictions meant that the family could not check in online or at a kiosk. They were required to check in at an Air NZ counter. On some occasions they were also asked to provide identification.

[42] Air NZ staff reported to Ms Stewart after Ms Sharma travelled, and this was noted in shift reports which, as early as 3 February 2019, indicate that Ms Sharma was

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<sup>3</sup> Ms Sharma sought to make something of the fact that the lounge host gave her the wrong spelling for Mr Luxon's name. This was an easy mistake to make and I do not accept it was a deliberate attempt by Air NZ to make things difficult for Ms Sharma.

asking about check-in restrictions. Ms Stewart followed up with staff after Ms Sharma travelled asking if there were any issues.

### **February 2019 – Ms Sharma visits Nelson Airport**

[43] On 18 February 2019, Ms Sharma and her son, went to Nelson Airport to discuss the warning letter. They recorded the conversation without informing Air NZ staff. The recording discloses that:

- (a) Ms Sharma said she was about to write to Mr Luxon about the warning letter and wanted to discuss it.
- (b) Ms Sharma said the warning letter was incorrect. They were not refused access to the Koru lounge and had entered with permission.
- (c) Ms Whyte said to Ms Sharma that two of the family were not travelling business class. Ms Sharma said this was incorrect.
- (d) Ms Stewart did not agree that it was a good idea for them to talk.
- (e) Ms Whyte said she had been told that she could not get into any discussions with Ms Sharma.
- (f) Mr Andrew Leckie, Airport Manager, invited Ms Sharma to put her concerns in an email and he would respond.

[44] Ms Stewart sent an email to Mr Leckie which said that Ms Sharma “was saying that the letter was incorrect stating that they all had business class tickets (incorrect) very inconsistent.” Ms Sharma was in fact correct, and Ms Stewart was wrong on this point.

[45] Ms Stewart sent an email to staff on 21 February 2019 stating:

We will not accept any form of discrimination, harassment or bullying. The specific information that you provide is crucial to successfully monitoring and building an overall case and behavioural profile. What you think as a minor piece of information more than often builds part of a bigger picture. It is also

important that if you are feeling intimidated outside of the work environment from a member of the public who is in dispute with the NSN Air NZ team that you report this, again, this is not o.k.

(emphasis in original)

[46] Ms Martin replied to Ms Stewart about the email:

Great email to your team, let's hope the reporting culture improves so we can get the desired outcomes we want. I am a little concerned that Andrew is getting so involved. It has been dealt with so any further issues that occur with the Sharma family need to be reported so we can investigate and take action.

[47] In the meantime, Ms Stewart continued to liaise with Nelson Airport staff about Ms Sharma, including providing instructions on how they should deal with her when she checked in on 20 February 2019:

Basically in no way are we "allowing" her behaviour nor rewarding her behaviour.....but basically we want to give her the opportunity NOT to kick off (in my opinion this will be hard for her).

So thought of a plan, if we can execute it this way (knowing that a lot of work is going on behind the scenes) and keep a mental note of the steps, convo had and her behaviour..

If possible can we get either Wendy or Dennis to check her in – ask her for ID. Then if she and/or the daughter has a bag and she wants to check it in – explain the ticket that she is on.....seat only (be 100% sure that she hasn't purchased one online between yesterday and tomorrow first). Follow procedure here, no free bags etc.

If she has a cabin bag with a fast bag tag – explain the rules but LET her use the fast bag "this one time we will let you pop your bag on the trolley etc"....this is the opportunity for her to be kind/understanding or even say 'thank you' ..if she then kicks off and we have done all that our case is basically much stronger. The daughter cannot have a fast bag as not koru etc.

Having a CHC agent check her in also removes the NSN element from it and then its completely bias free in terms or her coming back on us....we can say "well actually you were served by a CHC CSA and this process is air NZ wide etc"

I am staying away from the action! Do not want any risk of her commenting on me watching or anything like that. I will however be ready for a call if it turns to custard.

@Louise Wise same in the lounge – note behaviour and if she tries to intimidate you in ANY manner please call me.

Again, security is aware, but please don't make a call without talking to myself or Andrew unless your safety is compromised....we need to be very careful here.

Please come back to me with any questions and lets brief the team on the plan early and be ready for her check-in early (she will likely want the time in the lounge)...I want to reiterate that us doing it this way is part of a bigger picture... Andrew has reached out to the senior manager of lounges and I have been in contact with our security advisor.

(emphasis in original)

[48] Mr Grant May, Nelson Airport Manager, enquired about Ms Sharma's travel on 20 February 2019 and Ms Stewart responded that she had behaved but the staff could "immediately" tell she was "high maintenance." Ms Stewart then referred to the 18 February 2019 conversation in which Ms Sharma had wanted to talk about the warning letter and said about Ms Sharma, "I have never in my life met such a nasty woman, who lies through her teeth."

[49] In response, Mr May said:

That's what manipulative bullies do – twist facts to suit their position. You probably scared her and she's picked up that Sherry [Ms Whyte] is a softer touch.

[50] Ms Martin followed up with Ms Stewart to submit an OSR for her interaction with Ms Sharma on 18 February 2019.

### **March 2019 – correspondence to Chief Executive**

*Ms Sharma and Mr Christopher Leaper write to Mr Luxon*

[51] On 7 March 2019, Ms Sharma wrote to Mr Luxon providing her version of what happened on 1 December 2018. She refuted that the family had not been permitted into the lounge and provided a copy of their business class tickets. Ms Sharma questioned the check-in restrictions describing the "unexplained situation" as "inhumane" and expressing her view that there was "an element of corporate bullying and harassment." She said they were entitled to request an explanation for why they were being treated in this way.



[52] On 12 March 2019, Mr Christopher Leaper emailed Mr Luxon in support of his wife's letter. He reiterated that the family had all been travelling business class. He said the warning letter was a "total shock" and Air NZ had "threatened our whole family in a bullying type militaristic fashion over alleged behaviour which has been presented in the worst light possible." He reiterated that lounge access was never refused. He complained that there was no right of reply.

*Mr Leckie investigates and responds to Ms Sharma*

[53] After the 18 February 2019 conversation with Ms Sharma, Mr Leckie requested information from Air NZ staff about Ms Sharma so that he could respond to her once he received her email. Staff members forwarded him the information that had been gathered prior to the issue of the warning letter.

[54] Ms Martin provided information to Mr Leckie and said the family became "aggressive" when queried about their membership and "entered the lounge uninvited." She also said that Mr Christopher Leaper had given one of the children his pass to enter the lounge.

[55] On 8 March 2019, after receiving a copy of Ms Sharma's letter to Mr Luxon, Mr May acknowledges to Mr Leckie the need to "do some highly accurate investigation here." Mr May says to Mr Leckie:

If (that's truly if) some of the points Ms Sharma raises in her letter are correct, (e.g. the statement that all pax were business class as opposed to Sherry's [Ms Whyte's] assertion that some of them were premium economy) we will need to ensure accuracy in response and own any errors.

My approach will be to keep to facts and facts alone, ignoring the emotion. The main issue which seems to have been avoided is the behaviour.

I've advised Lisa [Ms Stewart] I will take this over for now.

(emphasis in original)

[56] On 14 March 2019, Mr May sent Mr Leckie an email setting out a "summary of facts" which referred to earlier complaints and issues. Mr May concluded by stating:

... There have been a number of events where Ms Sharma and/or her family members have asserted themselves to the point of staff feeling bullied or there has been an irregularity in the travel. This is the reason for the letter from Giles Carter, and the reason for not allowing kiosk check in. ...

...

There is an established pattern of questioning, challenging and intimidating staff when the anticipated response is not forthcoming. We cannot have our staff treated in this way and exposed to the belligerence Ms Sharma and some other members of her family display when they don't get their own way. I am personally proud of the way my team have handled the various difficult situations that Ms Sharma and family have presented us with over time. I fully support the statement in the Giles Carter letter to Ms Sharma that "Failure to comply, breach or non-acceptance of these conditions will result in you not being permitted to enter the lounge, board a flight at the time of check-in/boarding, being off-loaded, and/or being banned entirely from flying on Air New Zealand's services in the future."

...

I trust that we as an organisation can take steps to ensure our staff are not subjected to this treatment.

[57] On 15 March 2019, Ms Sharma asked Mr Leckie whether she would be able to check in online for an upcoming flight. Mr Leckie sent Ms Sharma's query to other Air NZ staff and asked that if they were still comfortable to continue the restrictions that someone call Ms Sharma and inform her. On 21 March 2019, Ms Martin replied as follows:

As per the warning letter issued to Mrs Sharma, there is no condition restricting her ability to check in online. The letter was outlining the lounge access eligibility and our conditions of carriage which she must comply with.

[58] It appears from the above email, that Ms Martin was not aware of the check-in restrictions. On the same day, Ms Paul separately informed Ms Stewart that restrictions were in place for Ms Sharma's upcoming flight. No one called Ms Sharma as Mr Leckie had asked.

[59] On 29 March 2019, Mr Leckie responded to Ms Sharma's 7 March 2019 letter to Mr Luxon stating, among other things, that:

Having completely read your detailed outline of the event and reviewed the letter Giles Carter our Senior Manager Security sent you on 21 December 2018 I am comfortable with the position we have taken.

Without further debating what did and did not occur it is important to be clear tickets issued by Singapore Airlines for travel both within New Zealand and Internationally do not meet out Lounge entry Terms and Conditions.

*Ms Sharma's request for personal information*

[60] On receiving Mr Leckie's response, Ms Sharma wrote to Air NZ's privacy officer, requesting a response to her personal information requests made in the letter of 7 March 2019.

[61] On 9 May 2019, Mr Hugh Roberts, Senior Legal Counsel at Air NZ, sent Ms Sharma a copy of the December 2018 OSR prepared by Ms Stewart.

**April 2019 – Ms Sharma travels to Wellington**

[62] In April 2019, Ms Sharma travelled with Mr Christopher Leaper and two of her children from Nelson to Wellington return. The family checked in at Nelson Airport and were not asked for identification. On their return at Wellington Airport Air NZ staff asked them for identification, which they did not have for the two children who were still at secondary school.

[63] Ms Sharma recorded the conversation. Ms Sharma questioned why they were being asked for identification and asked who she could talk to about the issue. When the check-in attendant said she would get her team manager to come over, Ms Sharma said she did not want to talk to anyone and had a flight to catch. The check-in operator became upset and an Air NZ manager intervened and spoke with Ms Sharma. The interaction was the subject of Ms Sharma's next letter to Mr Luxon on 24 June 2019.

**24 June 2019 – Ms Sharma complains to Chief Executive**

[64] On 24 June 2019, Ms Sharma emailed Mr Luxon to complain about the incident at Wellington Airport:

... It was clear to us that Ms Stewart has written defamatory comments about us, that creates a knee-jerk reaction from ground staff. This is exactly what happened in Wellington. ...

[65] Ms Sharma said the “hostility” directed towards them was “completely awful.” She said the check-in attendant had “put on a show of tears” and it was a “deliberate set up.” She complained that the manager had “aggressively” shut down her son. Ms Sharma told Mr Luxon she had taped the encounter and would tape all future encounters at Air NZ check-in. Ms Sharma also accused Ms Stewart of being “on a venomous mission” against her.

## **25 June 2019 – check-in at Nelson Airport**

### *Conversation with Ms Gillooly*

[66] The morning after emailing Mr Luxon, Ms Sharma caught a flight from Nelson Airport with her son. She taped her conversation with the Air NZ check-in attendant, Ms Cheryl Gillooly, without her knowledge.

