DECISION

Fair Work FW Act 2009
s.394 - Application for unfair dismissal remedy

Andrew Peggie and Geoffrey King
v
Qantas Airways Limited
(U2020/15461 and U2020/15799)

COMMISSIONER JOHNS SYDNEY, 1 SEPTEMBER 2021

Application for Relief of Unfair Dismissal.

Introduction

[1] On 2 December 2020, Andrew Peggie, and on 10 December 2020, Geoffrey King (together, **"the Applicants")** each made an application to the Fair Work Commission (**Commission**) pursuant to section 394 of the *Fair Work FW Act 2009* **(FW Act)** for an unfair dismissal remedy. Both Messrs Peggie and King were dismissed from their employment with Qantas Airways Limited **(Qantas/Employer/Respondent)**.

[2] At the time of their dismissal both Applicants were employed as long-haul pilots on Qantas' A380 fleet. That is to say, both Applicants were international pilots. Further, it is also relevant that, at the time of their dismissal, both Applicants had attained the age of 65 years. Mr Peggie turned 65 on 19 August 2020. Mr King did so on 17 July 2020.

[3] On 10 December 2020 in respect of Mr Peggie and on 17 December 2020 in respect of Mr King, Qantas filed a response to the unfair dismissal applications. No jurisdictional objections were raised by Qantas.

[4] In respect of both applications Qantas contended that the dismissals were not unfair because the Applicants could not perform the inherent requirements of their positions as long-haul pilots. This is because the rules of the International Civil Aviation Organisation (**ICAO**) prohibit a pilot engaged in international flying from operating in most airspaces after a pilot attains the age of 65 years (**Rule of 65**).

[5] In this modern day it might be thought odd that there remain compulsory retirement ages and discrimination on the basis of age that require a person to cease employment, not because they can no longer perform their job, but because of an accident of birth. However, it is not an entirely foreign concept. Members of this Commission can only hold office until the age of 65 years.[1] My own observation is that we have lost some of our best Members at the prime of their abilities and service to the industrial relations community, when, like in the 1976 film *Logan's Run*, they are must undergo something like the rite of "Carrousel".

[1] *Fair Work Act 2009*, s. 629.

Similarly, I am sure that Messrs Peggie and King were a loss to the airline industry. There is no evidence that they lacked the skills to continue to work as pilots. Qantas conceded that Messrs Peggie and King were good and loyal employees.

[6] On 21 December 2020 the Peggie matter was allocated to me. I listed the matter for a mention/directions hearing on 24 December 2020. However, at the request of the parties I re-listed the matter in the New Year, on 13 January 2021.

Permission to be represented

[7] At the mention/directions hearing in the Peggie matter on 13 January 2021, Qantas made an application for permission to be represented by a lawyer. A determination of this issue was necessary to ensure that the manner in which any hearing is conducted is fair and just, *Warrell v FWC* [2013] FCA 291.

[8] In *Warrell v FWC* the Federal Court held that,

> "A decision to grant or refuse "permission" for a party to be represented by "a lawyer" pursuant to s 596 cannot be properly characterised as a mere procedural decision. It is a decision which may fundamentally change the dynamics and manner in which a hearing is conducted. It is apparent from the very terms of s 596 that a party "in a matter before FWA" must normally appear on his own behalf. That normal position may only be departed from where an application for permission has been made and resolved in accordance with law, namely where only one or other of the requirements imposed by s 596(2) have been taken into account and considered. The constraints imposed by s 596(2) upon the discretionary power to grant permission reinforce the legislative intent that the granting of permission is far from a mere "formal" act to be acceded to upon the mere making of a request. Even if a request for representation is made, permission may be granted "only if" one or other of the requirements in s 596(2) is satisfied. Even if one or other of those requirements is satisfied, the satisfaction of any requirement is but the condition precedent to the subsequence exercise of the discretion conferred by s 596(2): i.e., "FWA may grant permission…". The satisfaction of any of the requirements set forth in s 596(2)(a) to (c) thus need not of itself dictate that the discretion is automatically to be exercised in favour of granting "permission".[at para 24]"

[9] Section 596 of the FW Act provides as follows:

> "Representation by lawyers and paid agents
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> (1) Except as provided by subsection (3) or the procedural rules, a person may be represented in a matter before the FWC (including by making an application or submission to FWA on behalf of the person) by a lawyer or paid agent only with the permission of the FWC.
>
> (2) The FWC may grant permission for a person to be represented by a lawyer or paid agent in a matter before the FWC only if:
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> (a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
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> (b) it would be unfair not to allow the person to be represented because the person is

unable to represent himself, herself or itself effectively; or

(c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter."

[10] Having heard from the parties, on 13 January 2021 I determined that allowing the Respondent to be represented by a lawyer would enable the Peggie matter to be dealt with more efficiently, taking into account the complexity of the matter.

[11] At the hearing on 17 March 2021, I made the same decision in relation to the King matter and likewise granted Qantas permission to be represented.[2]

Conference or Hearing

[12] On 13 January 2021 I also sought submissions from the parties in the Peggie matter about whether the Commission should conduct either a determinative conference (section 398) or a hearing (section 399) in relation to the matter.

[13] Taking account:

a) any differences in the circumstances; and
b) the wishes;

of the parties in the Peggie matter, and considering whether a hearing would be the most effective and efficient way to resolve to the matter, I decided to conduct a Determinative Conference. The Peggie matter was programmed for a Determinative Conference.

Joinder of the King matter

[14] On the day after the mention/direction hearing in the Peggie matter, the King matter was allocated to me. It became immediately apparent that a very similar substratum of facts occurred in both matters, namely in relation to the valid reason put forward by Qantas and that similar legal issues arose.

[15] After consulting with the parties I decided to hear the matters together. After some amendments to the timetable, the Determinative Conference in both matters was conducted on 17 March 2021.

The Determinative Conference

[16] At the Determinative Conference on 17 March 2021:

a) the Applicants represented themselves and both gave evidence on their own behalf.

b) the Respondent was represented by Mr J Forbes of counsel. Mr Forbes called two witnesses as follows:

i. Douglas Alley, Head of Base Operations, Flight Operations; and
ii. William Tidmash, Manager Operations Capability and Development.

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[2] Transcript PN 49-52.

[17] In advance of the hearing the parties filed witness statements, submissions and documents. During the hearing an additional document was tendered as an exhibit. Consequently, in coming to this decision I have had regard to the following materials:

Exhibit	Document title	
1	Notice of Listing dated 28 January 2021	
2	Amended Directions dated 28 January 2021	
3	Forms: F2 – Unfair Dismissal Application Andrew Peggie dated 2 December 2020	
3a		Termination Letter Andrew Peggie dated 31 August 2020
3b		Termination Letter Response Letter dated 7 September 2020
3c		Qantas Decision Letter dated 8 October 2020
3d		Employment Separation Certificate dated 16 November 2020
4	Forms: F2 – Unfair Dismissal Application Geoffrey King dated 10 December 2020	
5	Forms: F3 Employer Response Form Andrew Peggie dated 10 December 2021	
5a	Annexure A	Outcome Letter dated 8 October 2020
5b	Annexure B	Show CauseLetter dated 31 August 2020
5c	Annexure C	Applicant's Response to Show Cause Letter dated 7 September 2020
6	Forms: F3 Employer Response Form Geoffrey King dated 17 December 2021	
6a	Annexure A	Outcome Letter dated 15 October 2020
6b	Annexure B	Letter Setting Out Options Available dated 15 July 2020
6c	Annexure C	Show CauseLetter dated 28 August 2020
6d	Annexure D	Show Cause Response dated 3 September 2020
7	Form F53 Notice that a person has a paid lawyer dated 11 January 2021	
8	Applicant's Outline of Arguments Andrew Peggie no date	
9	Applicant's Statement of Evidence Andrew Peggie no date	
10	Applicant's Document List Andrew Peggie no date	
10a		Show cause letter dated 31 August 2020
10b		Show cause response dated 7 September 2020
10c		Termination notification letter dated 8 October 2020
10d		Email confirming 737 flying dates dated 26 January 2021
10e		Confirmation of employment dated 8 November 2020
10f		Statement of Service dated 16 November 2020
10g		Roster of duties dated 29 August 2020
10h		Allocated roster duties of leave dated 26 August 2020
10i		Leave balances dated 9 November 2020
10j		Letter of Preference dated 19 March 2020
10j		Payslip for period ending 27-09-20 dated 24 September 2020
10k		Flying experience dated 29 August 2020
11	Applicant's Outline of Arguments Geoffrey King no date	
12	Applicant's Statement of Evidence Geoffrey King no date	
13	Applicant's Document List Geoffrey King no date	
13a	Document A	My response to the Pre -Termination letter from Qantas dated 3 September 2020
13n	Document B	Termination letter from Qantas dated 15 October 2020
13c	Document C	Letter from Qantas re. termination of my job.dated 28 August 2020
13d	Document D	Letter from a Captain giving evidence re. his transition from the International Ops. To the Domestic Ops dated 25 January 2021
13e	Document E	Letter of preference with my bid to the Short Haul Fleet dated 16 September 2020

Exhibit	Document title	
13f	Document F	Confirmation of Employment dated 24 July 2020
13g	Document G	Stand Down Notice dated 15 August 2020
13h	Document G2	Stand Down Notice dated 20 August 2020
13i	Document H	Reference from Manager dated 24 August 2020
13j	Document I	Reference from Manager dated 12 August 2020
13k	Document J	Statement of Service with Qantas dated 11 December 2020
13l	Document K	Letter of employment dated 9 March 1984
13m	Document L	Flight record various dates
13n	Document M	Payslip dated 23 June 2019
14	Respondent's Outline of Submission Andrew Peggie dated 26 February 2021	
15	Respondent's Outline of Submission Geoffrey King dated 26 February 2021	
16	Respondent's Witness Statement of Douglas Alley dated 26 February 2021	
16a	DA-1	Qantas Airways Limited Pilots (Long Haul) Enterprise Agreement 2020 dated 28 April 2020
16b	DA-2	Qantas Airways Limited Pilots (Short Haul) Enterprise Agreement 2020 (EBA8) dated 18 February 2020
16c	DA-3	Letter of Appointment Geoffrey King dated 9 March 1984
16d	DA-4	Letter of Appointment dated 9 March 1984
16e	DA-5	4.6 Flight Crew Age Restrictions from Flight Administration Manual dated 22 May 2019
16f	DA-6	ASX Announcement dated 5 May 2020
16g	DA-7	ASX Announcement dated 25 June 2020
16h	DA-8	ASX Announcement dated 20 August 2020
16i	DA-9	ASX Media Release dated 25 February 2021
16j	DA-10	Letter of Preference Andrew Peggie dated 20 March 2020
16k	DA-11	Show Cause Letter Andrew Peggie dated 31 August 2020
16l	DA-12	Show Cause Response Andrew Peggie dated 7 September 2020
16m	DA-13	Termination Letter Andrew Peggie dated 8 October 2020
16n	DA-14	Letter re Turning 64 Geoffrey King dated 15 July 2019
16o	DA-15	Letter of Preference Geoffrey King dated 20 March 2020
16p	DA-16	Show Cause Letter Geoffrey King dated 28 August 2020
16q	DA-17	Show Cause Response Geoffrey King dated 3 September 2020
16r	DA-18	Termination Letter Geoffrey King dated 15 October 2020
17	Respondent's Witness Statement of William Tidmarsh dated 26 February 2021	
17a	WT-1	ICAO Convention on International Civil Aviation dated 2006
17b	WT-2	ICAO International Standards and Recommended Practices dated 5 November 2020
17c	WT-3	Regulation 215 of Civil Aviation Regulations 1988 dated 1 September 2020
17d	WT-4	CASA Regulation 29/18 – Civil Aviation (Fuel Requirements) Instrument 2018 dated 22 May 1988
18	Applicant's Submission in Reply Andrew Peggie no date	
19	Applicant's Submission in Reply Geoffrey king no date	
20	Email dated 12 March 2021 from Captain Alex Scamps	

Application to stay the decision

[18] At the conclusion of the Determinative Conference on 17 March 2021 I reserved my decision.

[19] On 21 April 2021 her Honour Justice Katzmann of the Federal Court of Australia delivered judgment in *Summers v Qantas Airways Limited*[3] (**Summers Decision**). Her Honour also issued an order (subject to an undertaking and certain conditions) restraining Qantas from terminating the employment of Paul Summers.

[20] Mr Summers is a long-haul pilot who, like the Applicants, had reached the age of 65. Qantas informed Mr Summers that as a long-haul pilot subject to mandatory retirement on attaining the age of 65, he was unable to carry out the inherent requirements of his position. Qantas invited Mr Summers to show cause why his employment should not be terminated.

[21] Mr Summers disputed the need for his retirement, questioned Qantas' efforts to identify alternative roles and suggested to Qantas that he could be redeployed as a flight instructor or to a position in which his degree in political science would be of use. Mr Summers argued that in any event, he could fulfil his present role as an A330 captain by flying short-haul and domestic routes which are not subject to the mandatory retirement rule.

[22] Qantas maintained that there were no vacant short haul flying positions available to Mr Summers and were unable to identify any alternative roles that were suitable for his redeployment. Given the impact of Covid-19 on the airline industry causing uncertainty about the timing of redeployment to domestic routes Qantas decided to terminate Mr Summer's employment.

[23] Mr Summers lodged a complaint of age discrimination with the Australian Human Rights Commission (**AHRC**) and applied under s 46PP of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) for an interim injunction to restrain Qantas from giving effect to its decision to terminate his employment until his complaint has been withdrawn or terminated.

[24] Qantas argued that Mr Summers case was analogous to the case of *Qantas Airways Ltd v Christie* (***Christie***) and had no reasonable prospect of success. However, in granting the interim injunction, Justice Katzmann found that Mr Summers had a prima facie case that he was discriminated against on the ground of age and that he was able to carry out the inherent requirements of his position. Her Honour stated:

> "Unlike Mr Christie, Captain Summers was not engaged solely in international flying and since he has been employed as an A330 captain he has undertaken a significant amount of domestic flying. Unlike the aircraft flown by Mr Christie, the Qantas A330 is flown on limited international routes and the evidence adduced on this application indicates that Captain Summers is physically, mentally and legally capable of flying on the majority of routes serviced by the A330 fleet. The inherent requirements of Captain Summers' position, according to the information posted by Qantas on the pilots' website, includes operating to the majority of ports to which Qantas operates. On the evidence before me there is at least a prima facie case that he can meet those requirements."[4]

[25] Further, her Honour found that the inconvenience or injury that Mr Summers would be likely to suffer if the injunction were refused outweighed the injury which Qantas would

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[3] [2021] FCA 391.

[4] Ibid at [110].

suffer if an injunction were granted. Her Honour found that the balance of convenience favoured Mr Summers because:

1. The chances of a 65 year old pilot finding alternative work in the airline industry or elsewhere during the Covid-19 pandemic being likely to be poor.

2. There being a general personal importance in preserving a connection to employment especially to a reasonably long serving employee who enjoyed and valued their job and a particular value in retaining such a connection while the matter is resolved, given current economic uncertainty.
3. The detriments claimed by Qantas being overstated by the likelihood of a significant increase in domestic flights, including short haul flights, in the short to medium future. The detriments being:

    a. that if the applicant were stood-up then Qantas would need to stand up additional pilots to cover for the possibility of gaps being created when Mr Summers is rostered by the system onto a flight he cannot undertake. In such cases Qantas would be paying Mr Summers but receiving no services from him in respect of flights he cannot undertake;
    b. that if the applicant modified its rostering system to accommodate for Mr Summers, then in addition to the costs involved in doing so Qantas would be exposed to liability for breaching its long-haul enterprise agreement; and
    c. that if an interim injunction were granted there was a real risk that other pilots of the same age would seek similar relief in which event Qantas would need to completely overhaul its bidding and rostering system.