[67] The transcript of the recording indicates that when Ms Gillooly asked Ms Sharma for identification, she said she did not know why she had to provide identification and said “it is all to do with Lisa Stewart. Is she still here?” Ms Sharma said that Ms Stewart has “put a block on us and made all these allegations against our family.” Ms Sharma told Ms Gillooly she had written to Mr Luxon the night before. She said Ms Stewart had accused them of “all these things”, that Ms Stewart was from Christchurch, and that “[s]he doesn’t know us at all but [has] a vendetta and it’s just absolutely upsetting.”

[68] Ms Gillooly checked them in for their return flight. Ms Sharma said, “Great, awesome. So we’re checked in. We don’t have to check in – great. Thank you.” The conversation ended amicably.

[69] Ms Gillooly told Ms Stewart about her encounter with Ms Sharma. Ms Stewart asked Ms Gillooly to write down what had happened. Ms Gillooly made handwritten notes. The handwritten notes include the following observations:

- (a) Ms Gillooly found Ms Sharma hard to deal with and “very disrespectful.”

- (b) Ms Sharma had informed her that she had sent a detailed email to Mr Luxon telling him of her “disgust” with Ms Stewart.
- (c) Ms Sharma said she had no respect for Ms Stewart or Air NZ and that Ms Stewart has a “vendetta” against Ms Sharma and her family.
- (d) Ms Sharma said Ms Stewart would have trouble coming her way once Mr Luxon received her email.
- (e) Ms Gillooly said all of Ms Sharma’s words were “negative [and] malicious.”

*Ms Stewart submits OSR*

[70] At 11.26 am that same morning, Ms Stewart submitted an OSR attaching Ms Gillooly’s written statement and a screenshot showing Ms Sharma had checked Ms Stewart’s LinkedIn profile. Ms Stewart said she had been made to feel “intimidated and personally attacked in my own workplace.” She felt “intimidated and concerned of what Ms Sharma is capable of, what she is trying to do to my professional career and the effect that she could potentially have on my personal life outside of work if given the opportunity (Nelson is small).”

[71] Ms Stewart forwarded the OSR to Mr May on the same day. Mr May spoke with Mr Giles Carter and Mr Legge and forwarded the OSR to them and Mr Leckie. Ms Martin and a security adviser then investigated the OSR.

[72] Ms Gillooly met with Ms Stewart and Mr May a couple of days after the incident. Ms Gillooly says she was asked to write down everything that happened in as much detail as she could remember. That information was then captured in an email that Ms Stewart sent to Ms Martin and includes a statement from Ms Gillooly that:

I definitely felt that she [Ms Sharma] was unstable, her body language and aggressiveness was not normal human behaviour. Her demeanour was quite aggressive. There was no reasoning with her to stop her being aggressive towards Lisa and the company.

*2019 unruly passenger report*

[73] On 26 June 2019, Ms Martin prepared an unruly passenger report about the incident on 25 June 2019 (2019 unruly passenger report). That was based on Ms Gillooly's account. She assessed Ms Sharma's conduct as intimidating, threatening and abusive, and of major severity, justifying a ban.

[74] On 1 July 2019, Mr Roberts responded to Ms Sharma's email of 24 June 2019:

Mr Luxon has asked me to respond to your email to him dated 24 June.

I have authority to deal with your complaint. Please direct all correspondence to me.

Your email to Christopher Luxon is distasteful and insulting. We won't respond to the content of that email.

Rather, we will deal with the substance of your complaint. We disagree that the personal information that we have disclosed is inaccurate or untrue. It reflects the views and opinions of our staff and the effect that your recent behaviour has had on them. It is clear from your email to Mr Luxon, that you don't consider that you are in anyway responsible for the position that you now find yourself in and that you have no awareness of the effects of your behaviour.

Given the tone of your email, we have no confidence that your intimidatory and aggressive behaviour toward our staff won't be repeated when you travel with us again.

While Air New Zealand will always endeavour to exceed our customer's expectations, we are very clear that we have obligations to our staff and we will not tolerate ill treatment of them by any customer.

I have forwarded the email that you sent to Mr Luxon to our Group Security Team with a recommendation that they review your eligibility to access both the Koru Lounge and Air New Zealand operated flights.

[75] On the same day, Ms Sharma responded to Mr Roberts's email saying there had been no ill treatment of Air NZ staff – it was a “fabricated litany of lies.” Ms Sharma considered the way her family had been treated was “completely distasteful” and “unprofessional.”

[76] Mr Roberts forwarded Ms Sharma's email to the Security team and recommended that Air NZ not renew Ms Sharma's Koru membership, saying, “it's time to put an end to Ms Sharma's travel with us for a period.”

*Air NZ decide to ban Ms Sharma*

[77] On 2 July 2019, after considering the unruly passenger report about the incident with Ms Gillooly and the 24 June 2019 email, Air NZ decided to ban Ms Sharma and sent her a letter:

As a result of your recent intimidatory and aggressive behaviours towards Air New Zealand staff, you will be banned for 12 months from the date of this letter from travelling on Air New Zealand flights or use of any Air New Zealand Group Services, including its subsidiary domestic carriers.

Any attempt by you to enter any Air New Zealand premises, properties or facilities during the prohibited period will be promptly reported to the Police and the Civil Aviation Authority, for them to respond as they consider appropriate.

Any unused bookings you hold with Air New Zealand will be fully refunded to you or to the third party who paid for the booking. Any bookings made by you or by a third party on your behalf during this ban will not be processed. Any enquiries from a third party regarding such a refund or the non-processing of any booking should be directed to the entity with whom the booking was made.

The above commentary and conditions are without prejudice to any other rights Air New Zealand or its employees may have against you in relation to this matter.

[78] At the time of her ban, Ms Sharma had booked and paid for travel scheduled between July and December 2019 and had paid for a Koru membership valid until 30 March 2020.

[79] On 4 July 2019, Air NZ refunded Ms Sharma.

[80] Ms Sharma then sent four separate letters to Mr Roberts on 4, 5, 6 and 8 July 2019. In those letters:

- (a) Ms Sharma requested that the information held by Air NZ about the December 2018 incident be removed from their records. Ms Sharma described the allegations as “blatant untruths.”
- (b) Ms Sharma described the banning as “disproportionate” and “severe.”
- (c) Ms Sharma alleged that Air NZ was in breach of its privacy policy.

- (d) Ms Sharma described the allegations about her sons' behaviour towards Ms Matuszewski as "denigrating", "offensive" and "abhorrent."
- (e) Ms Sharma said there had been no openness, transparency or honesty.
- (f) Ms Sharma described her "mental shock" at the banning letter and that she felt "totally consumed" by the "significant humiliation, upset and distress" from the ban.
- (g) She had not received a "substantive response" to her 7 March 2019 letter other than Mr Leckie saying he was comfortable with Air NZ's position.

[81] There was further correspondence between Ms Sharma and Mr Roberts, and then between Ms Sharma's counsel and Air NZ's inhouse legal team, but no resolution was reached.

### **Ms Sharma files proceedings**

[82] Ms Sharma then filed proceedings seeking to reinstate her ability to travel with Air NZ. She was unsuccessful in obtaining an injunction requiring Air NZ to remove the ban and this Court determined that Ms Sharma had not established that she had an arguable case that Air NZ had breached its terms of carriage.<sup>4</sup>

### **Air NZ obtains further information**

[83] After proceedings were filed, Air NZ made further internal enquiries and obtained information from Ms Janine Hamilton and Ms Dayana Joseph regarding their interactions with Ms Sharma at the Wellington Airport in April 2019. It was reported that Ms Sharma spoke to Ms Joseph in a "very aggressive and condescending manner" and caused her to burst into tears. Ms Joseph was sent home because she was upset.

[84] Air NZ also located an OSR dated 5 May 2019 from a cabin crew member who reported that Ms Sharma was "very vocal" about not being seated next to her son. The

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<sup>4</sup> *Sharma v Air New Zealand Ltd* [2020] NZHC 230.



OSR had been closed without any further action and was not considered when Air NZ decided to ban her.

## LEGAL PRINCIPLES

[85] The parties agree as to the applicable legal principles when considering the exercise of a contractual “reasonable discretion.”

[86] Mr Fowler for Ms Sharma accepted the formulation of the test by Davison J in this Court:<sup>5</sup>

Or put another way, such a decision to refuse carriage will be lawful so long as it is not unreasonable in the sense that it is irrational, capricious, or unreasonable in the public law sense of being a decision that no reasonable decision maker could make.

[87] The above passage reflects the position as summarised in *C & S Kelly Properties Ltd v Earthquake Commission*:<sup>6</sup>

... the position is reflected in New Zealand cases which recognise absolute discretions in a contract must be exercised in a way that is not capricious, arbitrary or unreasonable, and that an apparently unfettered discretion may be subject to an implied term of reasonableness and the need to give business efficacy to the contract.

### *Reasonableness*

[88] Air NZ relied on *Braganza v BP Shipping Ltd* in arguing that the decision does not have to be objectively reasonable.<sup>7</sup> There, the court held:<sup>8</sup>

It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable – for example, a reasonable price or a reasonable term – the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose.

[89] The key issue is therefore not whether the decision is objectively reasonable, but rather whether it was made rationally, in good faith, and consistently with its contractual purpose.

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<sup>5</sup> *Sharma v Air New Zealand Ltd* [2020] NZHC 230 at [66].

<sup>6</sup> *C & S Kelly Properties Ltd v Earthquake Commission* [2015] NZHC 1690 at [68].

<sup>7</sup> *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661.

<sup>8</sup> At [30].

[90] The majority of the United Kingdom Supreme Court in *Braganza* recognised that there are two limbs to the question of “reasonableness.”<sup>9</sup>

The first limb focusses on the decision-making process – whether the right matters have been taken into account in reaching the decision. The second focusses on its outcome – whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the *Wednesbury* principle, but without necessarily excluding the former.

[91] In terms of process and the first limb, in *Braganza* the United Kingdom Supreme Court considered what a rational decision-making process involves:<sup>10</sup>

If it is part of a rational decision-making process to exclude extraneous considerations, it is in my view also part of a rational decision-making process to take into account those considerations which are obviously relevant to the decision in question. It is of the essence of ‘*Wednesbury* reasonableness’ (or ‘*GCHQ* rationality’) review to consider the rationality of the decision-making process rather than to concentrate on the outcome. Concentrating on the outcome runs the risk that the court will substitute its own decision for that of the primary decision maker.

[92] This Court considered the applicability of the majority’s approach in *Braganza* to a commercial contract in *Woolley v Fonterra Co-Operative Group Ltd*.<sup>11</sup> Isac J noted that *Braganza* concerned an employment agreement, and about that context stated:<sup>12</sup>

It is not surprising, then, that the nature of that relationship might import process requirements not generally found in commercial cases involving the exercise of a contractual discretion.

[93] Isac J noted that there had been no explicit endorsement in New Zealand of the *Braganza* approach and he considered it remains questionable whether it can be applied in the context of more commercial contracts. The Court declined to follow the expanded default rule in *Braganza* and considered that the approach should focus on the contract and not import public law concepts to strictly commercial contracts:<sup>13</sup>

An approach focussed on the contract itself, a broad view of the purpose of the venture, and the uncertainty the contractual discretion was designed to manage ensures the Court is focussed on giving effect to the bargain the parties made.

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<sup>9</sup> At [24].

<sup>10</sup> At [29].

<sup>11</sup> *Woolley v Fonterra Co-operative Group Ltd* [2021] NZHC 2690.

<sup>12</sup> At [427].