[26] As such, her Honour found that it was appropriate to require Qantas to maintain Mr Summers' employment, notwithstanding that it meant Mr Summers would remain stood down unless he could be redeployed to short haul flights or some other suitable position.

[27] As a condition of the grant of the interim injunction, Mr Summers offered an undertaking to the Court that within 24 hours of the making of the order he would inform the AHRC of its terms, that he would seek the expedition of the conciliation of the complaint, and that he would provide all assistance necessary to enable the AHRC to handle the complaint expeditiously.

[28] The similarities between the Summers Case and the facts in the present matter concerning Messrs Peggie and King are obvious.

[29] On 24 April 2021 Mr Peggie forwarded the Summers Decision to chambers.

[30] On 26 April 2021 my chambers wrote to the parties as follows:

> "The Commission is aware of the decision.
>
> Depending on what Qantas has to say about the matter, the Commissioner is open to receiving further submissions.
>
> However, the Commissioner notes that the injunction granted in *Summers v Qantas* was subject to the occurrence of other events.
>
> The Commissioner wonders whether an alternative might be to keep his decisions in

Peggie & King reserved until the finality of the *Summers v Qantas* matter.

The Commissioner asks that the parties confer and advise chambers about any agreement about the further conduct of the matter.

If agreement cannot be reached:

- The Commissioner invites submissions about the how to progress the matters before him….

- The matter will be provisionally listed …"

[31] Agreement could not be reached between the parties. Consequently, it was necessary for me to hear and determine the application made by Messrs Peggie and King that I stay issuing a decision in the present matters until after the finalisation of the Summers matter. That interlocutory issue was programmed for hearing on 11 June 2021.

[32] In support of the stay application, Messrs Peggie and King submitted that:

"Relevance of the decision in *Summers*

1. On 21 April 2021 Justice Katzmann issued an injunction in a case brought by Captain Summers against Qantas. The injunction prevented Qantas from terminating his employment until finalisation of the matter before the AHRC, or further Order of the Court.

2. The case brought by Captain Summers is fundamentally similar to our applications. The central similarities are:

   (a) Like us, Captain Summers was a long serving Qantas pilot who was terminated by reason of him turning 65 years of age.

   (b) Like us, Captain Summers was aggrieved by the decision of Qantas, and wishes to challenge it.

   (c) As in our case, Qantas stated reason for the termination is that, because of his age, Captain Summers will no longer be able to fulfil the inherent requirements of his job.

   (d) In enforcing this reason in both our case and Captain Summers, Qantas relies totally upon the decision of the High Court in *Qantas Airways Limited v. Christie*, and further fails to acknowledge at all with the impact of Covid and the long term stand down /restriction on international operations that have flowed from that decision as to why termination is not appropriate at the present time.

3. In the reasons supporting the making of an injunction Justice Katzmann found that:

   (a) That Captain Summers had a prima facie case that he had been the subject of unlawful age discrimination [121]. Qantas had argued that on the issue of age discrimination the decision of Christie was "*indistinguishable and based on that case …Captain Summers' case has no reasonable prospects*

of success". On the other hand, Captain Summers alleged that he was the subject of both direct and indirect age discrimination, and that he was able to fulfil the inherent requirements of the position. In supporting her finding that he had an arguable case, Justice Katzmann noted that:

i. The case was not on all fours with Christie [110].

ii. 30 years had passed since Christie was decided [112].

iii. The decision of Christie was complex, and not unanimous. Justice Katzmann spent some time in the Summers judgment setting in some detail the actual findings from Christie which expressed a diverse set of reasons to reach the conclusion [78] – [90].

iv. That Captain Summers contended that there were instances where pilots over the age of 65 had worked under the Long-Haul Enterprise Agreement.

v. The rostering and work systems at Qantas had changed since Christies was decided. The significance of such changes is a matter for the trial [111].

vi. The terms of the legislation had changed (the inherent requirements had referred to "employment" and now referred to "position") since Christie, a change likely to assist Captain Summers [79].

(b) That it was appropriate for her to require Qantas to maintain the employment, notwithstanding that would mean that he would be stood down again.

(c) We were currently part way through a pandemic in which operations that would infringe the rule of 65 are more limited.

4. Captain Summers chose to pursue his matter as an age discrimination claim. Our claims are brought as unfair dismissals. However, a termination that would be unlawful age discrimination will always be an unfair dismissal – it cannot be for a valid reason (see *Selvachandran v. Peteron Plastics Pty Ltd* [1995] IRCA 333 – a reason which is prejudiced cannot be a valid reason), and in any event is plainly harsh, unjust and unreasonable.

5. Significantly, the ambit of the law in relation to unfair dismissal is clearly wider than simple age discrimination – a termination may not infringe age discrimination laws but still be unfair.

6. In addition to these matters, we note the following:

(a) Since the Summers judgment, there have been announcements which would appear to indicate further delays to resumption of full international operations (these are referred to a little at [128] but there have been further developments since that time). The type of international operations that seems most likely to be delayed longest – to Europe and the United States, correspond to Rule of 65 counties and also to routes that were previously

serviced by the A380 Aircraft.

(b) As with the A330 that Captain Summers currently operates on, there is no certainty as to when and what routes the A380 will do when it resumes operations, if it resumes operations at all. One of the routes previously undertaken by the A380 was between Australia and Singapore. Qantas may bring the A380 back to operate that route, which does not infringe the Rule of 65 and, if this were to occur would mean that we could fulfil the inherent requirements. Alternatively, it could operate other shorter services to Asia which may not infringe the Rule of 65. Again, if this were to occur, we could fulfil the inherent requirements. Equally possibly, Qantas may retire some or all of the A380 fleet. If this were to occur, we would likely be able to obtain a position on a primarily domestic fleet on which we could fulfil the inherent requirements.

7. During the hearing of the matter the question as to whether it was appropriate/possible to reinstate a person to be stood down was considered. We seek to be reinstated to our positions on the A380 on the basis that we will remain stood down until the A380 resumes operations, or we are able to obtain a position on a fleet where we can fulfil the inherent requirements.

8. We acknowledge that if we are still allocated to the A380 when it resumes operations on services we cannot operate and pilots are stood up, our employment should be terminated at that time. The situation facing Captain Summers was similar. While Captain Summers had not been terminated, the order made by Justice Katzmann that while Qantas should not terminate Captain Summers, he is to remain stood down unless and until he can be redeployed to short haul flights or some other suitable position [134].

9. There is a further, crucial difference between our case and Captain Summers. Our central case is that had Qantas not terminated us when it did, we would have remained stood down for the next period (during which time we could clearly fulfil the inherent, albeit occasional requirements) of our work. Our stand down would have continued until we obtained a position on the B737 aircraft, which we both say we want, and which, given our seniority, we would have been awarded if any vacancy had arisen. Alternatively, our stand down would have continued until the A380 resumed operations at which time, in the event it resumed to Rule of 65 countries, we agree that Qantas could terminate our employment. Captain Summers on the other hand says he wishes to remain on the A330 airc

Further relevance of Summers

10. In the Summers judgement, Justice Katzmann made a series of preliminary findings that we ask the Commission to consider in our matter. These include the matters set out above but also include other matters that are relevant to the finding in Christie, and as to why we should be reinstated.

11. As noted above, more than 10 paragraphs of the Summers judgment involves an examination of what the High Court held in *Christie*. Justice Katzmann notes that Kirby J dissented generally [13], while there was a variety of opinion from the others in finding that that it was not unlawful because Captain Christie could not

fulfil the inherent requirements. Only one judge - Gummow J - found on the basis of the Rule of 60 (as it them was). The other three judges (Brennan CJ, McHugh and Gaudron JJ) focused on the inherent requirement being tied to the fact that he could not participate equally in the rostering system and could not operate to a substantial number of international destinations serviced by the B747 at the time of his dismissal. If one were to apply the logic of those three to our case, we are able to currently fulfil the inherent requirements as we can participate equally as other A380 pilots in the rostering system and can operate to all destinations currently serviced by the A380.

Why judgment in the matters presently before the Commission should be deferred until such time the dispute between Qantas and Captain Summers is finalised

12. Justice Katzmann found [125] that "in the present climate in particular the chances of a 65-year-old pilot obtaining alternative work in the airline industry or elsewhere are likely to be poor. Not unreasonably it seems to me, he expressed concern that his lack of recent flying experience would make it impossible for him to work as a pilot for another employer. "We have both discovered first hand the difficulty in obtaining appropriate, alternative employment. Neither of us have obtained work as pilot (the job we held for more than 30 years each) or harbour any hope we will if we are not reinstated. What alternate work we have found has been menial and for far diminished wages. The corollary of Justice Katzmann's finding is that reinstatement to Qantas is our only hope of further employment in our area of expertise.

13. Justice Katzmann made further findings at [126] as to the importance of work in a meaningful life which we also reiterate from recent personal experience.

14. Justice Katzmann also found that the injunction, which is effectively the same remedy as our reinstatement, would have a limited impact on Qantas. She described the detriments as "overstated" [127].

15. Justice Katzmann has indicated that she considers that Captain Summers has an arguable case and that she anticipates that, should the matter run to final hearing, she will be required to determine if Qantas breached the *Age Discrimination Act*, notwithstanding the decision of the High Court in *Christie*.

16. This will be the first time a Court of the standing of the Federal Court has considered these issues since the 1990's.

17. In the event she finds for Captain Summers in a final hearing, we believe that the reasoning would mean that the Commission would have to conclude that our dismissal was unfair.

18. On the other hand, there is a risk of great unfairness in the event the Commission hands down a judgment in which we lose, and then later there is a judgment by Justice Katzmann in favour of Captain Summers (or that contains findings that would favour us).

19. There is no corresponding prejudice or loss to Qantas. We are not costing Qantas any money at the moment. All the A380 pilots are currently stood down and will

be for at least the next 6-12 months. Given this, Qantas are not retraining anyone into our places. Qantas will not suffer at all by a deferral of the judgment.

20. As a final point, we do not seek that the deferral of the judgment should be absolute until Summers is finalised. There is the possibility of changed events that mean the delay would be inappropriate. If, for example, there are changed circumstances that means that Qantas becomes substantially prejudiced by the delay, or that the finding in Summers is not relevant, then either Qantas or us should be able to seek to approach the Commission and ask that the deferral end and that judgement be entered. We would anticipate that the Commission would hear from the parties at that time, and then determine how to proceed."

[33] In opposition to the stay application, Qantas submitted that,

"Summary of Qantas' position

1. The *Summers* decision is of little relevance to the unfair dismissal applications which are currently awaiting decision. The facts are different, the nature of the proceedings are different and the proceedings have been brought under a different statutory regime. The decision of Katzmann J is interlocutory, there has been no determination of the merit of any legal argument or factual contest, and Her Honour's observations regarding the High Court decision in *Qantas Airways Limited v Christie* [1998] HCA 18 are obiter and not binding on any other court or tribunal.

2. There is no certainty that the Summers matter will ever manifest in a substantive proceeding in the Federal Court, let alone a final judgment. At present, Captain Summers has been successful only in obtaining an interlocutory order under section 46PP of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) which preserves the status quo while he pursues a complaint in the Australian Human Rights Commission.

3. In the ordinary course, the Fair Work Commission should proceed to determine matters as expeditiously as reasonably possible based on the evidence before it and in accordance with prevailing and binding legal principle. This approach would be consistent with the requirement that the Fair Work Commission perform its functions and exercise its powers in a manner which is fair and just, and quick. The ordinary administration of justice should not be delayed on account of speculation that a decision might emerge somewhere down the track which is in some way favourable to the Applicants. The Commission should follow the ordinary course in respect of the current applications and issue its decisions when it is ready to do so.

The facts of the matters are materially different

4. At [4] of their submissions, the Applicants contend that the case brought by Captain Summers is "*fundamentally similar*" to their applications.

5. The factual and legal foundations of the proceedings are in fact materially different and the matters should not be treated as being on all-fours. For example:
    a. Captain Summers' substantive role was as an A330 Captain. He operated

the A330 aircraft which prior to COVID predominantly serviced both the Qantas international network and, to a lesser extent, parts of the Qantas domestic network. By reason of COVID and subsequent international border closures, the A330 aircraft has predominantly (albeit temporarily) continued to service Qantas' domestic network;

b. the Applicants on the other hand were, prior to their termination, A380 pilots who have exclusively flown on Qantas' international network. The A380 exclusively services the Qantas international network (see the statement of William Tidmarsh dated 26 February 2021 at [25]) and the A380 fleet on which they worked has been grounded since COVID;
c. the circumstances of the Applicants remain relevantly indistinguishable from the circumstances of Captain Christie in *Christie*. The Applicants operated an aircraft (A380) which has and will continue to service international routes which neither of them can operate having turned 65 years of age. This is not at all dissimilar to the circumstances of Captain Christie. Captain Summers operated a different aircraft and the observations by Katzmann J regarding the application of Christie were directed at his circumstances specifically;
d. the Applicants have had their employment terminated and they have commenced unfair dismissal proceedings seeking an order for reinstatement pursuant to section 391 of the Fair Work Act 2009 (Cth). Captain Summers' employment has not been terminated and he is presently seeking permanent injunctive relief under the AHRC Act; and
e. the fact that all three pilots are aggrieved by the decision of Qantas to terminate their employment and want to challenge that decision is not enough to make their cases fundamentally similar.

The decision of Katzmann J is interlocutory

6. Interim injunctions issued under section 46PP of the AHRC Act are purely directed to preserving the status quo or the rights of the complainant for a short period of time to allow the conciliation processes of the Australian Human Rights Commission to be performed. The only question before Katzmann J was whether an interlocutory injunction should be made for that purpose.

7. A hearing on whether an interlocutory injunction should be granted is not a hearing on the ultimate substantive merits of the case.

8. The application in *Summers* required the Court to engage in a balancing exercise which considered whether there was a serious question in issue and, if so, whether the balance of convenience either favoured or weighed against the injunctive relief sought by Captain Summers.
9. An application for an injunction is made on limited affidavit evidence, which is not tested under cross-examination, and it does not result in any findings of fact or determination of contested legal arguments. In *American Cyanamid* [1975] AC 396 Lord Diplock said at 407:

> "The court no doubt the Court must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend nor

> to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. (emphasis added)

10. Justice Katzmann's assessment of serious question plainly did not determine the merits of Captain Summers' case. It was a decision which involved the exercise of broad judicial discretion, not the final determination of rights or remedies. The decision is confined to the immediate parties and it carries no precedent value. This raises serious doubts about the practical relevance of any determination in *Summers* to the different factual circumstances confronting Mr Peggie and Mr King, particularly when Justice Katzmann held at [121] "*while I am satisfied that Captain Summers has a prima facie case, I am unable to conclude that it is a strong one*".

11. As to Her Honours observations about the High Court decision in *Christie*, a number of points should be made.

12. First, Katzmann J made observations about the High Court decision and judgments in *Christie* in the context of assessing whether Captain Summers could reach the threshold of an arguable case. Her Honour observed that Captain Summers' circumstances (A330 pilot in 2021) might be different to those of Captain Christie (B747 pilot in 1998), that there have been changes in relevant legislation and that one day there may be cause to revisit the High Court judgment. However these observations are simply *obiter dicta* which weighed in favour of the injunction being granted on the basis of there being an arguable case. The observations do not overrule or undermine the correctness of *Christie*.

13. Secondly, even if Justice Katzmann had opined that *Christie* was wrongly decided, Christie remains binding on the Commission until such time as it is overturned by the High Court. The Fair Work Commission remains bound to follow *Christie* unless the circumstances of a case before it are distinguishable. In the case of the applicants their circumstances are not distinguishable and the applicants have failed to identify any material matters which distinguish their circumstances to those of Captain Christie.

14. The Applicants also submit that the *Summers* judgment is relevant because it supports their claim for reinstatement. That argument is flawed. The power exercised by the Federal Court in *Summers* is of a different nature and purpose compared to the Commission's powers exercised in an unfair dismissal context. Interim injunctions issued under section 46PP of the AHRC Act are purely about preserving the status quo for a short period of time to allow a matter to be conciliated. It is a narrow enquiry which is not directed to final relief and the considerations are different to those which must be considered by the Commission in relation to the remedy of reinstatement.

15. Any observations made by Justice Katzmann about the importance of work generally, Captain Summers' prospects of ongoing employment specifically and other such matters were made in the context of the Court weighing the "balance of convenience" in determining whether to grant an interim injunction. They are not statements of legal principle or final findings of fact and they have no relevance beyond the immediate application that was before the Federal Court.

16. In any event, the Applicants have already made detailed submissions regarding the remedy of reinstatement in the substantive hearing before Commissioner Johns. The remedy of reinstatement is a discretionary one which falls to be determined by the Fair Work Commission within the context of the *Fair Work Act 2009* (Cth) and anything said or done by Justice Katzmann in *Summers* has no practical relevance.

Submission regarding international flying

17. The Applicants' submissions at paragraph [8] regarding changed circumstances do not assist their request for delay.

18. Following the Federal budget on 11 May 2021, Qantas announced that it would delay the resumption of its international schedule. It was previously slated to recommence in October 2021 but has now been pushed out to December 2021.

19. In essence, the Applicants contend that for as long as the A380 remains parked in the desert, they can perform the inherent requirements of their position because the aircraft is not operational. This is not a new argument and the Applicants have made it before. And it misses the point entirely. The inherent requirements of a role do not fundamentally change because of a temporary change in circumstances (see [105] of the *Summers* judgment). They must remain able to operate to any international port to which Qantas operates.

20. Furthermore, the Applicants' submission in paragraph [8(b)] is entirely inconsistent with their submissions at [10] and [11] and what they maintained at the hearing on 17 March 2021. That is, they concede that once the A380 operation resumes they are unable to fulfil the inherent requirements of their role. Further, it does not matter what routes the A380 might service in the future. For the purposes of determining whether a dismissal was unfair, the assessment of whether there was a *valid reason* is made having regard to the facts available to the decision maker at the time of the termination.

No reasonable basis to defer the Commission's decision

21. There may never be a final determination in Summers. The next stage is an AHRC conciliation, the purpose of which is to resolve the matter without a contested hearing. The matter is yet to be conciliated. If it resolves, then there will be no final determination. Further, if it does not resolve at conciliation, Captain Summers may or may not file proceedings in the Federal Court.

22. Even if Summers does ultimately file an application in a Federal Court, this may be some months away as he has 60 days to decide to whether to commence proceedings once he receives a termination certificate from the AHRC. Once lodged, determination of those proceedings is likely to take many more months, probably in excess of a year. Given the legal complexity of the case and the potential for argument about the application of *Christie*, appeals are also highly likely. Therefore, if the FWC is minded to defer determination pending a decision in Summers, it logically follows that this would also need to await any appeals.

23. There is no logical sense in King and Peggie's proposal that the Commission

should defer but that the deferral is not absolute. It has to be one or the other.

24. The other point to make is that any decision of the Federal Court in Summers on the substantive application is unlikely to assist the Commission in its deliberations (see submissions on relevance above at [8] to [24]). Further, the decision in *Christie* and the principles relevant to "inherent requirements" have been cited in numerous subsequent cases, at all levels of the judicial system. Contrary to the submissions of the Applicants, Captain Summers' application does not present as the first time a superior court will consider those principles. Until definitively overturned, the Commission will continue to be bound by the High Court authority in *Christie*.

25. There will always be cases in the judicial system which challenge the current state of the law. It is a matter of speculation as to whether any of those cases will result in established legal principles being revisited or overruled. But the Commission should not suspend its decision-making function on account of that speculation.

26. It is not in the interests of justice for judgment to be deferred indefinitely in circumstances where the Commission has already heard the evidence and submissions of the parties. The Applicants have already been given ample opportunity to argue that Qantas' reliance on *Christie* is misplaced. The Commission will be in no better place to resolve that controversy by delaying its decision for months or more.

27. The submission that delay will not prejudice Qantas or cost Qantas anything is misconceived. As a respondent in litigation, Qantas has an important legitimate interest in having legal controversies resolved. There is a public interest in the Commission resolving those controversies. A decision in the unfair dismissal matters will give all parties certainty as to their legal rights and may have a bearing on Qantas' future corporate decision making and conduct.

Conclusion

28. In light of the submissions above, the Commission should be satisfied that:
    a. the Summers judgment has limited relevance (if any at all) to the unfair dismissal applications currently before the Commission;
    b. there is no utility in deferring judgment until such time the dispute between Qantas and Captain Summers has been finalised;
    c. Christie remains good law, and is relevantly indistinguishable from the facts pertaining to Messrs Peggie and King, and therefore it must be followed in the present case; and
    d. the Applicants' unfair dismissal applications should be dismissed."

[34] In reply Messrs Peggie and King submitted that:

1. Paragraphs 8 and 9 of the Qantas Submissions contends that Summers is of little relevance because the facts of the matter are fundamentally different. In our previous submissions we had submitted that the facts are fundamentally similar.

2. The primary difference Qantas identifies is that Captain Summers substantive role is an A330 captain, an aircraft that prior to Covid predominantly serviced the

international network while during Covid, is predominantly servicing the domestic network. They submit that the A380 exclusively serviced the international network, but has been grounded since Covid.

3. Qantas appears to be trying to have it both ways in terms of the impact of Covid.

4. If their contention is that the impact of Covid should be ignored (ie the pre Covid position assessed) we are in a very similar position to Summers – both aircraft operate international services. If, on the other hand the impact of Covid is to be taken into account we are in a better position than Summers, *vis a vis* the Rule of 65. The A330 currently operates predominantly on domestic services with an anticipation that it will extend to international operations (which may infringe Rule of 65 requirements) in late 2021. The A380 will not undertake any operations that infringe the Rule of 65 (or indeed any operations at all) until late 2022 or 2023.

Interlocutory decision

5. At paragraphs 10 to 20 Qantas makes submissions on the basis that the decision of Justice Katzmann was an interlocutory one.

6. This statement is uncontroversial. Likewise their submission that an interlocutory decision is not a final one, and that the matter may never proceed to a final determination are not controversial.

7. However, the Qantas Submissions go a step further and submit that a consideration of what was said, or the possibility of a further substantive and final determination is no more than speculation.

8. This is clearly not the case.

9. There remains on foot proceedings in the Federal Court of Australia in which these issues will be considered.

10. Submissions regarding international flying.

11. Qantas misconceives the position taken by the applicant, which is not changed.

12. Putting to one side the question as to when inherent requirements should take into account changed circumstances (such as the effects of the pandemic) the question before the Fair Work Commission is distinct.

13. The Fair Work Commission would be entitled to conclude that termination on the basis of inherent requirements that may arise in the future, in circumstances where we are able to fulfill the current actual requirements is harsh, unjust and unreasonable.

14. In this respect Qantas appears confused again seeks to have it both ways in respect of the argument. It says on the one hand the Commission should not take into account current events, but then on the other hand say that the Commission should assess whether there is a valid reason at the time of the termination.

15. At the time of the termination Qantas was aware that there would be no duty we were unable to perform for at least 18 months. It was also aware at that time there was a reasonable likelihood that we would be able to obtain another position that we could perform. It was also aware, contrary to the submissions now made by Qantas that there was a reasonable likelihood that when the A380 returned it may primarily do operations (such as between Australia and Singapore) via travel bubbles that we could perform.

Application of Christie & International Flying

16. At paragraphs 15-17, and then at 21-24 Qantas make various submissions as to Christie and "international flying".

17. In respect of Christie, Qantas again asserts that our circumstances are "*relevantly indistinguishable*" from Christie.

18. This submission, which has been made on several occasions before, appears to proceed on the basis that Christie is judicial authorisation for Qantas' future acts rather than an authoritative statement of legal principles in respect of inherent requirements and the *Age Discrimination Act.*

19. In *Christie*, a majority of the Judges focused on an ability to participate in the rostering process (as it then existed) as the relevant inherent requirement. Two Judges that did not focus on this issue, Justice Gummow (who focused on the terms of the contract), and Justice Kirby (who in dissent would have found for Captain Christie). The Court did not make some broad finding around Qantas's entitlement to terminate pilots on reaching a certain age.

20. if the matter is not proceeding by a strict application of Christie, then there should be a focus on whether we could participate in the roster process now (and for the reasonable future). The answer to this is uncontroversial – we will be able to participate equally with all of the other A380 pilots in all rosters until at least late 2022.

Deferral of the Commission's decision

21. At paragraphs 25 to 31 Qantas contends there is no reasonable basis to defer the Commission's decision. Qantas seems to rely upon three arguments:
    a. The obligations of the Commission pursuant to s.577;
    b. The public interest;
    c. Prejudice to Qantas.

22. Qantas also takes issue with our proposal that the decision be deferred pending resolution of Summers or further decision of the Commission.

23. Section 577 provides:

> The FWC must perform its functions and exercise its powers in a manner that:
>
> (a) is fair and just; and

(b) is quick, informal and avoids unnecessary technicalities; and

(c) is open and transparent; and

(d) promotes harmonious and cooperative workplace relations.

24. Qantas reads this obligation to focus on the word quick, to the near exclusion of fair, just or the other elements. It would be unfair and unjust for the Commission to determine our case on the basis of factors that were the subject of judicial interpretation in a case that has already been commenced and remains on foot.

25. The decision of *Summers* means that there is a risk of an injustice should the Federal Court decide that at the time of our termination, such termination was contrary to the *Age Discrimination Act.*

26. Qantas refers to the public interest as requiring that legal matters be resolved. While this is true, the public interest is also to minimise the risk of discordant decisions.

27. Qantas does not identify any prejudice it will suffer, but rather says that it should be entitled to have legal controversies to which it is a party resolved as quickly as possible, and that the decision may impact upon its future decisions. The last submission is made without any reference to potential or likely events and is pure speculation.

28. Finally, Qantas says "*There is no logical sense in King and Peggie's proposal the Commission should defer, but the deferral is not absolute. It has to be one or the other."*

29. There is no foundation for the contention that it has to be *"one or the other"*. Orders of Courts and tribunals of stays, adjournments or injunctions are routinely made as lasting until a point in time or event, or alternatively further Order of the Court of the Tribunal. Indeed, that is the Order made by Katzmann J in *Summers*.

30. Our proposal is that the Commission should defer the matter until *Summers* is determined (be it by settlement, by a decision of Captain Summers not to proceed, or by ultimate resolution by the Court) or by further Order of the Commission.

31. We anticipate that such further Order of the Commission may arise in a variety of circumstances including if Qantas could identify actual prejudice or changed circumstances (such as if the A380 fleet restarting operations such that we could not participate in the rostering process), or if Qantas were to advertise vacancies on the B737 (a position which it is uncontroversial we could fill)."

[35] On 11 June 2021 I advised the parties that I was not prepared to stay the issuing a decision in the present matters until after the finalisation of the Summers matter. I indicated that my reasons for not staying the issuing of a decision would be contained in the substantive decision.

Reasons for not staying my decision

[36] The primary reason why I decided not to stay the issuing of this decision was because the timing of a potential outcome in the Summers matter was too speculative and uncertain.

[37] Relevantly, section 577 of the FW Act requires the Commission to,

> "… perform its functions and exercise its powers in a manner that:
>
> (a) is fair and just; and
>
> (b) is quick, informal and avoids unnecessary technicalities…"

[38] Presently, there is no substantive proceeding before a federal court. There may never be depending on what happens during the process before the AHRC. Deferring deciding these matters involving Messrs Peggie and King until there is an outcome (if any) in proceedings that may never be commenced goes against the quick performance of the Commission's functions.

[39] The Applicants contended that "it would be unfair and unjust for the Commission to determine [their] case on the basis of factors that were the subject of judicial interpretation in a case that has already been commenced and remains on foot". That contention misunderstands the litigation process involving Captain Summers. The current interlocutory proceedings in the Federal Court of Australia will not, as a matter of process, result in a reconsideration of *Christie*.

[40] I accept that existing authority (such as that in *Christie*) may one day be overruled, qualified or further explained. However, there is no substantive case on foot in a federal court that might, in time, lead to a change in the existing authority. Further, if *Christie* remains any guide to Qantas' attitude to litigation, any future proceedings would likely be the subject of appeals – thus requiring me to continue to stay issuing a decision in these matters for possibly years to come. That would be an unacceptable delay.

[41] Fairness also imports a notion that justice will be done in a timely fashion. "Justice delayed is justice denied."[5] Noting that Captain Summers may never file a substantive proceeding in a federal court, any decision that might address the authority in *Christie* is too speculative.

[42] Additionally, while the case involving Captain Summers is very similar to the facts concerning Messrs Peggie and King, there is an important factual difference. The evidence before Justice Katzmann was that "Captain Summers was not engaged solely in international flying and … has undertaken a significant amount of domestic flying." The same cannot be said about Messrs Peggie and King. The evidence of Captain Summers was that, as a captain of an A330 aircraft, he was able to participate effectively in the Qantas roster system. Messrs Peggie and King could not likewise do so – even if they were reinstated tomorrow.

[43] I reject the argument that, because international pilots are stood-down and, consequently, no one is being rostered, it means that Messrs Peggie and King can comply with the non-rostering of international pilots. As exclusive international pilots, the facts relevant to Messrs Peggie and King are more akin to those in *Christie* than in the interlocutory matter involving Captain Summers. The inherent requirement (the Rule of 65) still applies to them, even if no one is currently flying. I say more about this below.

[44] The Summers Decision is only interlocutory in nature. It was decided having regard

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[5] William Ewart Gladstone, 17 March 1868.

to whether there was an arguable case and where the balance of convenience fell. It was decided on different principles to those that I am required to apply in the matters before me under the FW Act.

[45] Finally, both Applicants seek reinstatement as the remedy. Reinstatement cases should be heard and determined expeditiously. If reinstatement is to be ordered then it should occur as soon as possible after the dismissal so as to give the best chance of the employment relationship being restored. Delaying the handing down of a decision in these matters until the final conclusion of the Summers matter would undermine the ability to award the primary remedy.

[46] For the above reasons I was not satisfied that there was any legitimate basis for delaying the issuing of this decision.

Background

[47] The following matters were either agreed between the parties or not otherwise substantially contested. Consequently, I make the following findings of fact:

a) The Applicants' employment commenced on:

   i. 16 March 1984 in respect of Mr King, pursuant to a letter of appointment dated 9 March 1984.
   ii. 6 July 1984 in respect of Mr Peggie, pursuant to a letter of appointment dated 4 June 1984.

b) The Applicant's letters of appointment referred to:

   i. being required "to perform duties as required by the Company from time to time including … to undertake such duties in any part of the world."[6]
   ii. "your conditions of employment are set out in the *International Airline Pilots' Agreement 1992* as varied from time to time.[7]
   iii. "your initial retirement date is the first day of July following your 55th birthday, but you may elect to extend your employment on a year by year basis beyond that date to your 58th birthday…."

c) Up until around September 1992 Qantas was an international airline. Around that time it merged with Australian Airlines (a nationally owned domestic airline).[8]

d) The Applicants' careers with Qantas progressed as follows:[9]

Position	Mr King	Mr Peggie
Pilot-Under-Initial-Training	16 March 1984	6 July 1984

[6] See attachments DA-3 and DA-4 to the Statement of Douglas Peter Alley, Exhibit 16.