<sup>13</sup> At [460].

It also avoids category errors caused by the application of public law concepts to a contract, or employment based fiduciary obligations to strictly commercial contracts.

[94] Counsel for Ms Sharma did not seek to rely on the expanded approach in *Braganza* and Air NZ submits that it is inappropriate to expand the default rule in the context of this case. It is not therefore necessary for me to determine whether the expanded approach in *Braganza* applies to Air NZ's terms of carriage.

[95] I consider Air NZ's decision-making process to the extent that this is relevant to determining whether the decision was reasonable, in the *Wednesbury* sense, and to determine whether Air NZ acted in good faith, rationally and consistently with the terms of carriage.

#### *Standard of investigation*

[96] Where a reasonable discretion is required, a lay decision maker is not expected to investigate to the same standard as a court of law:<sup>14</sup>

Where, as here, the success or failure of a claim depends upon the exercise of a discretion by a lay body, it would be a mistake to expect the same expert, professional and almost microscopic investigation of the problems, both factual and legal, that is demanded of a suit in a Court of law.

#### *Context of decision-making power and applicable principles*

[97] The context of the contractual relationship is also relevant.<sup>15</sup> In *Canaan Farming Dairy Ltd v Westland Dairy Company Ltd* the applicable principles were helpfully summarised, as follows:<sup>16</sup>

- (a) absolute contractual discretions may not be exercised in a way that is arbitrary, capricious, or unreasonable, having regard to the provisions of the contract;
- (b) the meaning of good faith in this context is the parties to the contract must be true to the ideal that lies behind the contract or, in other words, "the reasonable expectations of honest [people] must be protected"; and

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<sup>14</sup> *CVG Siderurgica del Orinoco SA v London Steamship Owners' Mutual Insurance Association Ltd (The "Vainqueur José")* [1979] 1 Lloyd's Rep 557 (QB) at 577.

<sup>15</sup> *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661 at [18].

<sup>16</sup> *Canaan Farming Dairy Ltd v Westland Dairy Company Ltd* [2022] NZHC 2524 at [122].

- (c) an approach focused on the contract itself, a broad view of the purpose of the venture, and the uncertainty the contractual discretion was designed to manage ensures the Court is focused on giving effect to the bargain the parties made.

[98] In *Canaan*, which was an application for an interim injunction, Doogue J considered that a contract-focused approach required that the discretion must be set in the context of the contract as a whole and should not be interpreted in such an expansive way as to render other provisions redundant or meaningless.<sup>17</sup> In that case, the Court looked at the purpose of the bargain – that being for Westland to take Canaan’s milk supply for a set period. Canaan had duties regarding milk quality and Westland had the right to refuse to take milk at its discretion. There were numerous grounds for refusing milk including where the milk did not comply with the supply terms or legal requirements, where it was not in Westland’s best interests, and where there was “any other reason to refuse the milk.”

[99] The Court considered that the more general grounds to refuse milk should be read in the context of the more limited grounds. Westland was concerned about Canaan’s employment practices after the Employment Court had made findings regarding farms at Gloriavale. It was because of concerns arising from that decision that led Westland to refuse to take Canaan’s milk. Canaan had offered to provide Westland with any information or reports to satisfy itself as to Canaan’s operations, but Westland had not taken up that offer and determined that it would not take the milk.

[100] The Court held that Westland should have taken the opportunity to obtain the information offered by Canaan to satisfy itself of the current position, rather than simply relying on related historical matters. That should have happened before exercising its discretion to refuse milk. There had been a 30-year amicable business relationship between the parties and there had been no findings of breach of any legal obligations. In these circumstances, the Court considered there was a strong case that Westland’s discretion had not been exercised reasonably or in a manner that gave effect to the bargain between the parties.

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<sup>17</sup> At [142].

### *Conclusion on legal principles*

[101] In assessing Air NZ's decision to ban Ms Sharma, the applicable legal principles require consideration of:<sup>18</sup>

- (a) The context of the terms of carriage between Air NZ and consumers, including the reasonable expectations of parties to that contract;
- (b) Whether Air NZ acted honestly and in good faith;
- (c) Whether Air NZ acted arbitrarily or capriciously; and
- (d) Whether Air NZ's decision is unreasonable in the *Wednesbury* sense.

## **BREACH OF CONTRACT**

### **Terms of carriage**

[102] Air NZ's terms of carriage provide:

#### **7.1 RIGHT TO REFUSE CARRIAGE**

We and/or our operators may at any time prior to boarding refuse to carry you or your Baggage if, in the exercise of our reasonable discretion, we decide or establish any of the following:

- 7.1.1 such action is necessary for reasons of safety;
- 7.1.2 such action is necessary to comply with any applicable laws, regulations, or orders of any state or country to be flown from, into or over;
- 7.1.3 your conduct, age or mental or physical state including your impairment from alcohol or drugs, is such as to require special assistance, cause discomfort or make yourself objectionable to other passengers or involve any hazard or risk to yourself or to other persons or to property;
- 7.1.4 such action is necessary because you have failed to observe any of our instructions including non-compliance with these Conditions in relation to carriage of dangerous or prohibited goods;

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<sup>18</sup> *C & S Kelly Properties Ltd v Earthquake Commission* [2015] NZHC 1690; *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661; *CVG Siderurgicia del Orinoco SA v London Steamship Owners' Mutual Insurance Association Ltd (The "Vainqueur José")* [1979] 1 Lloyd's Rep 557 (QB); and *Canaan Farming Dairy Ltd v Westland Dairy Company Ltd* [2022] NZHC 2524.

- 7.1.5 you have refused to submit to a security check;
- 7.1.6 you have not paid the applicable fare, charges or taxes for your current or any previous carriage with us;
- 7.1.7 you do not appear to have valid travel documents; you may seek to enter a country through which you are in transit; you may destroy your travel documents during flight; you refuse to surrender your travel documents to the flight crew, against receipt, when so requested;
- 7.1.8 the Ticket you present has been acquired unlawfully or has been purchased from an entity other than us or our Authorised Agent; has been reported as being lost or stolen; is a counterfeit; or contains a Flight Coupon that has been altered by anyone other than us or our Authorised Agent, or has been mutilated;
- 7.1.9 you cannot prove that you are the person named in the Ticket;
- 7.1.10 you have previously committed an act or omission of the type referred to in article 7.1 on a previous flight or at any location connected with airline services including airports and ticket selling offices, and we have reason to believe that such act or omission may be repeated on a flight operated by us or Our Operators;
- 7.1.11 we have notified you in writing that we would not after the date of such notice, carry you on our flights or those of Our Operators. In this circumstance you will be entitled to a refund less any reasonable service fee to cover our administrative costs;
- 7.1.12 you are wearing or otherwise displaying gang patches, insignia, signs or symbols, or other attire which we deem offensive or believe will cause discomfort to other passengers and you have refused to remove such offensive items.

[103] Article 11 refers to conduct on board aircraft. Article 11.1 provides:

## **ARTICLE 11: CONDUCT ON BOARD AIRCRAFT**

### **11.1 GENERAL**

If in our opinion you conduct yourself on board the aircraft so as to endanger the aircraft or any person or property on board, or obstruct the crew in the performance of their duties, or fail to comply with any instructions of the crew, including but not limited to those with respect to smoking, alcohol or drug consumption, or behave in a manner which causes or is likely to cause discomfort, inconvenience, damage or injury to other passengers, the crew or any property, including the aircraft, we may take such measures as we deem necessary to prevent continuation of such conduct, including restraint. You may be off-loaded at any point, prosecuted for offences committed on board the aircraft and we may decide to refuse to carry you at any time in the future.

[104] Air NZ relies on art 7.1.11 and says the 2 July 2019 letter notified Ms Sharma that it would not carry her on its flights for a period of 12 months and that Air NZ would refund her booked flights.

[105] I accept Air NZ's submission that the breach of contract claim applies in respect of booked flights only. Subject to compliance with applicable laws, Air NZ is not obliged to sell a ticket to any person. The issue is therefore whether Air NZ exercised their "reasonable discretion" under art 7.1.11 when refusing to carry Ms Sharma.

[106] The Air NZ terms of carriage are structurally similar to those in *Canaan* in that Air NZ has discretion to refuse carriage on a number of grounds as specified in art 7.1. While the other grounds are specific (see [102]), art 7.1.11 is general and only requires prior notice before carriage is refused. I agree with Davison J that art 7.1.11 cannot be interpreted as requiring the prior occurrence of one of the other matters described in art 7.1 as the express wording does not specify those grounds as a prerequisite to notice.<sup>19</sup>

[107] While art 7.1.11 does not prescribe any underlying reason for refusing carriage, it does require that Air NZ exercise reasonable discretion. The other grounds in art 7.1 are relevant context and examples (not prerequisites) of the types of factors that would justify banning a customer. It would also be a reasonable expectation of the contracting parties that Air NZ have a broad discretion to notify customers that it cannot carry passengers given the inherent nature of air travel. Travel may need to be cancelled for many reasons including, for example, a pandemic or weather. The requirement that Air NZ exercise a "reasonable discretion" fetters its discretion to rely on art 7.1.11 arbitrarily.

[108] The discretion to refuse carriage appears to be designed to allow Air NZ flexibility to decline travel if there is a reasonable basis for so doing. This is consistent with the regulatory context within which Air NZ operates under the Civil Aviation Act 1990 and the Civil Aviation (Offences) Regulations 2006. Air NZ is required to ensure its activities are carried out safely and in accordance with prescribed safety standards

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<sup>19</sup> *Sharma v Air New Zealand Ltd* [2020] NZHC 230 at [65].

and practices.<sup>20</sup> This supports that discretion not being unreasonably fettered to ensure Air NZ is able to meet safety standards and practices.

[109] Air NZ's terms of carriage also apply to consumers. The terms are not negotiated, in contrast to commercial contracts. Suppliers of services to consumers are subject to consumer protection legislation, including the Consumer Guarantees Act 1993 (CGA). The purpose of the CGA includes to contribute to a trading environment in which the interests of consumers are protected, businesses compete effectively, and consumers and businesses participate confidently. Section 28 of the CGA provides that where services are supplied to a consumer there is a guarantee that the service will be carried out with reasonable care and skill.

[110] Air NZ's obligation to exercise reasonable discretion under art 7.1.11 is therefore to be considered against the regulatory context prescribed by the Civil Aviation Act 1990 and the consumer context as prescribed by the CGA. Air NZ is required to provide its services with reasonable care and skill and its decision-making powers are to be assessed in that context.

### **Air NZ's policies and procedures**

[111] Mr Legge gave evidence about Air NZ's policies and procedures when investigating a security incident. These are captured within Air NZ's "Group Security Watch List Process Standard Operating Procedures" (security procedures). Mr Legge explained the investigation process as follows:

- (a) Reporting – any employee may report a threat to safety. This may involve an initial call or email and then completion of an OSR.
- (b) Allocation – the OSR is allocated to security staff for investigation.
- (c) Investigation – a security adviser and security consultant investigate the OSR based on its identified level of urgency. Information may be collated from internal and external sources.

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<sup>20</sup> Civil Aviation Act 1990, s 12(3).



- (d) Assessment – once all information has been collated, analysed and evaluated, a risk assessment is completed to determine the severity of the incident and any actions required to mitigate risk. Potential actions include no further action; information only; warning letter; or ban.
- (e) Peer review and approval – for a ban or warning, the Senior Manager of Security must approve the action and an unruly passenger report must be submitted to inform the assessment and justify the decision. The report must also be circulated to relevant parties. A copy of the unruly passenger report and the ban or warning letter must be attached to the “Watchlist” entry along with any other relevant information. There are template warning and ban letters that should be used for passenger correspondence.
- (f) Post action review – warning letters and bans are reviewed, generally after 12 months but this can be altered on a case by case basis.