[7] At the time of the cessation of their employment the Applicants' employment was covered by the *Qantas Airways Limited Pilots (Long Haul) Enterprise Agreement 2020.*

[8] Statement of Douglas Peter Alley, Exhibit 16, paragraph 7.

[9] Statement of Douglas Peter Alley, Exhibit 16, paragraphs 15 and 19.

Position	Mr King	Mr Peggie
Second Officer B747	August 1984	December 1984
First Officer B747	June 1986	March 1988
First Officer B767	n/a	October 1993
Captain B747	October 1990	n/a
Captain B747-400	September 1999	September 1996
First Officer A380	n/a	June 2010
Captain A380	October 2009	n/a

e) All of the positions held by the Applicants during their respective employment with Qantas were as long-haul pilots.

f) At the time of the cessation of their employment the Applicants' employment was covered by the *Qantas Airways Limited Pilots (Long Haul) Enterprise Agreement 2020* (**LHEA**).

g) In the lead up to his 65th birthday:

   i. On 22 February 2020, Mr King advised Qantas that he wanted to transfer to a position as a First Officer in short-haul operations (i.e. to become a domestic pilot).[10] He had previously done so on 16 September 2019.
   ii. On 19 March 2020, Mr Peggie advised Qantas that he wanted to transfer to a position as a First Officer in short-haul operations (i.e. to become a domestic pilot).[11]

h) On 13 March 2020 Mr Peggie flew his last flight with Qants.

i) On 21 March 2020 both of the Applicants were stood-down because of the COVID-19 pandemic. They remained stood-down until the cessation of their employment. Until their employment was terminated Messrs Peggie and King were in receipt of JobKeeper payments.

j) On:

   i. 17 July 2020 Mr King turned 65.
   ii. 19 August 2020 Mr Peggie turned 65.

k) On:

   i. 28 August 2020, Mr King received a letter to 'show cause' why his

[10] See attachments DA-15 to the Statement of Douglas Peter Alley, Exhibit 16.

[11] See attachments DA-10 to the Statement of Douglas Peter Alley, Exhibit 16.

employment should not be terminated.[12]

ii. 31 August 2020, Mr Peggie received a letter to 'show cause' why his employment should not be terminated.[13]

l) The show cause letters received by each of the Applicants were in similar terms and stated that:

i. Upon turning 65 years of age each of the Applicants were unable to perform the inherent requirements of his position on the A380 fleet due to the ICAO restrictions;

ii. Although each of them had indicated a preference to transfer to short haul, his request could not be accommodated because there were no pilot vacancies available (at the time or in the reasonably foreseeable future) due to the significant reduction in demand in domestic flying caused by the COVID-19 pandemic;

iii. Qantas was unable to identify any alternative roles into which either Applicant could be redeployed. Given the volatility of the COVID-19 pandemic there were no opportunities or vacancies within Qantas at the time and it was unlikely for one to have arisen in the foreseeable future;

iv. In all the circumstances, Qantas was left no choice but to terminate his employment on the basis that he could not perform the inherent requirements of his role as a long haul pilot; and

v. Qantas wished to provide each of the Applicants with an opportunity to provide a response to the proposed termination.

m) On:

i. 3 September 2020 Mr King responded to the show cause letter.[14] Mr King asserted that:

A. it would be premature to terminate his employment as there was currently no flying on the A380 fleet (so it could not be said that he could not fulfil the inherent requirements of his role), and he was otherwise likely to be awarded a vacancy in short haul once domestic flying resumes. He requested to remain on leave without pay until such time; and

B. Mr Alley had made a number of representations to him in a conversation on 10 July 2020 about him remaining in employment with Qantas until such time there was a vacancy in short haul.[15]

ii. 7 September 2020 Mr Peggie responded to the show cause letter.[16] In short, Mr Peggie maintained the position that it would be premature to terminate his employment on two main grounds being that:

C. there was currently no flying on the A380 fleet and so it could not be said that he could not fulfil the inherent requirements of his role; and

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[12] See attachments DA-16 to the Statement of Douglas Peter Alley, Exhibit 16.

[13] See attachments DA-11 to the Statement of Douglas Peter Alley, Exhibit 16.

[14] See attachments DA-17 to the Statement of Douglas Peter Alley, Exhibit 16.

[15] Mr Alley denies making the representations. However, nothing turns on the factual contest.

[16] See attachments DA-12 to the Statement of Douglas Peter Alley, Exhibit 16.

D. he otherwise was likely to be awarded a vacancy in short haul once domestic flying resumes and that he should remain stood down until such time.

n) Mr Alley considered the responses from the Applicants to the show cause letters.

o) On:

i. 8 October 2020 Mr Alley advised Mr Peggie that his employment would be terminated with effect on 12 November 2020. Correspondence to that effect was provided to Mr Peggie.[17]
ii. 15 October 2020 Mr Alley advised Mr King that his employment would be terminated with effect on 19 November 2020. Correspondence to that effect was provided to Mr King.[18]

p) On:

i. 12 November 2020 Mr Peggie's employment ended.
ii. 2 December 2020 Mr King's employment ended.

q) On:

i. 2 December 2020 Mr Peggie made an application for unfair dismissal.
ii. 10 December 2020 Mr King made an application for unfair dismissal.

r) At the time of their dismissal,

i. Mr King had earned approximately $40,000 in the previous 12 months, but his evidence was that, in the FY18/19 tax year he earned $483,286; and
ii. Mr Peggie had earned $237,411 in the previous 12 months, but that his ordinary hourly rate was $228.28 per hour.

[48] I think fairly I can also take judicial-like notice of the impact of COVID-19 on Qantas. The Applicants and Qantas have led evidence about it and made submissions. Only last week it was reported[19] that,

> "Qantas has posted a $2.35bn annual loss, taking the airline's total losses for the last two years to an eye-watering $5bn.
>
> The grim result was attributed to a $16bn loss in revenue, due to the lack of international flying for the full 12-months and extensive disruption to domestic travel.
>
> Throughout the 2021 financial year, a total of 330 days were affected by domestic

[17] See attachments DA-13 to the Statement of Douglas Peter Alley, Exhibit 16.

[18] See attachments DA-18 to the Statement of Douglas Peter Alley, Exhibit 16.

[19] https://www.theaustralian.com.au/business/aviation/qantas-posts-235bn-annual-loss-as-the-airline-looks-to-resume-international-flights-in-december/news-story/c7f043bc622c3a539c5ca36ac5856b64?utm_source=TheAustralian&utm_medium=Email&utm_campaign=Editorial&utm_content=TA_BREAKING_CUR_04&net_sub_id=@@@@@@%@@@@@&type=curated&position=1&overallPos=1&utm_source=TheAustralian&utm_medium=Email&utm_campaign=Editorial&utm_content=emailname_

travel restrictions, with devastating results for the airline group.

Qantas and Jetstar have now shed 9400 jobs – or a third of the workforce, and more than 8000 employees remain stood down as they wait for domestic and international borders to reopen.

On that front, Qantas was hopeful of resuming commercial international flights in December, to a limited network including Singapore, the US, Japan, the UK, Canada and Fiji."

[49] The Applicants submit they were unfairly dismissed. They both seek an Order that they be reinstated. The position that they seek to be reinstated to is that of long-haul pilot. That is a position that, if they are reinstated to it, would see them being stood-down because of the COVID pandemic. The Applicants conceded that, "if we are still allocated to the A380 when it resumes operations on services we cannot operate and pilots are stood up, our employment should be terminated at that time." In that sense their cases differ from that in *Christie* because neither Applicant seeks to remain a long-haul pilot.

[50] In seeking an Order that they be reinstated (to positions that, if they become operational, the Applicants concede they should be dismissed from) the Applicants hope to be employed long enough for them to undertake training in and transfer to short-haul operations. That is a common career path for international pilots once they reach the age of 65 years.

[51] For the following reasons I am not satisfied that the Applicants were unfairly dismissed. Even if I am wrong about that conclusion, I am not satisfied that reinstatement into positions to which the Applicants would be stood-down is an appropriate remedy.

Protection from Unfair Dismissal

[52] An order for reinstatement or compensation may only be issued where the Commission is satisfied the Applicant was protected from unfair dismissal at the time of the dismissal.

[53] Section 382 sets out the circumstances that must exist for the Applicant to be protected from unfair dismissal:

"**382 When a person is protected from unfair dismissal**

A person is ***protected from unfair dismissal*** at a time if, at that time:

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;

(ii) an enterprise agreement applies to the person in relation to the employment;

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with

the regulations, is less than the high income threshold.

[54] There is no dispute, and the Commission, as presently constituted, is satisfied, the Applicants had completed the minimum employment period, and were covered by an enterprise agreement, namely the *Qantas Airways Limited Pilots (Long Haul) Enterprise Agreement 2020*. Consequently, the Commission, as presently constituted, is satisfied the Applicants were protected from unfair dismissal.

[55] I will now consider if the dismissal of the Applicant by the Respondent was unfair within the meaning of the FW Act.

Was the dismissal unfair?

[56] A dismissal is unfair if the Commission is satisfied, on the evidence before it, that all of the circumstances set out at s.385 of the FW Act existed. Section 385 provides the following:

> "**385 What is an unfair dismissal**
>
> A person has been ***unfairly dismissed*** if the FWC is satisfied that:
>
> (a) the person has been dismissed; and
>
> (b) the dismissal was harsh, unjust or unreasonable; and
>
> (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
>
> (d) the dismissal was not a case of genuine redundancy.
>
> Note: For the definition of ***consistent with the Small Business Fair Dismissal Code***: see section 388."

Were the Applicants dismissed?

[57] A person has been unfairly dismissed if the termination of their employment comes within the definition of "dismissed" for purposes of Part 3–2 of the FW Act.

[58] In these matters Qantas did not contend that the Applicants were not dismissed. It conceded that Mr Peggie was dismissed on 12 November 2020 and Mr King was dismissed on 2 December 2020. Consequently, I find that the Applicants were dismissed from their respective employment with the Respondent within the meaning of s.386 of the FW Act.

Was the dismissal consistent with the Small Business Fair Dismissal Code?

[59] A person has not been unfairly dismissed where the dismissal is consistent with the Small Business Fair Dismissal Code (**Code**). Qanats is not a small business. Consequently, compliance with the Code is not relevant in the present matter.

Was the dismissal a genuine redundancy?

[60] The Respondent did not submit I should dismiss the application because the dismissal

was a case of genuine redundancy. Genuine redundancy is not relevant in the present matter.

Harsh, unjust or unreasonable

[61] Having been satisfied of each of s.385(a),(c)-(d) of the FW Act, the Commission must consider whether it is satisfied the dismissal was harsh, unjust or unreasonable. The criteria the Commission must take into account when assessing whether the dismissal was harsh, unjust or unreasonable are set out at s.387 of the FW Act:

> "**387 Criteria for considering harshness etc.**
>
> In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:
>
> (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
>
> (b) whether the person was notified of that reason; and
>
> (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
>
> (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
>
> (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
>
> (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
>
> (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
>
> (h) any other matters that the FWC considers relevant."

[62] The ambit of the conduct which may fall within the phrase 'harsh, unjust or unreasonable' was explained in *Byrne v Australian Airlines Ltd* [1995] HCA 24; (1995) 185 CLR 410 at 465 by McHugh and Gummow JJ as follows:

> .... It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.

[63] I am under a duty to consider each of these criteria in reaching my conclusion.[20] I will now consider each of the criteria at s.387 of the FW Act separately.

Valid reason - s.387(a)

[64] The Respondent must have a valid reason for the dismissal of the Applicant, although it need not be the reason given to the Applicant at the time of the dismissal.[21] The reasons should be "sound, defensible and well founded"[22] and should not be "capricious, fanciful, spiteful or prejudiced."[23]

[65] There is no suggestion that the dismissal of the Applicants was associated with their conduct. They both have an exemplary employment record.

[66] The sole reason for their dismissal from employment was that they had both reached the age of 65 years and Qantas determined that, consequently, they could not perform the inherent requirements of their position as long-haul pilots.

The Christie and Qantas Airways Ltd Litigation

[67] Qantas relies upon the decision in *Qantas Airways Ltd v Christie* to establish that section 18(4) of the ADA operates in these matters i.e. the inherent requirements exemption.

[68] Accordingly, as her Honour Justice Katzmann held in the Summers Decision "it is useful to see what was actually decided in Christie." Her Honour's very useful analysis was as follows:

> 79 *Christie* concerned a Qantas pilot who was dismissed after 30 years' service because he had reached the age of 60. Mr Christie sued Qantas in the Industrial Relations Court of Australia claiming that the termination of his employment was in breach of s 170DF(1)(f) of the *Industrial Relations Act 1988* (Cth) (IR Act) which provided that an employer must not terminate an employee's employment by reason of age. By s 170DF(2), however, a matter referred to in para (1)(f) was not prevented from being a reason for terminating employment "if the reason [was] based on the inherent requirements of the particular position". In the present case, both parties considered that s 170DF(2) of the IR Act was relevantly indistinguishable from s 18(4) of the Age Discrimination Act, despite the reference in the latter subsection to "the particular employment" rather than "the particular position". This approach is questionable. In *X v The Commonwealth* (1990) 200 CLR 177 at [150] Kirby J remarked that the word "employment" is "somewhat broader".
>
> 80 Mr Christie had been employed as a pilot of B747-400 aircraft that were used for flying international routes. As was the position with Captain Summers, his letter of appointment and the relevant industrial agreements stipulated that he would be required to perform duties as required by Qantas in any part of the world where Qantas may from time to time be operating.

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[20] *Sayer v Melsteel* [2011] FWAFB 7498.

[21] *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-378.

[22] *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371, 373.

[23] Id.

81 Under the terms of an agreement between the Australian Federation of Airline Pilots (later the Australian International Pilots' Association) and Qantas, the retirement date for pilots was set at 55. Pilots were able to extend their employment but not beyond the age of 60. At this time the Convention prohibited State parties from allowing a pilot who had attained that age to act as a pilot in command of an international air service and gave State parties the power to refuse entry to aircraft piloted by such a person. This was known as the Rule of 60 and it was the law in most of the countries on the routes flown by Qantas. Indonesia, Fiji and New Zealand were the only exceptions.

82 At first instance in the Industrial Relations Court, Wilcox CJ held that the rostering and bidding system employed by Qantas and the effect of the laws which had been enacted in most countries on Qantas routes to prevent pilots over the age of 60 from entering their airspace meant that it was an inherent requirement of Mr Christie's position that he had not attained the age of 60. Accordingly, his Honour dismissed the application. On appeal, the Full Court of the Industrial Relations Court, by a majority, set aside his Honour's order, holding that age was not an inherent requirement of the particular position.

83 By a majority, Kirby J dissenting, the High Court allowed the appeal, holding that there had been no breach of s 170DF(1)(f).

84 It was apparently uncontroversial that the particular position occupied by Mr Christie at the time of his termination was that of a captain of B747-400 aircraft flying international routes. Kirby J said at [164] that there was no doubt that the requirements of that particular position included the requirement that he be able to fly that aircraft anywhere in the Qantas network. Gummow J at [114] defined it more narrowly, however, as "the particular bundle of contractual rights and obligations, supplemented … by the operation of statute".

85 The Court was of the unanimous view that an inherent requirement is one which is essential, intrinsic, or indispensable to the position: *Christie* at [1] (Brennan CJ), [34] (Gaudron J), [74], [86] (McHugh J), [114] (Gummow J) and [164] (Kirby J). Each member of the Court except for Gaudron and Kirby JJ held that the termination of Mr Christie's employment because he had reached the age of 60 was lawful because he was unable to fulfil the inherent requirements of his particular position but their views differed as to the reason he was unable to do so. Brennan CJ at [3] considered that it was because he was unable to participate effectively and equitably in the bidding system, McHugh J at [86] because he was unable to fly to a reasonable number of the airline's overseas destinations, and Gummow J at [117] because availability for international service was an inherent requirement of the position according to his contract.