[112] Where Air NZ is considering a ban the Security Procedures require consultation with “legal, Chief Ops (and Customer where required).”

### **Investigation by Air NZ**

[113] Mr Legge explained that the decision to ban Ms Sharma was made after the OSR was prepared in relation to the incident with Ms Gillooly on 25 June 2019. That incident was investigated by Ms Martin who prepared an unruly passenger report. Mr Legge discussed that report with Mr Carter and Mr May of Nelson Airport. They all agreed that, consistent with Ms Martin’s assessment, a one year ban should be issued.

[114] Mr Legge says they took into account “all of the reports of Air New Zealand employees including the concerns raised after the warning letter had been issued.” They also considered Ms Sharma’s email of 24 June 2019 where she had complained to Mr Luxon about the incident at Wellington Airport. They considered there had been “insulting conduct and statements” which included personalised statements. They

considered the conduct crossed the line from being rude and into being unacceptable behaviour and “it was persistent.”

[115] In cross-examination, Mr Legge acknowledged the importance of not missing something important when investigating. He agreed that if there was something important, he would want to know about it when making his decision.

[116] Mr Legge also acknowledged that it would be a very significant failure in the investigative process if matters contained in the unruly passenger report on which the decision was based were never said by Ms Sharma.

[117] Air NZ submits that investigative failure is not the legal test. Any investigative failures are relevant to the reasonableness of the decision, whether Air NZ acted in good faith and whether there is any arbitrary or capricious conduct. If, absent the investigative failures, the same decision would have been reached, then this may indicate that the decision was not unreasonable, in the *Wednesbury* sense.

#### *Relevance of tape recordings*

[118] Mr Legge acknowledged he had seen the 24 June 2019 email to Mr Luxon and that this was considered in making the ban. In that email, Ms Sharma told Air NZ that she had taped the interaction at Wellington Airport and would tape interactions going forward:

What have we done to deserve this type of hostile customer treatment? That was my question at the time, and it remains that. *I taped the interaction*, because it was completely hostile towards us, and we felt strongly that it was a deliberate attempt to set us up for failure. In the lounge, the host suggested that the reason why we may have to check-in is because of the similarity in names. It seems nobody really knows the reason why we are being asked to check-in as through we are some security risk. However, it is so obvious that Ms Stewart is behind it, because previously travelling to India, we never had this issue.

...

*From now on, I will be recording all interactions between us and Air New Zealand at kiosk check-in.* After the debacle in Wellington, I realise now that Ms Stewart is on a venomous mission, which makes her look so very unprofessional.

(emphasis added)

[119] In fact, Ms Sharma had taped earlier interactions, and had done so since January 2019 when the family returned from India. She did not disclose that fact to Air NZ.

[120] In exercising a reasonable discretion, a decision maker should consider relevant information offered by the other contracting party.<sup>21</sup> In *Canaan*, the Court determined that the decision maker should have taken the opportunity to satisfy itself as to the position between the parties, rather than relying on historical matters, before exercising the discretion.<sup>22</sup>

[121] This is also consistent with the recent decision in *Targa Capital Ltd v Westpac New Zealand Ltd* where the Court considered whether Westpac had exercised a reasonable discretion in terminating banking services to Targa.<sup>23</sup>

As to process, it cannot seriously be argued that Westpac acted unreasonably. It did not rush to terminate. It sought information from Targa. It made other inquiries. The decision was made at a high level within Westpac. Westpac engaged in correspondence with Targa once the decision was made and provided extensions to the termination date.

[122] In contrast to the above, Air NZ did not make inquiries about the recording of the Wellington Airport incident or subsequent recordings at check-in with Ms Gillooly. Ms Sharma was not provided with any opportunity to respond to Ms Gillooly's complaint before the decision was made to ban her. This is despite Air NZ's security procedures indicating that consultation with the customer may be required. In circumstances where the customer had indicated they have recordings of their interactions with Air NZ, it would have been prudent to ask for those recordings.

[123] The existence of recordings was relevant to the matters under investigation. The investigation concerned Ms Sharma's conduct at check-in and Ms Sharma had notified Air NZ that she had recorded the incident in Wellington and would be recording all her interactions at check-in (which is what she subsequently did when she checked in at Nelson Airport).

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<sup>21</sup> *Canaan Farming Dairy Ltd v Westland Dairy Company Ltd* [2022] NZHC 2524.

<sup>22</sup> *Canaan Farming Dairy Ltd v Westland Dairy Company Ltd* [2022] NZHC 2524 at [149].

<sup>23</sup> *Targa Capital Ltd v Westpac New Zealand Ltd* [2023] NZHC 230 at [48].

[124] Mr Wilson for Air NZ submitted that it is speculative to assume Ms Sharma would have disclosed the recordings if the allegations had been put to her, and said Ms Sharma first disclosed them in her reply affidavit dated 30 August 2019. This ignores the fact that Ms Sharma had told Air NZ she had recorded the Wellington interaction and would record future interactions. Air NZ was on notice that recordings existed.

[125] It would have been difficult for Ms Sharma to refuse to disclose the recordings when she had told Mr Luxon about them in her 24 June 2019 email. If Ms Sharma refused disclosure, Air NZ would have been entitled to rely only on the information before it.

[126] That the recordings were relevant is clear from their content. I consider that Ms Gillooly's account of her conversation with Ms Sharma portrayed Ms Sharma in a more negative light than can be inferred from the recording. In particular:

- (a) By saying Ms Sharma said, "why doesn't she piss off back to Christchurch", instead of, "she's from Christchurch," Ms Gillooly alleged Ms Sharma used inappropriate language and showed a degree of malice, which cannot be inferred from the recording.
- (b) By saying Ms Sharma "began getting aggressive about the company and Lisa [Ms Stewart]" infers Ms Sharma used an aggressive and angry tone and that cannot be inferred from the tone used by Ms Sharma in the recording.
- (c) By saying Ms Sharma was unstable, aggressive, was not displaying normal behaviour, and that there was no reasoning with her to stop being aggressive, is inconsistent with the recording in which Ms Sharma is heard laughing, thanking Ms Gillooly and saying "awesome." Ms Gillooly at one point even says to Ms Sharma, "I know what you mean" when Ms Sharma made comments about Ms Stewart.

[127] Ms Gillooly's account formed the basis for the 2019 unruly passenger report. The 2019 unruly passenger report summarised Ms Sharma's conduct as follows:

Mrs Sharma has made the NSN PSM feel intimidated and personally attacked

She has searched for the PSM via LinkedIn for no reason

A NSN CSA who was unaware of Ms Sharma's past was grilled by Ms Sharma

Ms Sharma's aggressive behaviour made the CSA feel very uncomfortable and intimidated

Ms Sharma made it clear to the CSA she had an issue with the PSM and was going to take it further

She told the CSA she had sent an email to Christopher Luxon telling him of her disgust with the PSM

Ms Sharma told the CSA that the PSM will have trouble coming her way and accused the PSM of having a vendetta against her and her family

[128] Ms Stewart did feel intimidated and personally attacked so this is true (as is the LinkedIn search, although any member of the public is entitled to access that platform). Ms Gillooly was unaware of Ms Sharma's past and likely did feel uncomfortable when Ms Sharma criticised Ms Stewart, a fellow Air NZ staff member. Ms Sharma did make it clear that she had an issue with Ms Stewart and had written to Mr Luxon. Ms Sharma also used the word "vendetta."

[129] The transcript of the conversation with Ms Gillooly discloses that Ms Sharma was willing to speak negatively about Ms Stewart to Ms Gillooly and her reasons for doing so:

Anjela: ... she's put a block on us and made all these allegations against our family.

...

Anjela: I've actually written to Chris Luxon last night, saying we don't even know this lady and she's made all these allegations. We've actually got some information from Air New Zealand where she's accused us of all these things. She's actually from Christchurch. She doesn't know us at all but [has] a vendetta and it's absolutely upsetting.

...

Anjela: We've lost all the joy of travelling. We're quite frequent flyers and it's just lost all its joy cos we have to get here and check-in as well. She's put this big thing on our whole family all over...

...

Anjela: ... and made these accusations. We are going to be dealing with Air New Zealand about it but it's just been so wrong.

[130] Ms Sharma had been provided with Ms Stewart's report in December 2018. That included the recollections of Ms Whyte and Ms Matuszewski. Ms Stewart had not made those allegations. Rather, she had captured the recollections of staff at Nelson Airport and communicated them to Security. That was an appropriate action to take in light of the nature of the comments that had been relayed by Ms Whyte and Ms Matuszewski to Ms Stewart. Ms Stewart had not made allegations herself but had taken action.

[131] Ms Sharma was also willing to complain about Wellington staff to Ms Gillooly:

Anjela: In fact, the first time we left here from Nelson in the last trip we did and nobody asked us for ID and I had no idea. We got to Wellington and they were so horrible to us. They said, "You haven't got any ID." I said, "But no one told us." No one told us that we had to bring ID. It was just awful, it was insidious.

[132] The transcript of the Wellington conversation does not disclose any "horrible" conduct on the part of Wellington staff. Those staff were following instructions and asking for identification as they had been instructed to do.

[133] Ms Sharma was correct in that the check-in restrictions appear to have been instigated by Ms Stewart when she emailed the Security and Fraud teams as a result of the 1 December 2018 incident. Ms Stewart had no authority alone to implement those restrictions.

[134] The reason for the check-in restrictions had not been communicated to Ms Sharma despite Mr Leckie asking someone to call her if they were to remain in place. It was not unreasonable for Ms Sharma to express concern about those restrictions and the fact it was difficult to comply with them when she had not been informed about them. This did not however, entitle Ms Sharma to insinuate that frontline staff had been "horrible."

[135] I accept that a large part of Ms Gillooly's account is accurate. While the degree of aggressiveness and malice Ms Gillooly suggests was present is not evident from the recording, Ms Sharma was willing to disparage other staff (including Ms Stewart and Wellington staff).

[136] Air NZ says there is "an inherent unfairness" in challenging the credibility of Ms Gillooly who prepared evidence for the injunction proceeding without the benefit of the recording. This submission ignores the content of Ms Sharma's 24 June 2019 email where she told Air NZ she would be recording all interactions at check-in going forward (which therefore includes the conversation with Ms Gillooly the next day).

[137] Ms Sharma's 24 June 2019 email was given to Air NZ's legal team to prepare a response, so Mr Roberts was aware there may be a recording of the conversation. Air NZ should therefore have been aware of the risk of inconsistencies if Ms Gillooly gave evidence without Air NZ first asking Ms Sharma for a copy of the recording. Air NZ was on notice.

[138] Mr Wilson for Air NZ submits that while Ms Gillooly's account was not exact, it accurately captured the nature of the conversation. Ms Gillooly's account did exaggerate Ms Sharma's conduct. It did however, accurately record that Ms Sharma was willing to accuse Ms Stewart of making allegations about the December 2018 incident when the information provided to Ms Sharma indicated that it was other Air NZ staff who had shared their recollections with Ms Stewart. Ms Stewart had decided to take action and refer the issues to Security, as she was entitled to do. That was not prompted by any vendetta but by the shift report she had received and then the recollections of Ms Matuszewski and Ms Whyte. Ms Stewart was entitled to be concerned about staff health and safety.

[139] Mr Legge's evidence was that in banning Ms Sharma, Air NZ also considered her conduct on 1 December 2018 and her subsequent conduct after the warning letter. Air NZ considered that Ms Sharma had been warned but that she had ignored that warning and had continued to intimidate, threaten and be aggressive.

[140] Ms Sharma was aggrieved about the contents of the warning letter and the email report of Ms Stewart that she had received from Mr Roberts. Ms Sharma disputed that her family had made disparaging remarks about Ms Matuszewski, and she wanted an explanation for the warning letter saying the family had entered the lounge without permission. She also contested Ms Whyte's false accusation that the family were not all travelling business class. That incident is therefore relevant background to the ultimate decision to ban Ms Sharma.

*December 2018 incident*

[141] The 1 December 2018 incident is relevant to the extent that it shows a propensity for Ms Sharma to behave in a particular way. It was open to Air NZ to consider that background in banning Ms Sharma.

[142] Air NZ submits that Ms Sharma's conduct in relation to that incident indicates "overbearing behaviour and insulting comments."

[143] The short video recording in the Koru lounge is helpful. The tone of the conversation sounds civil and not aggressive. It was disruptive to another lounge guest, but this is likely because of the size of the lounge and the number of people talking rather than any yelling or shouting, which is not evident from the video. Ms Whyte acknowledged this:

It was only a very small lounge at that stage so everything was, it was quite, if it was anyone was vocal it was quite prominent and I know it was upsetting the rest of the customers so...

[144] Ms Whyte's tone and words captured on the video indicate she was willing to be conciliatory to diffuse the situation.

[145] The words "embarrassing" and "humiliating" heard on the video are consistent with Ms Sharma's letter to Mr Luxon when she says those family members addressing Ms Whyte may have "appeared somewhat reactive." Ms Sharma says there was some tension because the family's integrity was being questioned.



[146] There are consistencies between the video, Ms Whyte's recollection and Ms Sharma's recollection, as follows:

- (a) The family's business class travel was questioned by Ms Whyte.
- (b) The conversation included discussions about Ms Matuszewski. Ms Whyte told Ms Sharma that Ms Matuszewski had raised the issue of Koru lounge eligibility, and Ms Sharma acknowledged she had referred to Ms Matuszewski as "that lady" and that she was told by Ms Whyte to use her name.
- (c) A lounge guest did request that the discussion be taken elsewhere and said it was "really loud."
- (d) There was some tension between Ms Whyte and the family. Ms Sharma acknowledged that those addressing Ms Whyte "may have appeared somewhat reactive."

[147] Ms Whyte was honest when cross-examined. She made appropriate concessions and accepted that she had confused the business class travel when she went to check the tickets after she left the lounge. She mistakenly thought some of Ms Sharma's sons were travelling premium economy and that this mistake was reflected in her subsequent shift report.

[148] Ms Sharma's March 2019 letter to Mr Luxon did not mention that a lounge guest had asked them to quieten down. She withheld that relevant information when complaining to Mr Luxon. Ms Sharma also complained about the public nature of the confrontation without disclosing to Mr Luxon that Ms Whyte had asked her to speak outside of the lounge, so the public nature of the conversation was of her own doing. Ms Sharma also referred to Ms Matuszewski in her letter to Mr Luxon as an "ice-queen." Ms Matuszewski was however, simply doing her job, and was correct about the access rules.

[149] What happened after Ms Whyte left the lounge is disputed. Ms Matuszewski says the family made insulting and rude comments about her and mimicked her. She says she had to step out of the Koru lounge and call security because of her concerns.

[150] Ms Sharma and her sons who gave evidence all categorically denied they made derogatory comments about Ms Matuszewski. Mr Christopher Leaper said he was in the Koru lounge and did not observe any mimicking or derogatory comments. Mr Timothy Leaper and Ms Sharma's daughter did not give evidence.

[151] Mr Cameron, who knows the family, gave evidence that he entered the Koru lounge at approximately 4.30 pm and was likely in the lounge for about 20 minutes before his flight departed. This was after Ms Whyte had left the Koru lounge. He said he did not observe any of the family mimicking Ms Matuszewski or making derogatory comments. This is contrary to Ms Matuszewski's evidence that the comments were made for the entire time the family were in the Koru lounge.

[152] Of the family members who gave evidence, all said that no one lost a boarding pass and that Air NZ's records would show this. I accept that no boarding pass was lost. I do not consider anything can be inferred from Air NZ's failure to check its records as the remark could be made and then the boarding pass found.

[153] When she gave evidence, Ms Matuszewski became upset. I accept that comments were said that deeply upset her.

[154] Comments from Ms Sharma's children, recorded in the video, that what was happening was "embarrassing" and "humiliating," suggest that they were also upset. In the absence of any other explanation for being questioned about the legitimacy of their business class travel, it is plausible that a member of the family may have expressed concern that they were being questioned because of their race. This is particularly so for people who may have experienced racism before. One of the Leaper sons indicated in cross-examination that he had been called names because of his background.

[155] Ms Whyte's evidence during cross-examination suggests the insults were made by one of Ms Sharma's sons:

No. It was more the sons, it wasn't Ms Sharma at all. The sons were quite derogatory calling Kara she, she doesn't know what she's doing. I did mention I said to her look, just – words, I don't know what my exact words were but just cut her a wee bit of slack, you know, she's relatively new up here, be a wee bit mindful and a wee bit kinder. They were calling her "she this" and "she that" and I took offence, it was quite disrespectful so I said: "Would you mind not calling her she, her name is Kara."

[156] Ms Whyte noted in her shift report for that day that she and Ms Matuszewski had been accused of being racist. There was no reason for Ms Matuszewski or Ms Whyte to make this up and I am satisfied that Ms Matuszewski's upset was genuine. In those circumstances, I accept that one or more of the family made a comment that led Ms Matuszewski and Ms Whyte to believe they were being accused of being racist.

[157] In terms of comments about Ms Matuszewski's intellect, the March 2019 letter from Ms Sharma to Mr Luxon records that:

... I should note that at this point, that I find it difficult to comprehend how both Kara and Ms Whyte struggled with our lounge access eligibility, when the check-in staff fully acknowledged our business class travel, and verbally invited us to access the lounge. ...

[158] The above comment indicates that Ms Sharma had negative views of Ms Matuszewski and Ms Whyte's ability to understand the lounge access rules. However, both were correct in their assessment of the rules.

[159] I therefore accept that comments were made that caused Ms Matuszewski to become very upset. Ms Matuszewski could overhear the comments made about her when Ms Whyte was speaking to the family. The blame appears to have been put on Ms Matuszewski for questioning their eligibility. It was not her fault. She was simply doing her job. The fact she became upset again, over four years later, supports comments having been made that were deeply upsetting to her.

[160] Against that, I accept Mr Cameron's evidence that he did not observe any issues after he entered the Koru lounge, despite Ms Matuszewski saying the remarks

continued for the entire time the family were in the lounge. I find that it is unlikely that the comments continued while Mr Cameron was in the lounge.

[161] There was also no evidence from Mr Simon Trillo of Nelson Airport security. Air NZ's explanation is that this evidence was not necessary because Mr Trillo was not an eyewitness to the events in the Koru lounge. No security incident however, was recorded at Nelson Airport that day. Mr Trillo could have corroborated the seriousness of the incident.

[162] Ms Whyte mistakenly thought some members of the family were flying premium economy. Ms Whyte communicated this mistake to Ms Stewart who then passed it on to Ms Martin who prepared the 2018 unruly passenger report. Further, Ms Stewart wrongly considered that Mr Christopher Leaper may have deliberately given his boarding pass to his children so that they could get into the Koru lounge under his name. There was no basis for this suggestion.

#### *Attempts at getting answers*

[163] Ms Whyte's mistake was relevant context to Ms Sharma's questioning when she visited Nelson Airport in February 2019 to clarify the contents of the warning letter. After speaking with Ms Sharma in February 2019, Ms Stewart again repeated this mistake to Mr May. That this mistake mattered was acknowledged by Mr May in March 2019 when he noted that if it was correct, Air NZ would need to ensure accuracy in its response and "own any errors." Air NZ, however, did not own its error when it discovered the mistake and Ms Sharma continued to express concerns.

[164] The warning letter said that Ms Sharma and her family had entered the Koru lounge without permission. Mr Wilson, for Air NZ, acknowledged this statement was untrue but submitted it was irrelevant because Air NZ did not take this into account when it made its decision to issue the warning letter.

[165] This false allegation, however, was relevant to Ms Sharma's insistence on an explanation. Air NZ communicated this mistake to Ms Sharma and other Air NZ staff. She rightfully felt aggrieved about that aspect of the warning letter because it was not true.

[166] Further, Ms Martin repeated the allegation and circulated it to other Air NZ staff with the warning letter in her email of 27 December 2018. Ms Stewart also distributed the warning letter to Nelson Airport staff without the 2018 unruly passenger report. While the 2018 unruly passenger report may have been included in the “Watchlist” system, it would have been necessary for Air NZ staff to read through that report to identify that Air NZ had mistakenly said the family had entered the lounge without permission.

[167] The circulation of the warning letter without context to other Air NZ staff supports Mr Fowler’s argument that Air NZ enabled “suggestibility” so that other Air NZ staff were led to believe the family had entered without permission when this was not true.

[168] The issue however, that caused Air NZ to issue the warning letter was the content of the comments about Ms Matuszewski. It was that conduct that created a potential threat to the health and safety of staff.

[169] Making inaccurate accusations is provided as an example of corporate bullying in WorkSafe’s guidelines on workplace bullying (WorkSafe guide).<sup>24</sup> A consumer is entitled to expect that reasonable care is taken to ensure any allegations are correct and if they are not, they are withdrawn. Air NZ knew the allegation was wrong, because it was acknowledged in the 2018 unruly passenger report that Ms Matuszewski had allowed the family into the Koru lounge. Despite this knowledge, it issued a warning letter and circulated it internally with the inaccurate allegation.

[170] Further, Air NZ is required to exercise reasonable skill and care in providing services to customers so it was a reasonable expectation of Ms Sharma to request Air NZ to explain the allegation or, if it was wrong, to withdraw it.

[171] Mr Fowler submits that Air NZ “stonewalled” Ms Sharma and would not respond to her requests for an explanation of the warning letter. He says Ms Sharma’s

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<sup>24</sup> WorkSafe *Preventing and Responding to Bullying at Work* (New Zealand Government, March 2017) at 17.

requests were reasonable in circumstances where the warning letter had said that the family had entered the lounge without permission and no details were provided about the family's alleged offensive behaviour until Ms Sharma made a privacy request and received Ms Stewart's report.

[172] When the warning letter was circulated to Nelson Airport staff on 31 December 2018, Ms Stewart instructed them not to engage with Ms Sharma, to refer Ms Sharma back to the information in the warning letter and to tell her to contact the Air NZ Security team. This approach was reinforced during the 18 February 2019 conversations with Ms Sharma at Nelson Airport during which:

- (a) Ms Stewart said about the warning letter, "I'm not going to get into that with you today."
- (b) In response to Ms Sharma saying it was good to talk, Ms Stewart said "No, it's not. I actually think we're going to stop it now."
- (c) Ms Whyte said to Ms Sharma she had been told that she could not get into any discussion with her and she would have to deal with Mr Carter.

[173] Ms Stewart, on Ms Martin's suggestion, filed an OSR about the above conversation and described the conversation as "inappropriate" and "offensive behaviour." That OSR also repeated the inaccurate accusation about business class travel. To request an explanation is not "inappropriate" or "offensive" in circumstances where inaccurate allegations have been made against a customer, and in the context of receiving a related warning letter.