86 Gaudron J remarked at [36] that a practical way of determining whether a requirement is inherent is to ask whether the position would be essentially the same if the requirement were removed. In that case, therefore, the question was "whether the position would be essentially the same if it involved flying B747-400 aircraft only on those routes which remain available by reason of the enforcement of the Rule of 60". Her Honour held at [38] that, notwithstanding the limited destinations to which he could now fly, his position would be essentially the same as that he had previously occupied if he were able to comply with the Qantas roster system. Her Honour did not

answer the question, however. Her Honour's view, which was not shared by the other members of the bench, was that the question could only be answered if the matter were remitted to the Full Court to answer the question whether Wilcox CJ had erred in holding that Mr Christie would need to use a large proportion of short flights that would otherwise be used to make up the hours of other captains flying the same aircraft.

87 Brennan CJ agreed with Gaudron J except in relation to the critical factual question. His Honour held at [2]–[3] that the ability to participate effectively in the bidding process on an equal footing with other Qantas international pilots of similar seniority was an inherent requirement of Mr Christie's position. Later, at [5] his Honour said:

> The question is not whether Mr Christie would need to use a large proportion of short flights to make up his hours but whether he would necessarily make up his hours by excluding from his bids flights to or over those countries which apply the Rule of 60. As Mr Christie would be constrained to exclude flights to or over some countries from his bids, he could not participate equally with other pilots of similar seniority in the bidding system. His exclusion from flights to and from some destinations would require other pilots to be selected for duty on those flights more frequently than if Mr Christie had been available for that duty. Even if, the Rule of 60 apart, Mr Christie's seniority would have allowed him to exclude those flights from his bids which filled the required number of flying hours, that hypothetical exclusion would have been made in exercise of his rights as an equal participant in the bidding system. There would have been a continuing possibility of bidding successfully for the flights from which he is now compulsorily excluded. But his inability to bid and to be selected for some flights skews the equitable operation of the system.

88 For this reason, his Honour said that it was unnecessary to pursue the "large proportion of short flights" issue and a remittal to the Full Court was unwarranted.

89 McHugh J held at [42]–[43] that the age of an employee can be an inherent requirement of the particular position within the meaning of s 170DF(2) and at [86] that it was an inherent requirement of Mr Christie's position as a Qantas captain of international B747-400 routes that he have the physical, mental and legal capacity to fly B747-400 flights to any part of the world. His Honour went on to say at [86]–[87]:

> It is true that a contractual requirement does not necessarily equate to an "inherent" requirement. However, it was essential that, at the very least, a pilot in Mr Christie's position should be able to operate a sufficient number of flights to meet the requirements of his employment with Qantas as an international pilot. It is probably the case, having regard to the terms of the employment contract, that the Captain of a Qantas B747-400 flying internationally should be able to fly to every Qantas destination. It is unnecessary, however, to decide that point in this case.

> When Mr Christie turned sixty, he was unable to perform a large and essential part of his duties. Whether an inherent requirement of his position is identified by reference to his age or merely by reference to an ability to fly to a reasonable number of Qantas' overseas destinations is immaterial, as the former necessarily incorporates the latter. It is unnecessary to determine what conclusion might be reached if only a small number of countries imposed the sixty year age ban.

(Emphasis added.)

90 Gummow J said at [117] that the contractual requirement to be available for service in any part of the world where Qantas from time to time operates was a property or attribute that gave to any tasks and responsibilities which made up Mr Christie's duties their particular character. His Honour held that termination of employment at the age of 60 was therefore incidental to the requirement to be available for international service.

91 The following year, in *X v The Commonwealth*, the High Court considered a case of alleged disability discrimination in which an issue arose about the application to a soldier infected by HIV of the expression "unable to carry out the inherent requirements of the particular employment" in s 15(4) of the *Disability Discrimination Act 1992* (Cth).

92 By this time the composition of the bench had significantly changed. Of the members of the majority in *Christie*, only Gummow and McHugh JJ remained. In *X v The Commonwealth,* the majority held that the inherent requirements of a particular employment are not confined to the performance of the tasks or the use of the skills for which the employee is specifically prepared (at [100] per Gummow and Hayne JJ, Gleeson CJ, McHugh J and Callinan J agreeing at [8], [30]–[37], and [170] respectively).

93 McHugh J explained at [35]–[36] that *Christie* stands for the proposition that the legal capacity to perform the employment tasks is, or at all events can be, an inherent requirement of employment and that in determining what the inherent requirements of a particular employment are it is necessary to take into account the surrounding context, unless context is excluded from consideration by statute or agreement. And what is an inherent requirement of a particular employment will usually depend on the way the employer has arranged its business. His Honour went on to say at [37] that "unless the employer's undertaking has been organised so as to permit discriminatory conduct, the terms of the employment contract, the nature of the business and the manner of its organisation will be determinative of whether a requirement is inherent in the particular employment". His Honour stated that "appropriate recognition" must be given to the business judgment of the employer in organising its undertaking and in regarding certain requirements as essential to the particular employment. For this reason his Honour explained, in *Christie* Qantas had no obligation to restructure the roster and bidding system it used for allocating flights to its pilots in order to accommodate Mr Christie.

94 Gummow and Hayne JJ, with whom Gleeson CJ and Callinan J agreed, confirmed at [102] that the reference to "inherent" requirements is a reference to "the

characteristic or essential requirements of the employment" rather than those which might be described as "peripheral". Their Honours emphasised, however, that "the requirements that are to be considered are the requirements of the *particular* employment, not the requirements of employment of some identified type or some different employment modified to meet the needs of a disabled employee …". Wilcox CJ had made a similar point at first instance in *Christie*, in a passage cited by Gummow J in *Christie* at [117].

95 Their Honours held at [103] that it follows from the reference to both "inherent requirements" and "particular employment" that, in considering the analogous provisions of the Disability Discrimination Act, "it is necessary to identify not only the terms and conditions which stipulate what the employee is to do or be trained for, but also those terms and conditions which identify the circumstances in which the particular employment will be carried on" (Gummow and Hayne JJ at [103]). Thus their Honours held at [106] that the identification of inherent requirements must begin with the terms and conditions of service."

What position do the Applicant's hold?

[69] Mr Alley gave the following evidence about the employment of pilots at Qantas.

"7. Up until around September 1992 when Qantas merged with Australian Airlines (a nationally owned domestic airline), Qantas was an international airline. A pilot engaged by Qantas prior to the merger was considered to be a long haul pilot. That is, a pilot solely engaged to service Qantas' international routes.

8. With the introduction of domestic services to the airline which has been maintained to present day, a pilot will either occupy the role of a long haul or short haul pilot. Although a pilot might be generically described as such, a pilot will only be engaged at any one time as either a short haul pilot (to primarily service Qantas' domestic routes) or a long haul pilot (to primarily service Qantas' international routes).

9. For as long as I have been employed with Qantas, all pilots are initially engaged as a long haul pilot because they commence their employment as a "Second Officer in Training" under the relevant terms of the applicable long haul enterprise agreement. A long haul pilot may then transition across to short haul operations (pursuant to the terms of the applicable short haul enterprise agreement) to the extent there is a "vacancy" in short haul (I will discuss the meaning of a "vacancy" below at paragraphs 29 to 30).

10. The distinction that is maintained between the long haul and short haul positions is evidenced by the following:

a). a pilot's employment will be underpinned by either a long haul enterprise agreement (currently the Qantas Airways Limited Pilots (Long Haul) Enterprise Agreement 2020 (LHEA)) or a short haul enterprise agreement (currently the Qantas Airways Limited Pilots (Short Haul) Enterprise Agreement 2020 (SHEA)). They set out the different terms of employment. For example, rostering and pay conditions. ….

b). the LHEA and SHEA each contain clauses (see clauses 20 and 21 respectively) allowing for a long haul or short haul pilot (depending upon

which enterprise agreement covers their employment) to transfer to short haul or long haul operations respectively;

c). a long haul pilot can only operate aircrafts which primarily or exclusively service international routes being, the A380, B747 (which has since been retired), A330 or the B787. Meanwhile a short haul pilot can only operate the B737 being the aircraft which is overwhelmingly used to service domestic routes. A long haul pilot will be unable to (and cannot be directed or required by Qantas) to operate the B737 aircraft used to service domestic routes as they would not be trained to fly that particular aircraft; and

d). although generated using the same programs, separate bidding systems and rosters are maintained for long haul and short haul pilots. Indeed, separate rosters are maintained for every "category" (this term is described immediately below) and are entirely independent of one another.

11. A pilot's position is further refined by reference to the "category" that a pilot holds or occupies pursuant to the LHEA or the SHEA. Under both enterprise agreements, the "category" held is defined to be the status (being the rank held as a Captain, First Officer or Second Officer) of the pilot on an aircraft. Under the LHEA, a long haul pilot can hold a category on the A380, B747, A330 or B787 (being aircrafts which primarily or exclusively service international routes), whereas under the SHEA a short haul pilot can hold the category of either a Captain or First Officer on the B737 (being an aircraft which overwhelmingly services domestic routes).

12. This means that the position occupied by a pilot is defined by reference to whether they are a long haul or short haul pilot and the category within which they occupy. For example, the position of a long haul pilot occupying the category of Captain on the A380 fleet (such as Mr Geoffrey King) is usually be described as "Captain A380"”

[70] Mr Alley gave the following uncontested evidence about the capacity to fly in international airspaces.

“21. The duties and responsibilities of a "pilot" employed by Qantas are framed by terms of their letter of appointment, the terms of the applicable enterprise agreement, and an internal document called the "Flight Administration Manual" (FAM) which sets out Qantas' policies, standards and procedures for all flight crew when operating an aircraft.

Capacity to fly in international airspaces

22. Mr King and Mr Peggie were both employed by Qantas as pilots at a time when the airline was an international airline and domestic flying was carried out by other carriers. Their letters of appointment reflected this context and require that they "undertake such duties in any part of the world' (see paragraphs 14.a) and 18.a) and above). Where a pilot is required to undertake duties in any part of the world, the pilot must be able to operate freely and without restriction in international airspaces within which Qantas operates. This has remained a fundamental requirement of their positions.

Limitations on capacity to operate in international airspaces

23. For as long as I have been employed with Qantas, long haul pilots have been unable to operate an aircraft in most international airspaces upon turning a particular age. While this age has changed over time, the limitations imposed in long haul operations by virtue of a pilot's age is something that is known by all Qantas long haul pilots. Indeed, I would describe the mandatory retirement age as a fundamental aspect of the career of a long haul pilot. The common understanding that a long haul pilot's career is subject to an age limitation is reflected in the following documentation:

a). both Messrs King and Peggie's letters of appointment refer to a retirement age (see paragraphs 14.c) and 18.c) above);

b). clause 19.6 of the LHEA provides that Qantas may deny a pilot's bid for transfer to a higher rated aircraft type if at the anticipated training commencement date the pilot would not be able to provide two years of service in a new category. The clause implicitly recognises that there is an end date to a pilot's service in long haul operations and operates such that Qantas can avoid the extensive costs associated with training a pilot to a new aircraft type where that pilot cannot provide at least two years of service on the new type; and

c). clause 4.6 of the FAM provides that "A Flight Crew member who has reached their 65th birthday shall not operate or be rostered to operate as an A380, A330 B747 or B787 pilot crew member". A copy of the FAM is not attached to this statement as it is a confidential document intended for internal use only, but page 6 of chapter 4 showing the extracted clause 4.6 is attached to this statement and marked "Attachment DA-5". By signing on for work, all pilots acknowledge they are aware of the contents of the FAM and any changes which have been made to the FAM, and that they are able to comply with the FAM.

24. While I am not familiar with the precise details of the regulations which impose such restrictions, I understand that the convention and annexes established by the International Civil Aviation Organisation (ICAO) prevent a pilot of a certain age from operating commercial aircrafts which fly to and from countries who are a contracting state to the ICAO Convention. I understand that many of Qantas' international routes are to jurisdictions that require compliance with the ICAO Convention (also referred to as the Chicago Convention). It is also my understanding that the age limitation imposed upon long haul pilots has increased over time, and that at the time of terminating the employment of Messrs King and Peggie, the ICAO Convention prevented a long haul pilot who was 65 years of age and above from operating aircrafts in international airspaces.

25. In light of the ICAO Convention restrictions, Qantas does not permit pilots at or over the age of 65 to operate long haul flights.

[71] Qantas made like submissions in respect of the Peggie and King matters. The Peggie submissions (substantially replicated in the King matter) were as follows:

"18. A valid reason for dismissal is one that is "sound, defensible or well

founded" and not "capricious, fanciful, spiteful or prejudiced." The reason for dismissal must also be defensible or justifiable on an objective analysis of the relevant facts.

"19. The Applicant was terminated because from the age of 65 he was no longer able to perform the inherent requirements of his position.

"20. It is respectfully beyond doubt that a Qantas long haul employee cannot perform the inherent requirements of his or her position upon reaching 65 years of age, because the Chicago Convention precludes the pilot from operating aircraft within foreign jurisdictions in which Qantas operates.

"21. In terms of the impact of the Chicago Convention on the Applicant's ability to perform the inherent requirements of his position, Mr Peggie's circumstances are indistinguishable from those of Captain Christie in Qantas Airways Limited v Christie (1998) 193 CLR 280 (Christie), a High Court decision which is binding on the Commission.

Applicant's position was First Officer A380 long haul pilot, not generic 'pilot"

"22. When an employer relies upon an employee's incapacity to perform the inherent requirements of his position, it is the substantive position or role of the employee which must be considered and not some other modified, restricted or alternative position which the employee has not been employed to perform. The requirements to be considered are the requirements of the particular employment.

"23. The question for the Commission is whether the Applicant can perform the inherent requirements of the position. While it may prima facie be unlawful for an employer to take adverse action against an employee (including termination) because of the employee's age, that conduct is not unlawful if it is taken because of the inherent requirements of the position concerned.

"24. The question is not whether the Applicant can perform any work at all or can be productive in some other work – the question is whether he had the capacity to perform the inherent requirements of the substantive position in which he was employed.

"25. The Applicant's submission that he was employed as a "pilot" and occupied the position of "pilot" in some generic sense must be rejected. It is a misconceived argument which is inconsistent with the facts and authority.

"26. The evidence establishes that at all material times the Applicant's position was that of a long-haul pilot First Officer A380. He was employed as a long-haul pilot, his contract of employment required him to fly anywhere in the world as directed by Qantas, he has never worked other than as a long haul pilot, he is covered by industrial instruments which apply exclusively to long haul pilots, Qantas documentation confirms him as a long haul pilot and he acknowledges that he cannot perform short haul work and there is no "direct entry" to short haul in the absence of an available vacancy which is awarded on the basis of seniority.

"27. The relevant question here is not whether the Applicant can operate an

aircraft and perform the work of a pilot – it can be assumed he can. The issue is whether the Applicant can perform the inherent requirements of the long haul position he occupied. To determine that question, one examines the tasks performed or required to be performed in that position because it is the capacity to perform those tasks which is an inherent requirement of the particular position.

"28. In Christie the High Court dealt with the distinction to be drawn between the tasks and skills inherent in a job (pilot) and the inherent requirements of a particular position (long haul B747-400 Captain).

"29. McHugh J stated that although the distinction between the requirements of a position and the requirements of a job will often be of little significance, it would be a mistake to think that there is no distinction. In some cases, the distinction may be material. For example, if being an American-born citizen is an inherent requirement of the position of President of the United States, having the skills or capacity to perform the work done by a President will never be enough.