[174] In Ms Sharma's March 2019 letter to Mr Luxon, she said she felt "shut down" when she wanted to make reasonable enquiries. When responding to that letter, Air NZ did not "own its errors" (as Mr May had suggested it should). Ms Sharma appears to have been shut down because her questioning and previous behaviour were perceived as rude and intimidating without regard to her legitimate concerns. The failure to respond contributed to Ms Sharma's growing angst that she was being "set up." Ms Stewart did ensure that Ms Sharma was the subject of increased surveillance.

Ms Stewart liaised with the Fraud team about the check-in restrictions, asked staff for feedback when Ms Sharma travelled, submitted an OSR when Ms Sharma had wanted to discuss the warning letter, and encouraged staff to report any incident with Ms Sharma, including incidents outside of work.

[175] I accept Air NZ did not respond to Ms Sharma's attempts at getting a response to her legitimate concerns. If Air NZ's primary concern was staff welfare (which I accept it was), then it should have taken steps to minimise adverse interactions between Ms Sharma and check-in staff by responding to Ms Sharma's legitimate concerns. By not addressing Ms Sharma's legitimate concerns or being clear with Ms Sharma that the key concern was the way she spoke to staff, there was an increased risk that frontline staff would be exposed to Ms Sharma's frustrations.

[176] I accept that Air NZ's failure to address Ms Sharma's legitimate concerns was only relevant when considering the fact of Ms Sharma's questioning and not the manner in which she questioned staff. Air NZ was entitled to consider the manner in which Ms Sharma questioned staff alongside whether the questioning was reasonable in all of the circumstances.

[177] It was open to Air NZ to accept the recollections of Ms Matuszewski and Ms Whyte in so far as those recollections did not contain accusations that Air NZ knew were inaccurate. Air NZ was therefore entitled to accept that Ms Matuszewski had been insulted but not that the family had entered the lounge without permission.

#### *Imposing check-in restrictions*

[178] There is no evidence that Air NZ considered whether Ms Sharma's concerns about the check-in restrictions were valid in considering her behaviour after the warning letter. The check-in restrictions were one of the causes of Ms Sharma's frustrations. They led to the incident at Wellington Airport and the incident with Ms Gillooly in June 2019. It was those events that led to her being banned.

[179] Ms Sharma provided a list of her and her family's flights between 22 January 2019 and 28 June 2019 which show that out of 15 flights, online check-in was not permitted for 12 of them. Identification was required for five flights but not the others.

[180] The internal Air NZ documentation indicates that there was confusion as to the reason for imposing check-in restrictions. They appear to have been imposed because upon investigating the 1 December 2018 incident, the Fraud team identified the incident with one of Ms Sharma's sons in September 2017. The Fraud team then agreed to impose identification restrictions to avoid the incident happening again given the similarity of names amongst the Leapers (some of whom share a middle name and others whose first names are similar to that). Ms Sharma does not share the same name. An Air NZ staff member acknowledged that taking this action may "inflare the situation."

[181] Against that, Air NZ is entitled to ask passengers for identification. When asking for identification, Air NZ staff are also entitled to be spoken to in a reasonable manner.

[182] Mr Legge gave evidence that different divisions within Air NZ can impose restrictions including the Security, Fraud and Koru Loyalty teams. Mr Legge's recollection was that the decision was made between the Security and Fraud teams. Mr Legge also said that whether restrictions are communicated to the customer depends on the circumstances. In his experience, this information is kept internal. This is consistent with the family not being informed.

[183] Ms Sharma asked directly about check-in when she emailed Mr Leckie on 15 March 2019:

We (4 family members) are travelling to Auckland on Friday 22 March – do you know whether we will be able to check-in on line as we are accustomed to doing?

I do get anxious when I think about that. I do have enough conflict in my professional life to deal with, and do not like it coming into my personal space if I can help it.....

I do hope you have a nice weekend.

[184] Mr Leckie forwarded Ms Sharma's email to Air NZ's Security team on 21 March 2019 indicating he had received a call from Ms Sharma and then said:

If we are comfortable on our grounds to continue to restrict Anjela [Ms Sharma] and her travelling companions checking in online or through



kiosks *can someone please call her today and outline this.....* and I would encourage a factual concise response as there is the potential to be drawn into an extensive recap of historical experiences.

(emphasis added)

[185] While Mr Legge's evidence suggests the restrictions were a result of the warning letter, Ms Martin replied to Mr Leckie's email on the same day saying:

As per the warning letter issued to Mrs Sharma, there is no conditions restricting her ability to check in online. The letter was outlining the lounge access eligibility and our conditions of carriage which she must comply with.

[186] The restrictions remained in place and Ms Paul of the Fraud team informed Ms Stewart that same day (21 March 2019) that Ms Sharma's check-in would be restricted. There does not appear to have been any assessment at this time as to whether the restrictions were necessary to protect staff health and safety. The reason for the restrictions appears to have been because of the concern about fraud. That related to the similar names of the Leaper family members and not because of any action by Ms Sharma.

[187] Mr Leckie asked Air NZ staff to call Ms Sharma if the restrictions were to remain in place, but there is no evidence that anyone did. This appears to be because Mr Leckie's email was sent to the Security team and did not include the Fraud team (Ms Paul) and Ms Stewart.

[188] Further, Ms Stewart appears to have been under the misapprehension that the restrictions had been explained to the family when she questioned this in her email to Ms Martin on 26 June 2019:

.... Just her usual manner and demanding questions around having to show id and wondering why they have too – which was clear in her correspondence right? This has probably happened around the country.

[189] None of the Air NZ correspondence acknowledged or explained the check-in restrictions. No one called Ms Sharma to explain the restrictions as Mr Leckie suggested they should.

*June 2019 email to Mr Luxon*

[190] Air NZ says Ms Sharma displayed an “intense interest” and “hostility” towards Ms Stewart in her June 2019 email to Mr Luxon, which included the following:

... Lisa Stewart has completely blacklisted us in a way that is totally untrue. We don't even know this individual, but she clearly has an axe to grind with us, and it would seem that she and Ms Whyte in tandem are hell bent on making our lives as customers very difficult, clearly to add momentum to the lies that have been documented against me and my family. Some of what Ms Stewart has recorded is so completely far-fetched, that it is unbelievable, but she has been allowed to document it.

I am completely appalled over the treatment that we have been dealt as a family, and the absolute abuse of process that Ms Stewart has been allowed to follow in blocking us from checking in on our phone apps, or online. Her account contained in the information is premised on lies and embellishment. But clearly it is okay for her to spin a yarn like this, and treat us with absolutely no regard, even to the extent of your failure from the top to address our serious concerns. ...

...

Ms Stewart has embellished her story to the point of lying – clearly so that she can be viewed as justifying her position – and you as the leader of this organisation have done absolutely nothing about that, – I see that as being to your personal detriment.

... After the debacle in Wellington, I realise now that Ms Stewart is on a venomous mission, which makes her look so very unprofessional. I have also read her LinkedIn profile, – she is just somebody working her way up the ladder with no professional backing to give credibility to the lies that she has made about us, and me personally. ...

[191] The evidence suggests that Ms Sharma’s focus on Ms Stewart arose because:

- (a) Ms Stewart confirmed to Ms Sharma during the 18 February 2019 conversation that she had instigated the warning letter in December 2018;
- (b) Mr Roberts provided Ms Sharma with the OSR prepared by Ms Stewart regarding the 1 December 2018 incident; and
- (c) Ms Stewart was new to Nelson Airport and Ms Sharma had not previously received any warning about her conduct.

[192] Ms Sharma was entitled to dispute the recollections of Air NZ staff. To suggest that Ms Stewart was lying however, was inconsistent with the report that Mr Roberts had provided to her. Ms Stewart had reported the recollections of Ms Matuszewski and Ms Whyte. They were not allegations by Ms Stewart. Air NZ is entitled to accept the recollections of Air NZ staff unless it holds information that indicates those recollections are untrue.

[193] Ms Stewart did not give evidence so I am unable to assess her credibility other than from documents. The documents disclose Ms Stewart's concern to protect Air NZ staff and to take action to address incidents. Ms Stewart made comments in emails that indicate she wanted Ms Sharma to be banned after she had received the recollections of Nelson Airport staff.

[194] Ms Stewart also got some things wrong about Ms Sharma. Ms Sharma had not lied about travelling business class and had not entered the Koru lounge without permission. These mistakes appear to have contributed to Ms Stewart's view that, "I have never in my life met such a nasty woman, who lies through her teeth."

[195] Ms Sharma was also entitled to challenge the imposition of check in restrictions. The internal Air NZ documents indicate check-in restrictions were not imposed because of Ms Sharma's conduct but because of concerns that the family might attempt to travel under each other's names because one of Ms Sharma's sons had done this in 2017.

[196] Air NZ had a legitimate reason to ask for identification to prevent fraud as was flagged in December 2018. That decision however, was made at the same time as the warning letter and without any explanation to Ms Sharma to ensure she was aware of the requirements she was expected to meet when checking in – this is particularly relevant because school aged children do not ordinarily carry identification. In circumstances where Air NZ was monitoring Ms Sharma's interactions with Air NZ staff, it was arbitrary to impose those restrictions and then fail to acknowledge that those restrictions may be difficult to comply with if you are not told about them. The restrictions were also relevant to Air NZ staff safety as the failure to inform a customer

about them may increase the risk of customers being upset and questioning frontline staff when they cannot comply.

[197] Air NZ says that Ms Sharma's 24 June 2019 email to Mr Luxon was a "tirade of insults" and followed a pattern of "consistent rule and abusive" behaviour. Ms Sharma failed to acknowledge any responsibility for her behaviour or its impact on others:

- Q. Are there any aspects of your behaviour that you're not happy with or that you take some responsibility for?
- A. Well no because generally I mean we are just wanting to understand about this letter and what they were saying about we've entered without permission. So that was our main, and then of course when we – so the main enquiry was: "Look why, why have you said this it's not how we..."

[198] Regarding the impact of her behaviour on staff, when asked about this Ms Sharma responded:

- Q. It's Air New Zealand's case staff did feel very personally uncomfortable and intimidated.
- A. I don't, I don't understand why they would feel that way. I don't accept that.

[199] I accept that Ms Sharma appears to lack awareness as to the impact her behaviour has on others. The recording of the Wellington incident indicates she continued to question Ms Joseph and asked to speak with someone, and then did not understand why Ms Joseph became upset when she told her she did not want to speak to anyone. Ms Sharma showed no compassion for Ms Joseph's position. Ms Joseph was at work and had been instructed to ask for identification, so could not concede to Ms Sharma's demands without acting contrary to the instructions before her, in other words, not doing her job. Ms Sharma sought to belittle Ms Joseph's upset. On the one hand Ms Sharma said she "put on a show of tears," and then when giving evidence said she did not see her cry.

[200] In her 24 June 2019 email to Mr Luxon, Ms Sharma accused Ms Hamilton of "abusing" her and "publicly raising her voice" and as having "aggressively" shut her

son down. She considered the whole incident was a “deliberate set up.” The recording does not support these allegations.

[201] Ms Sharma described Ms Hamilton as “mannish” in the June email. During closing submissions, counsel for Ms Sharma indicated she wished to apologise for that comment, which shows some insight, although somewhat late in the piece.

[202] Air NZ considered Ms Sharma’s June email was insulting to Air NZ staff. It was insulting, but it was not communicated directly to the staff members. The insults were made in the context of a complaint to the Chief Executive. They show a propensity to blame others and focus on what they did and not what Ms Sharma may have done to contribute to staff becoming upset.