"30. Brennan CJ observed that the inherent requirements of the B747 Captain position are not just aeronautical skills and licenses, but "a capacity to fly on Qantas' international routes….". Gaudron J unequivocally dismissed the argument the Applicant seeks to make here:

> *"To identify the inherent requirements of that position as "the characteristic tasks or skills required in being a pilot" as did Marshall J in the Full Court, is to overlook its international character."*

"31. The Applicant also contends that when he turned 65 he could perform the inherent requirements of his position because at that time (19 August 2020), the A380 fleet was grounded and there was no requirement for long haul pilots to fly internationally. That is, at the time of his 65th birthday there was no inherent requirement for the Applicant to do that which the Chicago Convention prohibits. This argument is misconceived.

"32. The inherent requirements of the position are to be found in what the Applicant was employed to do, not by reference to what he might be required to do at any single moment in time.

"33. In Christie, Gummow J held that the "position" is the particular bundle of contractual rights and obligations, supplemented by the operation of statute and he found that "the primary requirement of Qantas was that found in the very terms in which [Capt Christie's] appointment was expressed, namely that he was "appointed as a Pilot for duty as required by Qantas in any part of the world". The inherent requirement of the position was the requirement that Captain Christie be available for service in any part of the world.

"34. But for COVID-19 and the grounding of the A380 fleet, the terms of the Applicant's employment would require him to be available to perform service internationally. The grounding of the fleet does not alter his contractual obligations or the inherent requirements of the position he occupied. He cannot make himself available for international service now or at any time in the future.

"35. The stand down of pilots from March 2020 also does not undermine the validity of the reason for termination. That A380 pilots are not presently required to fly internationally to ICAO destinations entirely misses the point. The stand down does not alter the Applicant's contractual obligations or the inherent requirements of the position he occupied. He cannot make himself available for international service now or at any time in the future.

"36. By reason of his inability to perform the inherent requirement of his position, the Commission should find that Qantas had a valid reason to terminate the Applicant's employment. Qantas has not engaged in unlawful age discrimination. On that question, the High Court decision in *Christie* is a complete answer."

[72] Mr Peggie submitted that,

"At the time of my dismissal, I was fully compliant with all requirements of my job.

I have a Confirmation of Employment letter, dated 8 November 2020, stating my position as a First Officer A380 on a full-time permanent basis. I was 65 years old.

I was employed to be a "pilot". Qantas separates the pilot employment in two main categories, long and short haul which have separate employment awards. All pilots are combined with an Integration Award. All these pilots are employed by Qantas. "Pilot" is the generic term and there is no specific definition of inherent requirements.

The job of a Qantas pilot is to carry out the duties described in his/her roster. This constitutes the inherent requirements of the job. Generally, duties include flying as part of the Qantas network, personal leave, training and checking.

COVID-19 led to the grounding of Airbus A380 aircraft. The aircraft are in long term storage. They are not expected to return to service until 2023. As per the Qantas Airways Limited Pilots (Long Haul) Enterprise Agreement 2020 (EBA10) Clause 15.6 Stand-down provisions I had been stood down.

At the time of my dismissal, I had been stood down for more than 6 months and Qantas expected this to continue for the foreseeable future. (refer dismissal letter)

The Qantas Annual Report issued in September 2020 notes:" With the impact of COVID-19 and the closure of international borders, the Group's A380 fleet is expected to be grounded for the foreseeable future." …and "Given the significant uncertainty around the return to service of the fleet…". Clearly flying duties are not part of the A380 pilots' rostering or plans. Apart from a few management positions, all A380 pilots are stood down. The title of A380 pilot does not describe the job. As of this date there is no notice of any flying duties.

The stand down provisions 15.6.3 state a pilot can only be stood down at his or her base or posting in Australia.

There was and will be no A380 international flying for a long time. There are no ICAO destinations. The dismissal letter refers to age limitations that are not relevant to the inherent requirements of the job now or in the foreseeable future.

The pilot roster that I had was the same as all other A380 pilots. This roster and its duties are all compliant with EA10.

I had a stand down notice dated after my 65th birthday. I had a roster which noted annual leave in December, well after I was 65. There was no problem rostering me after my birthday. It had already been done. I was rostered. (these documents submitted). My capacity to do the job was the same as all other A380 pilots. I had pay slips categorising me as an A380 pilot.

Transition to fly short haul.

I have an application or "bid" to transfer to short haul, Boeing 737, flying. There are no age restrictions on this flying.

COVID-19 had severely curtailed flying and no vacancies were available at the time of dismissal.

The normal career progression for a Qantas pilot is to start as a pilot on long haul, primarily international, flights. Over time the career path of the pilot is promotion to various other fleets and categories. This includes transfer to/from short haul. There is no direct entry to Qantas as a short haul pilot. Generally, the pay and conditions of long haul are more attractive and towards the end of the pilot's career they are employed as international long haul pilots. A pilot is not permitted to fly commercially over the age of 65 years in many countries which comply with the ICAO age regulations. Australia, New Zealand, Japan and South Africa are notable exceptions. A pilot who wishes to fly with Qantas after their 65th birthday may transfer to short haul flying within Australia. This is a standard progression in a pilot's aviation career and has not, to my knowledge, ever been denied. A vacancy in long haul is created which, in turn, creates vacancies throughout the pilot ranks leading back to the short haul position.

Promotion is not mandatory within Qantas and lifestyle choices are routinely recognised. The cost of training is part of the normal business of running an airline. Workplace flexibility has been supported based on seniority and need. The position of the pilot changes but the inherent requirements of the job is to pilot aircraft and carry out duties as per the pilot's roster.

Stand down provisions further state:

> 15.6.4 a pilot who is stood down under this clause 15.6 will be treated for all purposes (other than pay) as having continuity of employment despite having been stood down;
>
> 15.6.9 if the Company proposes to stand down a pilot under this clause 15.6, the pilot may elect to take any accrued annual leave entitlements during the stand down period;

At the time of dismissal, I had over 200 days accrued Annual and Long Service Leave. Qantas provided the option to take this leave at half pay. Over 400 days available.

I complied with the inherent requirements of my job. In the past, due to pilot surplus,

I have been forced to take annual leave and long service leave, I could have been assigned leave again. I could have remained employed with Qantas under the EA 10 until the completion of my B737 training. My leave balance could have been used until at least February 2022. There was no valid reason for me to be dismissed that related to my capacity to be rostered.

Availability and timing of vacancy in Short Haul

> Short Haul Enterprise Agreement 2020 (EBA8)
>
> 16.3.2
>
> The Company will advertise initial vacancies planned for a training block annually. This will occur in April each year unless deferred for operational reasons after consultation with the Association.
>
> 16.3.15 Re-scheduled or deferred training course dates
>
> (a) Training course dates may be rescheduled within a training block.
>
> (b) A training course that is deferred beyond the end of the relevant training block will be deemed to be cancelled unless the Company and the Association agree to continue to defer it into the next training block.

COVID-19 had severely curtailed flying and no vacancies were available at the time of dismissal.

As noted in the dismissal letter, the training courses that were allocated in April 2019 are yet to commence. It states that: "it is unlikely that any endorsement training on the 737 will be commenced prior to 30 June 2021". The training block commences 1 July 2021. Accordingly, these courses will be deemed to be cancelled unless the Company and Association agree to defer them. 2019 course allocations were deferred to 2020. Another deferral is extremely unlikely to be agreed upon especially considering the major upheaval of the aviation industry and career paths open to pilots. It is more likely than not that all training courses will be open to all pilots in April 2021. With my seniority after 36 years, I would almost certainly have been successful in being allocated a course in 2021. This is well within the period of leave available to me at time of dismissal (Feb 2022). Even the later date of May/June 2022 is not far beyond this time.

The comment: "Given the speculative nature of the existence of any future vacancies in short haul, and the very long period of time until any such vacancies might potentially arise," implies serious doubt in the viability of Qantas. I doubt this is the intention in the letter.

I find the dismissal letter to be misleading as to the timing and availability of short haul vacancies.

Impact of procedures

Given the size of Qantas, I do not think there is any significant or material impact of continuing my career on the operations of the company.

The Qantas financial statements refer to billions of dollars.

The cost of me using the stand down provisions or my accrued personal leave until taking up a training position on B737 is minimal.

The number of pilots in the same circumstances, of suffering the COVID caused delay of continuing their career beyond 65 years is negligible. The cost of training pilots is a normal cost of an airline.

After transfer to short haul flying there are no special rostering provisions. Neither Qantas nor other pilots are adversely affected. Rostering is not governed by seniority.

[73] Mr King submitted that,

"The COVID-19 pandemic has created an unprecedented effect to the normal course of events for my company of 36 + years, Qantas Airways, not the least of which has been the prolonged stand down of its pilots, with my current category of pilot, the A380 Captains and co-pilots expected to be the most severely affected for three to four years or more. The category that I would be moving to, the Domestic B737 Captain position has been forecast to be available much earlier than the A380 category even though that operation had slowed greatly due also to the COVID 19 pandemic.

I refer you to Qantas Group CEO Alan Joyce's FY20 results speech to the ASX on 20 August 2020 in which he indicated a "$1.4 billion write down of assets including our A380 fleet, which reflects that these aircraft will be on the ground for years" and "all of our A380s are now in long term storage in the USA" for a minimum of three years.

On Wednesday 2nd of Sept 2020 he said Qantas didn't expect to resume flying its Airbus A380s, which are currently confined to a storage facility in the Mojave Desert in California, for another three or four years "We don't see the demand for them coming back until 2023-2024 … but when the market recovers the A380s will be profitable (and) I believe these will fly again," Mr Joyce said, (according to Executive Traveller).

Furthermore, in the Qantas Group FY20 Results Investor Presentation to the market on the same day, Qantas indicated that the A380 aircraft will remain in "long term storage" for the "foreseeable future" (ASX 2020).

Conversely, in the associated media release to the market of the same day, Qantas indicated that due to the "Group's main domestic competitor significantly reducing its fleet and closing its low-cost carrier, the Group expects its domestic market share to naturally grow from around 60 per cent to up to 70 per cent as the market recovers" (ASX 2020).

The release makes further observations regarding the domestic market and states that "recent developments in Victoria and the reimposition of some border restrictions in other parts of Australia are not expected to have a material impact on the delivery of the three-year plan" (ASX 2020) and "recent sales activity shows high levels of

latent travel demand when restrictions are eased" (ASX 2020).

Qantas also indicates that domestic travel is expected to recover before international travel by stating "the Group remains well positioned to take advantage of the eventual return of domestic and, ultimately, international travel demand" (ASX 2020).

It should be noted that all this information was available at the time to those in the company who made the decision to terminate my employment because of my age, even though I was in a position to remain stood down or remain on leave (in the same way as all the other A380 pilots have been) until my B737 Domestic training began. As can be seen this was anticipated to be well before I may have been required to operate into any ICAO age restricted airspace on the A380.

As these A380's will be stored and not operated at all during this time, as announced by the CEO, any over 65year aged pilot such as my-self will not be required to actually fly into the ICAO Age Protected Airspace, therefore it follows that there would be no operational difference between myself at over 65 or any other pilot under 65years of age on these Qantas A380's for rostering purposes for the next three years and possibly much longer because of the negative situation that this pandemic has caused for the world.

Based on these facts alone I don't believe that I should have had my employment terminated.

Given the current stand down that all A380 pilots are experiencing and the expected long-term nature of this stand down, I am not failing to meet any Inherent Requirements of the position because there is no relevant restriction applicable to me that prevents me in fulfilling my rostering obligations to Qantas at this time. Furthermore, there are no practical difficulties that prevent me participating equally with other pilots of similar seniority.

As is indicated in the Respondents correspondence to me, I have a "letter of preference bidding for a transfer to a position as a B737 Captain in the short haul operation, being a position that is unaffected by the ICAO rules" (QF outcome letter Doc. 'B' Letter 2020).

Under clause 16.4.10 of the Enterprise Agreement (see document 'E') recently agreed to by Qantas, I am entitled to bid back to, and be awarded a vacancy in a lower category, provided I meet the criteria agreed between the Company and the Association.

I do not believe one of the criteria relates to age, in which case I do meet all requirements.

16.4.10 Bidding for, and award of, a vacancy in a lower or equal category

(a) Pilot's right to bid

A pilot may bid for a vacancy in a lower or equal category.

(b) Award of a vacancy is at the Company's discretion

An award of a vacancy in a lower or equal category is at the Company's discretion.

(c) Once only right to bid for, and be awarded, a vacancy in a lower category

(i) A pilot can only exercise the right to bid for, and be awarded, a vacancy in a lower category on one (1) occasion. Provided the pilot meets the criteria agreed between the Company and the Association, the vacancy will be awarded.

(ii) An award of such a vacancy in a lower category but within the same status, will only be made if the pilot has had five (5) years of completed service in his or her current category and undertakes to give a two (2) year return of service in the new category.

(iii) The Chief Pilot has discretion as to the timing of the transfer, taking into account the Company's ability to release the pilot from his or her current category.

Although section 16.4.10.2. (b) states Award of a vacancy is at the Company's discretion it is the normal practice that this transition is accommodated by the company.

During my 36 + years with Qantas I was asked, on many occasions, to work extra duties or sometimes fewer duties (i.e. to give up awarded leave or at times to be assigned extra leave) due to exceptional circumstances (e.g. European Volcano, extra busy periods, Xmas etc., aircraft malfunctions or general economic downturns etc.). On many occasions my leave periods were reduced or extended to 'make things work for the company' to which I always agreed, even though I did not have to contractually. I always did this to be helpful to my company as any good employee should and would.

There has always been a lot of give and take in the rostering of my flights in my 36 + years with Qantas - Flexibility arrangements in rostering

All I have been asking for by my request to Qantas this once is to remain stood down or to have the use of all or a portion my 200 plus days of accumulated leave (possibly at half pay to extend the period or possibly even leave without any pay) until my B737 training commenced.

The Respondent asserts on page 2 of my Outcome letter (see document 'B') that there is 'neither an automatic right to be transferred to short haul nor is there an entitlement to be awarded a vacancy in a lower category'. This is factually incorrect. Clause 16.4.10(c) of EA 10 makes it clear that a pilot has a "[o]nce only right to bid for, and be awarded, a vacancy in a lower category. Clause 16.4.10(c) is a qualification to clause 16.4.10(b) that permits the award of a vacancy to be at the Company's discretion. The Company has no discretion the first time a pilot bids for a position in a lower category provided the pilot 'meets the criteria agreed between the Company and the Association. (16.4.10(c)(i). There are further requirements in 16.4.10(c)(ii) which are not relevant in this case and the only discretion Qantas has is the timing of the transfer according to 16.4.10(c)(iii).

The clause was inserted to give pilots some certainty regarding their transfer from LH to SH approaching 65 and also to cater for compassionate cases where a pilot perhaps had a handicapped child and needed to fly domestically etc. rather than be absent from home in LH for 2 weeks. The compassionate situation may result in a more junior pilot receiving a transfer hence the provision that permitted the criteria to be agreed between Qantas and the Association in 16.4.10(c)(i).

My employment termination was totally at the initiative of my employer Qantas Airways (the Respondent).

I was very clear in my response letter (3rd Sept. 2020 – see document 'A') to the pre termination letter from Qantas (28th Aug. 2020 Document 'C') that "I have decided that will not retire of my own accord".