[203] The transcript of the recording of the Wellington incident does not disclose Ms Sharma making insults directly to Ms Hamilton or Ms Joseph. The recording does disclose that Ms Sharma kept questioning Ms Joseph about why she had to show identification. Both Mr Christopher Leaper and Ms Sharma asked why it was happening to them and who they should talk to about it. When Ms Joseph said they could talk to her team manager, Ms Sharma said she didn’t want to talk to a manager. By this stage, the team manager (Ms Hamilton) was coming to speak to Ms Sharma.

[204] The transcript records that:

Anjela [Sharma]: We’ve never had this before. We know we have to check in but no one’s actually gone this far, to say you’re checking our security, checking our ID. If you told us that, we would have brought ID with us.

Dayana [Joseph]: Can you please ... shouting at me.

Anjela [Sharma]: I’m not shouting.

Dayana [Joseph]: You’re shouting at me now.

Anjela [Sharma]: No, it’s unfair.

...

Anjela [Sharma]: Why do we have all these problems? We pay all this money to come on a flight. I cannot believe it. ... What if we miss our flight?

...

Christopher [Leaper]: Who do we ask why this is happening?

Anjela [Sharma]: Who do we talk to about this? You need to tell us. You can't just do this to us.

Dayana [Joseph]: Do you want to talk to my team manager?

Anjela [Sharma]: Not right now, cos we've got a plane to catch and we're not risking missing it.

Anjela [Sharma]: We want a name. You cannot do this to us.

...

Janine [Hamilton]: Yeah, I know, thank you for that, but it doesn't need to get my staff members so upset that she's crying because she's actually doing her job.

Anjela [Sharma]: Actually, I understand she's clearly pregnant and I've had six children and I know what it's like. You do get emotional about little things.

Janine [Hamilton]: I know that too.

Anjela [Sharma]: I don't believe we've shouted at her.

Janine [Hamilton]: You don't need to be condescending.

Anjela [Sharma]: Everything I say is wrong.

Janine [Hamilton]: You don't need to be condescending. I'll let you go.

Anjela [Sharma]: Thank you very much, Janine.

Janine [Hamilton]: I will talk to security about why this is happening.

[205] That Ms Joseph was genuinely upset is corroborated by her and Ms Hamilton's evidence that she had to take the remainder of the day off work. The recording indicates frustration with not being able to meet the identification requirements in circumstances where they had not been told about them, their children were school aged so did not carry identification, and they had not been asked for identification on the first leg of their trip. The concern however, is the manner in which Ms Sharma addressed her frustrations to Ms Joseph.

[206] The above shows the relevance of the recording of the Wellington Airport incident.

[207] Air NZ also says that Ms Sharma insulted Mr Luxon in her letter by stating that his entry into politics was a “frightening prospect.” Ms Sharma had been told to write to Mr Luxon and she was not satisfied that he had done anything about her concerns. The comment was made in that context.

### *Health and safety*

[208] When exercising the discretion, Air NZ was entitled to give due consideration to its legitimate interests and the purpose for which the discretion was conferred.<sup>25</sup>

[209] At the heart of Air NZ’s concern was the health and safety of its staff. Mr Wilson referred to Air NZ’s obligations to its employees under the Health and Safety at Work Act 2015 (HSW Act). Under the HSW Act, Air NZ has a statutory duty to ensure, so far as is reasonably practicable, the health and safety of its workers while they are at work,<sup>26</sup> and the provision and maintenance of a work environment that is without risks to health and safety.<sup>27</sup> Health means “physical and mental health,” and “hazard” includes a person’s behaviour where that behaviour has the potential to cause death, injury, or illness to a person.<sup>28</sup>

[210] Further, the HSW Act imposes a duty to eliminate risks to health and safety, so far as is reasonably practicable, and if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks as far as practicable.<sup>29</sup>

[211] Mr Wilson referred to the WorkSafe guide which refers to “bullying” at work as “repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm.”<sup>30</sup> The WorkSafe Guide contemplates bullying involving customers where “workers are bullied by those they serve.”<sup>31</sup> Examples of bullying are provided and include belittling remarks, being

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<sup>25</sup> *C & S Kelly Properties Ltd v Earthquake Commission* [2015] NZHC 1690 at [73].

<sup>26</sup> Health and Safety at Work Act 2015, s 36(1)(a).

<sup>27</sup> Section 36(3)(a).

<sup>28</sup> Section 16.

<sup>29</sup> Section 30(1).

<sup>30</sup> WorkSafe *Preventing and Responding to Bullying at Work: for Persons Conducting a Business or Undertaking (PCBUs)* (New Zealand Government, March 2017) at 1.

<sup>31</sup> At 16.

shouted or yelled at, insulting comments about one's personal life and intimidation, acting in a condescending manner, and making inaccurate accusations.<sup>32</sup>

[212] The WorkSafe guide also refers to examples of corporate bullying, which include withholding or concealing information, failing to return calls or pass on messages, ignoring or excluding by silent treatment, humiliation, judging wrongly, and supplying incorrect or unclear information.<sup>33</sup>

[213] That Air NZ was primarily concerned with the welfare of its staff is reflected in the various internal emails throughout the period from December 2018 to June 2019:

(a) Ms Stewart in different communications in December 2018:

I will continue to get information from my staff re previous incidents ... this single incident has left my staff feeling intimidated and rattled to the point that they have questioned their safety.

She has made numerous staff upset in the past.

We feel that a warning letter is not a strong enough message (to our staff) on how we manage such situations where our staff are treated so poorly.

(b) Mr May in March 2019:

... We cannot have our staff treated in this way and exposed to the belligerence of Ms Sharma and some other members of her family display when they don't get their own way. ...

(c) Mr May in June 2019:

... Staff should not have to be dealing with this intimidatory and bullying behaviour.

(d) Ms Stewart in June 2019:

After hearing of the interaction with my staff member and Ms Sharma when I arrived at [work] this morning, I have been made to feel intimidated and personally attacked in my own workplace from what she has said and what she has done/will do.

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<sup>32</sup> At 17.

<sup>33</sup> At 17.



Again one of my team have been put in a position that was described as “this customer was hard to deal with and disrespectful” “At the time I was in shock at her words” “all the words that were coming out of her mouth were negative and malicious.”

(e) Mr Carter on 26 June 2019:

If the integrity of the workplace has been breached by acts of intimidation and aggressive behaviour and as such [affects] our staff working environment, potentially their welfare and operational capability then I’m very much inclined to ban Ms Sharma for up to 2 yrs. This behaviour is compound[ed] by the tirade against one of our staff members (and CML) and intrusion into her background is unacceptable in my opinion and therefore supports banning Ms Sharma.

(f) Mr Roberts in his 26 June 2019 email:

The intimidating behaviour is causing issues for our staff. We may well need to consider threatening to prevent her from flying for a period.

[214] Given the numerous internal emails expressing concern about staff welfare, I accept that Air NZ was motivated by the desire to protect the health and safety of its staff.

[215] Mr Fowler, for Ms Sharma, accepted that the health and safety of Air NZ staff is a legitimate concern. He submitted that this, however, did not allow Air NZ to accept staff statements about a customer without enquiry, particularly where the statements form the basis of a banning decision.

[216] Air NZ’s legitimate desire to protect staff is relevant and indicates that Air NZ was not motivated by bad faith but by a concern that Ms Sharma would continue to upset staff because of the way she engaged with them. That concern was legitimate. Further enquiries may have resulted in Air NZ receiving the recordings, which further corroborated Air NZ’s suspicions that Ms Sharma would criticise staff to other Air NZ staff and speak to them in a way that would cause them to get upset.

### *Previous complaints*

[217] Mr Fowler submits that Air NZ should not have taken into account previous complaints by Ms Sharma or Mr Leaper to Air NZ.

[218] I consider that previous complaints by Ms Sharma provide insight into Ms Sharma's conduct when engaging with Air NZ staff. They may corroborate or weigh against Ms Sharma's conduct being inappropriate. I consider they were relevant to Air NZ's investigation.

[219] Further, the Air NZ privacy policy provided that complaints or concerns can be used in relation to any "vital interest" or "legitimate interest," including to "manage customer and employee safety and security." I accept that Air NZ was therefore entitled to consider complaints it held under its privacy policy when considering the risk a customer might pose to staff health and safety.

[220] I accept that in the context of investigating Ms Sharma's conduct, it was also appropriate for Air NZ to consider complaints by Mr Christopher Leaper as they may also disclose information that is relevant to the investigation of Ms Sharma. Those complaints, however, were only relevant to the extent that they did disclose information relevant to Ms Sharma.

### **Conclusion**

[221] I make the following findings:

- (a) There were investigative flaws in Air NZ's process in deciding to ban Ms Sharma in circumstances where:
  - (i) Air NZ decided to ban Ms Sharma without first requesting recordings of her interactions with Air NZ staff, about which it had prior notice; and

- (ii) the 2019 unruly passenger report contained statements that exaggerated the malice of Ms Sharma in her conversation with Ms Gillooly.
- (b) While Air NZ is not required to consult with customers, in circumstances where a customer has indicated they have a recording and will make recordings at check-in, obtaining those recordings would enable Air NZ to be satisfied that the information it was relying on was accurate.
- (c) The content of the recordings however, are unlikely to have changed the outcome of the decision. Those recordings corroborated much of Air NZ's concerns that Ms Sharma would criticise Air NZ staff to frontline staff and make allegations about Air NZ staff to Mr Luxon that were untrue.
- (d) It was open to Air NZ in the exercise of its reasonable discretion to issue a warning letter to Ms Sharma in December 2018 in circumstances where comments had been made about Ms Matuszewski which caused her to become upset. Air NZ is obliged to protect the health and safety of its staff.
- (e) In investigating and then issuing the warning letter, Air NZ made false accusations that not all of the family were travelling business class and that the family had entered the lounge without permission. Those false accusations were communicated to Ms Sharma and circulated internally within Air NZ. Air NZ did not withdraw them nor communicate a correction when it became aware they were untrue. Those false accusations were relevant to Ms Sharma's continued insistence on an explanation for the warning letter.
- (f) Air NZ imposed check-in restrictions on Ms Sharma and her family before it decided to issue the warning letter. Despite Mr Leckie requesting that Ms Sharma be informed about the check-in restrictions,

no one informed her. Those restrictions were directly relevant to Ms Sharma's requests for an explanation as to why they were being imposed.

- (g) Air NZ had a legitimate purpose in safeguarding the health and safety of its staff in deciding to ban Ms Sharma.
- (h) Ms Sharma's interactions with Air NZ frontline staff and her complaints to Mr Luxon indicate that she was willing to accuse staff of acting in a hostile and aggressive manner when they had not so acted. That communication also indicated that a staff member had cried as a result of their interaction with Ms Sharma. Air NZ was entitled to consider that information in the context of the 1 December 2018 incident where Ms Matuszewski had become upset.
- (i) Ms Sharma's conduct indicates a lack of awareness of the impact of her conduct on others. Ms Sharma showed no compassion or empathy for Air NZ frontline staff who were simply doing their jobs.

[222] This case is unfortunate as neither party has acted in a manner that is without fault. The key issue I need to determine however, is whether Air NZ's decision to ban Ms Sharma was an exercise of reasonable discretion. That requires me to be satisfied that Air NZ has not acted capriciously, arbitrarily, in bad faith, or made a decision that no reasonable decision maker could have made.

[223] I do not consider that the investigative flaws in failing to request the recordings resulted in the ultimate decision to ban Ms Sharma being so unreasonable that no reasonable decision maker would have made it. Even setting aside the exaggeration by Ms Gillooly of her conversation with Ms Sharma, the content of that conversation disclosed that Ms Sharma was willing to talk negatively to frontline staff about Ms Stewart. It is obvious that the information would likely be relayed to Ms Stewart, who would become upset. Talking negatively to frontline staff about their fellow Air NZ employee would naturally cause staff to feel uncomfortable.

[224] Ms Stewart had acted on a shift report and recollections of Nelson Airport staff when she took action in December 2018. Ms Stewart had sent the report to Security because she was concerned that staff were being treated in an inappropriate manner. While Ms Stewart got some things wrong (business class travel and entry into the lounge), it was not those matters that led to the warning letter. Air NZ was concerned about the comments that were made about Ms Matuszewski and the impact of those comments on her wellbeing.

[225] When Ms Sharma relayed her concerns to Mr Luxon, she did so by disparaging Air NZ staff (calling Ms Hamilton mannish, calling Ms Matuszewski an ice-queen and saying Ms Joseph had “put on a show of tears”). In the March 2019 letter, Ms Sharma also failed to disclose relevant information (including that another guest had asked them to quieten down and that she had refused to speak outside when approached by Ms Whyte). In the June 2019 email to Mr Luxon, Ms Sharma did not include the recordings with her correspondence to clarify what had happened. Ms Sharma took no responsibility for the impact of her actions, which resulted in staff in Wellington and Nelson crying.

[226] It was in the above context that Mr Legge and Mr Carter decided to ban Ms Sharma for 12 months. While Air NZ could have addressed Ms Sharma’s legitimate concerns in a more constructive and direct manner, that failure does not then result in its decision to ban her being arbitrary, capricious or made in bad faith. Nor was it so unreasonable that no reasonable decision maker could have made it. This is a high standard, and despite Air NZ’s errors and investigative flaws, it has not been met.

[227] In deciding to ban Ms Sharma, Air NZ did not therefore breach art 7.1.11 of its terms of carriage.

#### **FAIR TRADING ACT 1986**

[228] Ms Sharma claims that Air NZ, in breach of s 9 and/or s 11 of the FTA, engaged in misleading conduct in trade by:

- (a) representing through its agent, Singapore Airlines, that on account of:

- (i) Ms Sharma and her family having business class tickets; and
- (ii) Ms Sharma being a Koru member and flying on an Air NZ flight to Auckland;

that Ms Sharma and/or her family were entitled to enter the Nelson Airport Koru lounge;

- (b) creating rights of entry to the Koru lounge that were so complex and confusing that even its own staff were unable to determine Ms Sharma's eligibility to enter the Koru lounge;
- (c) advising Ms Sharma to proceed to enter the Koru lounge; and
- (d) erroneously stating that members of Ms Sharma's family only had premium economy tickets, this error was unknown to the decision maker.

[229] Ms Sharma claims that as a result of the misleading conduct, she has suffered mental distress from inconvenience and anxiety.

## **Law**

### *Section 9 of the FTA*

[230] Section 9 of the FTA states:

#### **9 Misleading and deceptive conduct generally**

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[231] The Supreme Court in *Red Eagle Corporation Ltd v Ellis* set out a two-stage approach to determine liability under ss 9 and 43 of the FTA.<sup>34</sup>

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<sup>34</sup> *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20.

- (a) First, the Court must ask whether a reasonable person in the claimant’s situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived. If yes, a breach of s 9 is established.<sup>35</sup>
- (b) Second, if a breach of s 9 is established, the Court must assess whether it is proved that the claimant has suffered loss or damage by the conduct of the defendant.<sup>36</sup>

[232] The Supreme Court has recognised that an “operating cause” of loss or damage may be the “claimant’s own conduct in failing to take reasonable care to look after [their] own interests.”<sup>37</sup>

### *Section 11 of the FTA*

[233] Section 11 of the FTA states:

#### **11 Misleading conduct in relation to services**

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.

[234] Section 11 differs from s 9 in that it is necessary that the conduct is liable to mislead the public rather than an individual. It follows that there must be a public element to the statement.<sup>38</sup>

### **Air NZ’s representations**

#### *Singapore Airlines and Star Alliance website*

[235] Ms Sharma did not provide any evidence that she spoke to Singapore Airlines prior to her travel. Ms Sharma said that her son checked the Singapore Airlines’ website and shared the content with the family. Ms Sharma’s son gave evidence that the Singapore Airlines website refers customers to the Star Alliance website where a

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<sup>35</sup> At [28].

<sup>36</sup> At [29].

<sup>37</sup> At [30].

<sup>38</sup> *Commerce Commission v Accent Holidays Limited* (1997) 8 TCLR 1 at 6.

lounge finder tool and a lounge access policy is available. During cross-examination, he said he remembered that the Air NZ website also referred customers to that same Star Alliance lounge access policy. While he could not confirm that the particular page provided to the Court included the link to the Star Alliance website, he maintained his view that Air NZ's website referred customers to the Star Alliance lounge access policy.

[236] It was open to Air NZ to call evidence as to the actual contents of its website at the relevant time to refute Ms Sharma's son's recollection. It did not. In those circumstances and given Air NZ is a member of the Star Alliance, I accept that Ms Sharma's son's recollection that the Air NZ website referred customers to the Star Alliance website is likely to be accurate.

[237] A copy of the lounge finder tool on the Star Alliance website as at 29 August 2019, shows that for Nelson Airport there is Koru lounge access for Singapore Airlines business class travellers, but not for Singapore Airlines economy class travellers.

[238] Air NZ says the family were travelling economy from Nelson to Auckland and so there was no lounge access.

[239] I consider that the lounge finder tool is confusing in that it returns Koru lounge access for Singapore Airlines business class flights from Nelson. Where a customer has booked return international business class travel with Singapore Airlines, and that trip includes domestic flights (here from Nelson to Auckland), it is reasonable for the customer to view their travel as business class, or at least including business class perks, in circumstances where the lounge finder tool indicates there is Koru lounge access for Singapore Airlines business class travellers in Nelson. In fact, there were no Singapore Airlines business class flights from Nelson to Auckland, the flight was a Air NZ operated domestic flight which does not have business class, so the lounge finder tool created confusion by suggesting there was lounge access for those flights.

[240] Air NZ also refers to the lounge access policy. That policy provides that "International Business Class Customers" have access at the airport where "your flight departs," if the following conditions are met:



- (a) You present a boarding pass in “International Business Class” on a Star Alliance member airline operated flight;
- (b) Your flight departs on the same day or by 5.00 am the next morning; and
- (c) The lounge shows the Star Alliance Gold logo at the entrance.

[241] The family say their flight departed in Nelson and they checked in as though they were flying international business class (that is, two hours before departure and with an international business baggage allowance). The international flight from Auckland Airport departed before 5.00 am the next morning. They did not have international boarding passes because the check-in operator was unable to print them. On that basis, they say, they were entitled to lounge access.

[242] Air NZ says the lounge access policy is clearly referring to the airport where the international flight departs, not the domestic flight. The reference to “your flight” is a reference to the flight for which there is a boarding pass in “International Business Class.”

[243] “International Business Class Customers” is defined in the lounge access policy on the Star Alliance website as “[c]ustomers holding a boarding pass for a Star Alliance member airline operated flight in International Business Class.” Air NZ says that Ms Sharma did not meet the above criteria because her international flight departed from Auckland.

[244] While I accept Air NZ’s interpretation of the lounge access policy that the flight being referred to is the relevant international flight, I also consider that the policy may be confusing for consumers, especially if they are also Koru members.

[245] Air NZ’s own staff acknowledged that lounge access eligibility was confusing. The Koru loyalty team said in an email dated 19 December 2018:

These customers were not permitted lounge access as per the details below – let me know if you need further clarity on this.

*I could appreciate that this MAY be confusing for the customer, however we do state in numerous places, online and within their membership card pack – that in order to access Koru member benefits all travel must be on Air New Zealand operated and *ticketed* flights.*

*For Business Class this may be a bit more confusing for the customer because we're getting into Star Alliance lounge access rules for Business Class Travel, however this only permits passengers travelling in business class from that specific port (i.e access is granted at AKL prior to their AKLSIN Business class flight, ... is not granted at domestic/regional lounge connections i.e. NSN in this instance).*

Had they been granted access as a Business Class travellers anyway – they are not permitted to take guests in with them...

*Due to the above, I think we should tread cautiously and outline the details of issue with the customer and be really clear on why they weren't permitted access.*

(emphasis in italics added, "ticketed" italicised in original)

[246] I consider it confusing for the lounge finder tool to return Nelson Airport as available in circumstances where the tool did not require the customer to specify whether the travel was domestic or international. The evidence was that there was no Singapore Airlines domestic class flight from Nelson. In those circumstances, it was not unreasonable for a customer to put 'Singapore Airlines' and 'business' in the relevant fields. When that happened, the tool indicated there was Koru lounge access.

[247] Air NZ denies that it is liable for the representations on the Star Alliance website. In circumstances where Air NZ is a member of the Star Alliance and its own website refers customers to the Star Alliance website, I do not consider it can deny responsibility for Star Alliance content about Air NZ lounges. Consumers are entitled to expect that Air NZ will act reasonably and by referring customers to the Star Alliance website, customers are entitled to rely on that information especially where the information relates directly to Air NZ.

#### *Representation to go to the Koru lounge*

[248] In terms of Air NZ staff informing Ms Sharma to go to the Koru lounge, Air NZ submits that any confusion caused was clarified when the boarding passes flashed red when scanned, indicating they were ineligible for entry. Air NZ says any confusion

was therefore only for a short time and was clarified when Ms Matuszewski and then Ms Whyte spoke with Ms Sharma. I accept this submission.

*Representation as to premium economy*

[249] That Air NZ staff erroneously stated that some of Ms Sharma's family were in premium economy cannot have been likely to mislead or deceive Ms Sharma because she knew this was incorrect.

*Relief*

[250] Section 43 of the FTA requires that Ms Sharma establish that she has suffered, or is likely to suffer, loss or damage *by* the alleged misleading conduct. The loss claimed is damages of \$15,000.00 for the ongoing effect of the notation in Air NZ records that she has been banned from travelling for 12 months; the effect of that record on Ms Sharma's travelling convenience and freedom both in New Zealand and elsewhere; and mental distress from inconvenience and anxiety. That is the same loss as is claimed for breach of contract.

[251] Air NZ was entitled to issue the warning letter given the insults directed at Ms Matuszewski. While the Koru lounge access rules were background context for the 1 December 2018 incident, I do not accept that they were the reason for the warning letter or the subsequent banning decision.

[252] In those circumstances the requirements under s 43 are not made out and I am not satisfied that the loss suffered was caused by any representations regarding lounge access.

**Overall conclusion**

[253] For the reasons set out in this judgment, Ms Sharma's claims against Air NZ fail.

*Costs*

[254] It is my preliminary view that some factual aspects of Ms Sharma's claim had merit. It was not unreasonable for Ms Sharma to proceed to a substantive hearing to enable the Court to consider all relevant evidence and to make factual findings. Some of those findings indicate Ms Sharma did have some legitimate concerns. In those circumstances, it may be appropriate for costs to lie where they fall.

[255] If Air NZ disagrees with this preliminary view, leave is granted for Air NZ to file a costs memorandum within **20 working days from the date of this judgment**. Ms Sharma then has a further **10 working days** to file a response. Memoranda are not to exceed five pages.

[256] Unless I need to hear from counsel, costs will be determined on the papers.

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Tahana J