Had my employer not taken this action to terminate my employment (letter from Qantas 15th Oct. 2020- see document 'B') I would have remained employed by Qantas as an A380 Captain being rostered on a type of leave, with no age restrictions, as I had been for several months post turning 65 years (in exactly the same way as all other Qantas A380 Captain's/pilots are being rostered during this wait for the return of the A380) as decided by the company until my B737 Domestic training, then I would be operating as a B737 Captain in the domestic fleet with no age restrictions, as no ICAO age restricted airspace is operated into by that fleet.

I have been dismissed in a way that contravenes The Fair Work Act

….

I believe that I have been unfairly dismissed and refer to Division3 of the Fair Work Act 2009. S385 applies whereby the decision leading to my dismissal was harsh, unjust and unreasonable.

I refer to S387 Criteria for considering harshness etc.

(a)whether there was a valid reason for the dismissal related to the person's capacity

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal

(h) any other matters that the FWC considers relevant

Although reference is made in the Age Discrimination Act 2004

….

I believe that the Respondent is relying heavily on Section 18 division 2 – Discrimination in work - 18 Paragraph 4 when I would hope that under these once in a lifetime circumstances that extra attention could be given to Paragraph 5 (a), (b) and (c) in deciding whether the other person is unable to carry out those requirements because of her age, by taking into account,

a: the other person's past training, qualifications and experience relevant to the

particular employment

(I have, extensive training, qualifications and experience in flying dozens of different types of aircraft for over 47 years including the years preceding my airline career in no less than 3 airlines including 36 + years as a pilot with Qantas Airlines with over 30 of those years as a Heavy and Super Heavy Jet Captain on Boeing 747 and Airbus A380 aircraft with many of these years as a flying instructor).

b: if the other person is already employed by the employer – the other person's performance as an employee.

(the Senior Manager Industrial Relations Mr. Jim Morton stated that my performance as an employee over my 36 + years with Qantas was very good. This was stated by him at the very beginning of the telephone Mediation Conference with the Commission on the 4th Jan 2021 which was mediated by Freja Soininen as the Conciliator for the Fair Work Commission).

c: all other relevant factors that it is reasonable to take into account.

(it has been standard practice for a pilot when transitioning from the Long-Haul Aircraft Fleet to the Short Haul Domestic Aircraft Fleet at age 65 to be placed on leave upon reaching age 65 until the next relevant Domestic Aircraft Flight Training Course began to commence training on that course this was sometimes several months on leave (please see letter from Capt. John Smith (see below & Doc. 'D')

> Hi Geoff,
>
> You asked for details of my award of a 737 slot after I turned 65. I had a tentative course date prior to the completion of A380 flying a day before my 65th birthday in September 2017. I then had several weeks of leave prior to commencement of a 737 course. At one stage I was asked if I would like to take extra leave to fit in with a change in course dates to which I agreed.
>
> Regards
>
> John Smith

All I have been asking for is an extension to my leave period until the next B737 course became available, which, because of the unprecedented event caused by COVID 19 could be some months Based on the information the Respondent had at the time it terminated my employment it would have been evident that this would have occurred well before I would be required to operate into the ICAO age protected airspace.

I would think that this request is not unreasonable based on my having been a very good senior officer employee of the company (as stated by Mr Jim Morton) for over 36 + years and that this situation is being caused by a once in a lifetime global event.

The granting of this request would not cause 'an unjustifiable hardship on the

employer" or a situation where "services or facilities" required for the particular employee cannot reasonably be provided or accommodated'. (Justice Kirby in Christie V Qantas).

There could be no greater exceptional circumstance than the COVID 19 situation that has basically shut down aviation and other business entities globally for a long period of time. It was due to the COVID 19 situation that my B737 Domestic Training position was not allocated to me by my retirement age even though my formal request for this position had been submitted many months prior in 2019 well before the emergence of COVID 19

Several years ago, I made a phone call to Qantas Flight Crew Allocations (the group who are responsible for scheduling pilots onto flight training courses) to ask for information on the process in transferring from the A380 International Long-Haul fleet to the Domestic B737 fleet upon reaching my 65th birthday. I was advised to place my formal request for the move into the system with a request that the course start after my 65th birthday (so as I could continue with A380 flying for as long as possible prior to my move to short haul) the process would then have me use some of my accumulated leave from the date of my 65th birthday until my B737 course was to start (possibly for some months depending on the frequency of courses at the time).

I was told that this is the normal process which I know to be true (please see evidence from Capt. John Smith in his accompanying letter - Document "D"). I did make this request in the suggested way as can be seen in – (Document "E"). When COVID 19 caused the dramatic slowing down of the economy and aviation sector there was no B737 course available for me to be allocated into for an unspecified time.

When I realized that this situation was occurring, I contacted Mr. Doug Alley (Head of Base Operations QF) and asked if I would be able to extend my leave period from what was to be possibly a few months to whatever period would be required (by taking some or all of my accumulated (during the 37 years) of leave – which was over 200 days leave at the time – or to take leave at half pay. I even offered to take leave without any pay.

One week before my 65th birthday Mr. Doug Alley confirmed to me in a phone call that these options were going to be made available to me. I gladly accepted this offer and remained on the books as an A380 Captain with pay and a roster of leave. I also received a confirmation of employment letter on the dated 24th July 2020 (one week after my 65th birthday) stating that I "currently hold the position of Captain A380 on a Full -Time basis" (see document 'F'). I also received another stand down notice 15th Oct 2020 (see document 'G1') and one on 20th Aug 2020 (see document 'G2') that all the other A380 Captains received which was post my 65th birth date (which all confirmed that the offer was accurate, I was very relieved and pleased). You can imagine my disappointment and surprise to be told some weeks later that I was going to go through the process of being dismissed due to my age being over 65.

I was told that I had to respond to a pre termination letter which I did (letter from QF document 'C') (My response/request letter Document 'A')

Several weeks later my employment was terminated (see Outcome Letter Document 'B' and Statement of Separation document 'J')

The respondent has made reference several times to the High Court Christie case (Capt. Christie v Qantas 1998).

I believe that the circumstances which caused the adverse findings for Capt. Christie by the Court and then the High Court are very different and therefore totally irrelevant to my case.

I am not asking for any special rostering treatment from Qantas , which was the negative, as requested by Christie and was found against. Christie was asking for very special individual rostering changes which, if granted, would cause great hardship to the company and his colleagues by accommodating his desire to only be rostered to fly into the small part the network which did not operate into the ICAO airspace after the nominated retirement age.

I have only been asking for a period of my leave until I can start my job in the different and not ICAO affected Domestic operation (so that I can continue with my hard-earned and maintained career as a Captain /Pilot) which causes no hardship to the company or my colleagues. This is totally different to the Christie case.

The Honourable Brennan CJ said: (in the Capt. Christie Case)

> (a case Capt. Christie v Qantas requesting that he remain in the long-haul Fleet after the long-haul retirement age but only to operate to that small part of the network that had no restriction on age, that was decided against him by the High Court)
>
> [1] I should wish to guard against too final a definition of the means by which the inherent nature of a requirement is determined. The experience of the courts of this country in applying anti-discrimination legislation must be built case by case. A firm jurisprudence will be developed over time; its development should not be confined by too early a definition of its principles.
>
> [5] he could not participate equally with other pilots of similar seniority in the bidding system. ... his inability to bid and to be selected for some flights skews the equitable operation of the system

Where Christie was asking for the company to only assign him on flight duties to a small portion of the flight network so as to be able to avoid flights into areas that he was not able to because of ICAO requirements I am only asking to be granted a form of leave (including leave without pay) for some months to be able to continue to operate as a pilot with Qantas domestic which is the operation that has no ICAO age restrictions therefore causing no disadvantage to Company or Colleagues due my not needing special rosters as Capt. Christie would have required as he was asking to stay on the International Fleet."

Consideration – Valid Reason

[74] Nothing about the decision to dismiss Messrs Peggie and King related to their physical or mental ability to fly an aircraft. Nor is this case about aircraft safety. In the *Christie*

matter, at first instance, Wilcox CJ,

> "concluded that none of the evidence supports any conclusion about the relationship between age and aircraft safety. … the compulsory retirement of pilots … is therefore not defensible on medical or safety grounds. …Wilcox CJ's findings on the medical and safety arguments were not challenged on appeal (in either the Full Court of the Industrial Relations Court of Australia or the High Court)."[24]

[75] I accept that if the termination of the employment of Messrs Peggie and King was founded in an unlawful ground of discrimination (for example age discrimination) then the dismissals would be unfair. A prejudiced reason cannot be a valid reason for dismissal.

[76] The *Age Discrimination Act 2004* (**ADA**) prohibits discrimination in employment on the basis of age[25]. Dismissing an employee because of their age is unlawful[26]. The ADA covers direct discrimination[27] and indirect discrimination[28]. However, the ADA allows an employee to dismiss an employee because of their age if the employee cannot perform the inherent requirements of the particular position because of their age.[29]

[77] What is essential to the consideration of the matters before me is the meaning of "inherent requirements." The *Christie* decision is clearly relevant. Although neither Messrs Peggie or King seek to continue flying long-haul/internationally, I reject the contention that *Christie* is not relevant. Their substantive position, prior their dismissals, was that of an A380 pilot on Qantas' international routes. If they are to be reinstated, it must be to that position (neither Applicant identified another role into which they should be redeployed) – albeit in a stood-down capacity.

[78] Consistent with the authority in *Christie*, I find that the particular position held by Messrs Peggie and King was that of an "A380 pilot on Qantas' international routes". They are not just pilots. As was found in *Christie*, the international nature of the position held by Messrs Peggie and King was fundamental to their employment.

[79] Their employment was governed by the LHEA. The terms of the LHEA (clause 15.4.2) require that "pilots will serve the Company, in any part of the world where the Company may from time to time be operating." I take this to mean that long-haul pilots must be able to operate without restriction in all international airspaces in which Qantas operates. It is not sufficient that a long-haul pilot could fly in an airspace where the Rule of 65 does not apply. There are only a few enlightened countries that do not discriminate on the basis of age and there would be insufficient full-time work for all the pilots over the age of 65 years. In any case, it appears that the Qantas rostering system does not allow for the creation of special exceptions for specific pilots due to their inability to fly to certain locations because of the Rule of 65.

[80] It might be argued that Messrs Peggie and King were not, by reason of them turning 65, unable to perform the characteristic tasks and skills of a pilot (even an international pilot).

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[24] Anna Chapman, Case Note "*Qantas Airways Ltd v Christie*", Melbourne University Law Review, Volume 22, 743 at 749.

[25] Section 18, *Age Discrimination Act 2004*.

[26] Section 18(2)(c), *Age Discrimination Act 2004*.

[27] Section 14, *Age Discrimination Act 2004*.

[28] Section 15, *Age Discrimination Act 2004*.

[29] Section 18(4), *Age Discrimination Act 2004*.

There is no evidence that they cannot fly an international aircraft. However, what does exist is a geographical impediment (as opposed to physical or mental impediment) to them flying to some countries (i.e. those that apply the Rule of 65).

[81] It is arguable that the rostering difficulty that this causes Qantas does not elevate being under 65 years to the level of an inherent requirement of their employment. I note that the age limit has increased over time. I note that not all countries apply the Rule of 65. It is not applied in Australia, New Zealand, Japan and South Africa. It seems odd to suggest that something is "inherent" when it is subject to change and geographical locations.

[82] In his dissent in *Christie*, Kirby J observed,

> "[164] … 1. The adjective "inherent" qualifies the noun "requirements". The meaning to be given to the word "inherent" may be assisted by resort to dictionaries of the English language. The Oxford Shorter English Dictionary defines "inherent" as "sticking in; fixed, situated, or contained in something ... existing in something as a permanent attribute or quality; forming an element, esp an essential element, of something; intrinsic, essential". The Macquarie Encyclopaedic Dictionary of Australian English confirms the notion of the permanency of the inherent characteristic. "Inherent" is defined as "existing in something as a permanent and inseparable element, quality, or attribute". These dictionary meanings reinforce my own understanding of the word. They are appropriate to the context of s 170DF(2) of the Act. Thus the "inherent requirements" of the particular position must be those which can be regarded as permanent and integral. This fits comfortably with the case law to which Gummow J has referred. The requirements are not those which are transient, subject to change, geographically limited or otherwise temporary. The word "inherent" imports those features of the requirements for the particular position as are essential to its very nature.
>
> 2. This differentiation between "inherent" and "non-inherent" requirements is particularly appropriate to the context of s 170DF(2) for two reasons. The first is a verbal reason. If it had been intended to permit transient or changing requirements to be taken into account, it would have been possible for the drafter to drop the world "inherent", in the present context. There is no doubt that the "requirements of the particular position" which Captain Christie held included the requirements that he be able to fly a B747-400 aircraft anywhere in the Qantas network. But it is necessary for the word "inherent" to be given work to do. This enlivens the second argument. It is one derived from the context. The purpose of identifying the prohibited reason of discriminatory termination is obviously to prevent such decisions being made on arbitrary or stereotyped grounds, including by reference to age. The provisions of s 170DF(2) must be read in such a way that the sub-section does not undermine the achievement of that purpose. That is why the adjective "inherent" has been added. It is not any "requirement of the particular position" which will prevent a matter from constituting an unlawful reason for termination of employment. To be within the sub-section, it is necessary to show that the requirements of the particular position relied upon are inherent, ie that they involve permanent features of the position and thus not such features as vary in time and place.
>
> 3. When the phrase, so understood, is applied to the evidence as found in this case, even when the definition of the "particular position" is extended to that of an international pilot flying B747-400 aircraft for Qantas, it cannot be said that the "inherent requirements" of that position exclude reaching a given age. Numerous

elements of the evidence demonstrate that this is so. The age of sixty can scarcely be described as "permanent". The evidence shows that the retirement age for Qantas pilots has varied over time, including by the increase from fifty-five to sixty years during Captain Christie's service. The same aircraft may be flown domestically by a pilot as a sector of an international trip. Accordingly, the "requirements" are not "inherent" at that time. The evidence also demonstrated that for some international routes there was no impediment by reference to the Rule of 60. The disqualification upon the pilot is thus shown to be connected with geography and rostering. It is not an "inherent", ie a permanent, requirement of the particular position. …

4. … in s 170DF of the Act … the Australian Parliament has prohibited an employer from terminating an employee for specified reasons, including age. It has given relief from that prohibition but only if the reason for termination is based "on the inherent requirements of the particular position". There is no mention of bona fides. There is no reference to reasonableness. There is no consideration of business necessity. Operational requirements (referred to in the immediately preceding section) are not an excuse. Instead, attention is focused upon the inherent, ie permanent, requirements of the particular position. In the face of the evidence accepted in the present case, it would be a bold person who asserted that being under the age of sixty was a permanent requirement of the particular position which Captain Christie enjoyed at termination. It is a present requirement. But, even then, only in some parts of the world. It is not a requirement for domestic sectors or for certain international flights. It cannot therefore be described as an "inherent" requirement of the position."

5. It seems clear from the heading which the primary judge used, in that part of his reasons where he came to his ultimate conclusion on this point ("The operational issue") that he took a different view of the meaning of "inherent". He regarded operational considerations as being involved in the "inherent requirements" of the particular position in question. In this, with respect, he erred. …

[83] It is an attractive reasoning.

[84] Therefore, it could be argued that the Rule of 65 is an operational issue and not an inherent requirement of the position. I doubt Qantas would dismiss all its female pilots if a country to which Qantas flies banned female pilots from landing in their country. If this became an operational issue for Qantas, I suspect a rostering solution would be devised so that female pilots could continue to fly to less sexist countries that did not ban their arrival. Similar concerns were expressed by Marshall J in the *Christie* appeal to the Industrial Relations Court of Australia.[30] In the High Court of Australia appeal Kirby J said[31],

"I also agree with Marshall J's remark that the logical consequence of Qantas' position was that Qantas would be entitled to terminate the employment of all of its female pilots if one or more foreign countries on its routing would not permit them to fly into their airports. Similarly, if particular nations decided that pilots of a sexual orientation ("sexual preference") to which they objected would not be permitted to land aircraft at their airports or fly through their airspace. To allow such discrimination to operate would be to defy the purposes of the Act and of the international law to which it gives effect. This point was never satisfactorily answered by Qantas.

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[30] *Christie v Qantas Airways Limited* [1996] IRCA 276, (1996) 138 ALR 19, 39.

[31] 152 ALR 365, 414.

[85] However, it is not for a mere Commissioner to decide differently to a majority of the High Court of Australia. While the Commission is not bound by the principles of *stare decisis* it has consistently been held that the doctrine of precedent and the predictability of the law are important considerations. It is not for me to direct Qantas to alter its roster bidding system to accommodate pilots who have turned 65 years of age.

[86] I accept that there was a disparity in the reasons of the majority in *Christie*. For my own part, as between the members of the majority, I am most attracted to the reasons of McHugh J. This is because his reasons were tied to the Rule of 60 (as it then was) rather than Qantas' rostering system. Giving primacy to the rostering system, in my opinion, imports a notion of reasonableness into the notion of 'inherent requirements'. Such a notion has no place in anti-discrimination law unless expressly provided for. The ADA does not expressly provide for an exemption based on an unjustifiable hardship being visited upon the employer.

[87] I respectfully adopt McHugh J's reasoning. He explained the important difference between "a job" and "a position" as follows,

> "73 In most cases, the distinction between the requirements of a position and the requirements of a job will be of little significance. But it is a mistake to think that there is no distinction between "a particular position" and "a particular job". In some cases the distinction between the inherent requirements of a particular position and those of a particular job, although subtle, may be material. This is often likely to be the case where qualifications are concerned, particularly those qualifications that are not concerned with the physical or mental capacity to perform the tasks involved in the position. Thus to be an American born citizen is an inherent requirement of the position of President of the United States, but it is not an inherent requirement of the "job" of President if that term refers to the work done by the President."

[88] What this jurisprudence means is that an inherent requirement is something that can change. It is not, as the natural meaning of the word "inherent" might suggest, fixed. For example, working with the analogy above used by McHugh J, the inherent requirement of the job of President of the United States of America could change. There is nothing preventing the citizens of the United States of America from amending the country's Constitution (it presently has 27 amendments) so that Article II, Section 1, Clause 5 no longer requires that,

> "No Person except a natural born Citizen, … shall be eligible to the Office of President …"

[89] The present inherent requirement of the position of President of the USA could be removed with the effect that a child born in Bendigo, Victoria, Australia could just as equally run for President of the USA as a child born in Kansas City, Missouri.

[90] McHugh J further held that,

> "74 Mr Christie's "job" was to captain international flights. His "position" was Captain of Qantas B747-400 aircraft flying internationally. What is an inherent requirement of the position of Captain of such an aircraft is not necessarily an inherent requirement of the tasks that the Captain performs, and an inherent requirement of the tasks of that Captain is not necessarily an inherent requirement of the position. In the report of the International Labour Organisation's Commission of Inquiry into the observance of the Discrimination Convention by the Federal Republic of Germany,

"inherent" was interpreted to mean "existing in something as a permanent attribute or quality; forming an element, especially an essential element, of something; intrinsic, essential". The term "inherent" in s 170DF(2) should be given the same meaning. Importantly, for the purposes of this case, that which is essential to the performance of a particular position must be regarded as an inherent requirement of that position. …

86 Nevertheless, the conclusion that it was an inherent requirement of Mr Christie's position as a Qantas Captain of international B747-400 flights that he be able to fly to a reasonable number of Qantas' numerous overseas destinations is inescapable. It was plainly an "inherent requirement" of the position of such a Captain that he or she should have the capacity (physically, mentally and legally) to fly B747-400 flights to any part of the world. That was an indispensable requirement of the position. Having regard to the fact that pilots over 60 are unable to fly over the greater portion of Qantas routes, it is an essential incident of that requirement and therefore an inherent requirement of the position of Captain that the holder be under 60. If Qantas had to employ persons over the age of 60 in the position of a Captain of a B747-400 flying internationally, the inherent requirements of the position of Captain of such an aircraft would be very different. It is true that a contractual requirement does not necessarily equate to an "inherent" requirement. However, it was essential that, at the very least, a pilot in Mr Christie's position should be able to operate a sufficient number of flights to meet the requirements of his employment with Qantas as an international pilot. It is probably the case, having regard to the terms of the employment contract, that the Captain of a Qantas B747-400 flying internationally should be able to fly to every Qantas destination. It is unnecessary, however, to decide that point in this case.

87 When Mr Christie turned 60, he was unable to perform a large and essential part of his duties. Whether an inherent requirement of his position is identified by reference to his age or merely by reference to an ability to fly to a reasonable number of Qantas' overseas destinations is immaterial, as the former necessarily incorporates the latter. It is unnecessary to determine what conclusion might be reached if only a small number of countries imposed the 60 year age ban. The ability to fly to most of Qantas' overseas destinations is a requirement which was, to use the words of Cooper J in Commonwealth of Australia v Human Rights and Equal Opportunity Commission32, "truly necessary to ensure the adequate performance of the employment".

[91] Messrs Peggie and King contend that because, presently, all international pilots are stood-down, because they are not flying at all, it is not an inherent requirement of their position as an international pilot that they be under 65 years of age. I am not attracted to that argument. The requirement of the position is not altered because Qantas is not presently flying internationally. The requirement of the job has changed, but not the position.

[92] The logical extension of the Applicants' argument is that, because there is no flying being undertaken by international pilots, there are currently no inherent requirements of the position at all. Presumedly they argue that it is presently not an inherent requirement of a pilot that they know how to fly an A380 aircraft (because no one is flying them). That cannot be correct.

[93] The requirement of the position as an international pilot remains constrained by the Rule of 65. The Rule of 65 is in operation. It is, presently, a permanent feature of the

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[32] (1996) 70 FCR 76 at 88.

requirements of international flight in most jurisdictions. It remains an integral feature of the position itself. The standing down of international pilots by Qantas has not changed the existence of the requirement. Messrs Peggie and King remain unable to perform a large and essential part of their duties as international pilots by reason of the Rule of 65.

[94] It is obvious from the chronology of events set out above that, as between the date upon which each of the Applicants turned 65 and the cessation of their employment, there was a period of time in which they continued to be stood-down and it was possible for Qantas to continue to employ them. The Applicants contended that, because they remained employed beyond their 65th birthday, this proves that it would have been possible to continue to retain them and goes against Qantas' argument about 'inherent requirements. Mr Alley explained the departure from the usual process as follows:

> 45. Mr Peggie remained stood down beyond his 65th birthday in August 2020, even though he could not perform the inherent requirements of his position from that date. At the time Mr Peggie turned 65, the Qantas business was in crisis mode due to the effects of the COVID-19 pandemic and was still in the process of working through the various options of managing its long haul surplus and the impact on its long haul workforce. These factors contributed to delays in operational decisions with the unintended consequence of Qantas maintaining Mr Peggie on stand down from a position he could no longer perform.
>
> …
>
> 55. On 21 March 2020, Mr King was stood down from his employment. Mr King remained stood down until the cessation of his employment. Although Mr King remained stood down after turning 65 years of age in July 2020, this did not mean that Qantas accepted he could perform the inherent requirements of his role. The same factors identified in paragraph 45 above all contributed to delays in operational decisions being made about the employment of Mr King which had the unintended consequence of Qantas maintaining Mr King on stand downs

[95] The explanation for the delay in actioning the dismissal is not to be taken as a concession by Qantas that the employment could be maintained. The reason for the delay in taking action was understandable.

[96] For the above reasons, I find that the inability of the Applicants to perform the inherent requirements of their positions as a A380 pilot on Qantas' international routes (because they had both reached the age of 65 years) was a valid reason for the dismissal.

[97] For the avoidance of doubt, let me make it clear, that I am not satisfied that the dismissal of Messrs Peggie and King constituted unlawful discrimination in the form of age discrimination.

Notification of the valid reason - s.387(b)

[98] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made,[33] in explicit terms[34] and in plain and clear

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[33] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 at [41].

[34] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

terms.[35] In *Crozier v Palazzo Corporation Pty Ltd*[36] a Full Bench of the Australian Industrial Relations Commission dealing with similar provision of the *Workplace Relations FW Act 1996* stated the following:

> "**[73]** As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted."[37]

[99] The show cause letters and letters of termination are evidence that the Applicants were notified of the reasons for their dismissals. I find the Applicants were notified of the reason for the dismissal.

Opportunity to respond - s.387(c)

[100] An employee protected from unfair dismissal must be provided with an opportunity to respond to any reason for dismissal relating to the conduct or capacity of the person. This criterion is to be applied in a common sense way to ensure the employee is treated fairly and should not be burdened with formality.[38]

[101] The chronology above sets my factual findings. Having regard to the opportunity provided to the Applicants to respond to the show cause letters I find the Applicants were given an opportunity to respond to the reason for the dismissal.

Unreasonable refusal by the employer to allow a support person - s.387(d)

[102] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, the employer should not unreasonably refuse that person being present.

[103] In the present matters the Applicants were offered an opportunity to have a support person. Neither of them availed themselves of the opportunity.

[104] I find the Respondent did not unreasonably refuse to allow the Applicants to have a support person present at discussions relating to the dismissal.

Warnings regarding unsatisfactory performance - s.387(e)

[105] The Applicants were not dismissed for unsatisfactory performance. This is not a relevant factor in determining with the dismissals were unfair.

Impact of the size of the Respondent on procedures followed - s.387(f)

[106] The size of the Respondent's enterprise may have impacted on the procedures followed by the Respondent in effecting the dismissal.

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[35] *Previsic v Australian Quarantine Inspection Services* Print Q3730.

[36] (2000) 98 IR 137.

[37] Ibid at 151.

[38] *RMIT v Asher* (2010) 194 IR 1, 14-15.

[107] Qantas followed a pre-determined process that it applies to long-haul pilots who are about to turn and then do turn 65 years of age. I find the size of the employer's enterprise did impact on the procedures followed in effecting the dismissal in a positive way. It was a fair process.

Absence of dedicated human resources management specialist/expertise on procedures followed - s.387(g)

[108] The absence of dedicated human resource management or expertise in the Respondent's enterprise may have impacted on the procedures followed by the Respondent in effecting the dismissal. In the present matters there was no absence of management. This is not a relevant consideration.

Other relevant matters - s.387(h)

[109] Section 387(h) provides the Commission with a broad scope to consider any other matters it considers relevant.

[110] Mr Peggie submitted that,

> "Other relevant matters
>
> Differential treatment compared to treatment of other employees.
>
> Historically Qantas has provided opportunities for transfer to short haul in order that pilots continue their career beyond the age of ICAO restrictions. I have not requested any special treatment. I have confirmed with a pilot who, after turning 65, was on annual leave until a short haul vacancy was fulfilled. (see email attachment) This is the same position that I had hoped for.
>
> Harsh impact of the dismissal on the employee's personal or economic situation
>
> Following this dismissal and especially considering my age, I will find it difficult to find work comparable to what I expected as a pilot in short haul. The job of being a pilot is a specialist job with limited transfer of skills. I currently support two sons who study music at Sydney University and my economic situation which had been supported by the Government's jobkeeper payments is challenging.
>
> Employment Record
>
> I have been employed by Qantas for over 36 years. I have more than 25,000 flying hours. I have accumulated 1 year's sick leave. I have always been prepared to help out beyond the requirements of my contract. I have had to take long service leave when there was a downturn in business and conversely relinquished leave and worked additional duties when there were too few pilots. I have frequently made personal sacrifices which assisted in managing the vagaries of aviation. I am proud to be a Qantas pilot and I continue to have a passion for flying and aviation. I have always endeavoured to work to the best of my abilities and be a loyal representative and advocate for Qantas Airways.
>
> I am competent and qualified to continue working as an airline pilot and my current medical certificate has no limitations.

Age Discrimination

There is no valid reason for my dismissal at this time. I was allocated duties after my 65th birthday and could continue to be allocated duties compatible with the Long Haul pilot's Enterprise agreement until transfer to short haul.

The term "inherent requirements" is too narrowly applied by Qantas given all the circumstances. If I meet the inherent requirements of my job, then it would be unlawful to be dismissed based on my age alone.

The Fair Work Act 2009 provides protection from discrimination based on a person's age except if it is because of the inherent requirements of the particular position concerned.

Qantas Airways v Christie (1998) HCA 18, Justice Gaudron of the High Court of Australia explained that determining if a requirement is an inherent requirement must involve consideration as to whether a position would be essentially the same in the absence of the requirement.

In my case it is clearly demonstrated that my 65th birthday did not change the roster. My age is not an inherent requirement of the job for the foreseeable future.

The Fair Work Act refers to the Age Discrimination Act 2004

Division 2—Discrimination in work

18 Discrimination in employment

(2) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's age:

(b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;

(5) In deciding whether the other person is unable to carry out those requirements because of his or her age, take into account:

(a) the other person's past training, qualifications and experience relevant to the particular employment; and

(b) if the other person is already employed by the employer—the other person's performance as an employee; and

(c) all other relevant factors that it is reasonable to take into account.

In this case the "inherent requirements" paragraph (4) does not apply to Paragraph (2)(b) and all of the matters mentioned in paragraph (5) would be in my favour.

If my dismissal was unlawful then it would be unjust or not a valid reason for dismissal.

COVID-19

The normal course of business is affected by COVID -19. It is considered a “once in a lifetime” event. It changes and modifies many elements of our lives and expectations. It affects what is normal, reasonable, just and fair.

I had the capacity to be a rostered long haul pilot because of the impact of COVID-19, the short haul transfer option was denied because of the same events. It is harsh to apply two negatives. Either look at the position during the effects of COVID or after the effects. I can be employed, without favour, under both scenarios.

In this matter, if COVID-19 had not occurred, I would have finished flying the A380 as close to my 65th birthday as possible and then transferred to the B737. If there was any delay required, my significant amount of annual leave could have been applied. This is nothing new or special, refer to Captain John Smith’s email attached. All normal protocols would have been used.

Under normal circumstances, the request to transfer to short haul should be considered in the light of the Fair Work Act s65 Requests for flexible working arrangements. The request, or bid, for short haul, is a request for a change in working arrangements. It is a standing request based on time and availability. If I had remained employed, I would have been eligible to meet all of these requirements of s65 in due course.

The dismissal letter states; “it would not be appropriate or reasonable to allow you to remain stood down in a role which you are no longer able to perform for the sole purpose of waiting for a vacancy in short haul to arise.” The FWA Part 6-4C s789GB refers to the object of the Coronavirus economic response:

The object of this Part is to:

(a) make temporary changes to assist the Australian people to keep their jobs, and maintain their connection to their employers, during the unprecedented economic downturn and work restrictions arising from:

(i) the COVID-19 pandemic; and

(ii) government initiatives to slow the transmission of COVID-19;

For Qantas to accept these variations in support of their business but not recognise the exceptional circumstances facing their employees is hypocritical at best. To summarise the reason for my dismissal that it would not be “appropriate or reasonable to remain stood down” is unfair.

To have deferred my dismissal, caused solely by a major pandemic, and used the stand down provisions or accrued leave could have been an option. I could have been given a pending short haul date. This would have given time to make a more accurate assessment of the pandemic’s impact on the aviation business, allowed time to arrange financial affairs and not abruptly terminated a proud and hard-earned career.

I would have expected a large company like Qantas to have facilitated a long serving, senior employee to continue their employment and not used reference to my age to help manage a surplus of crew.

All I have expected is a “fair go all round”. My dismissal was harsh, unjust and

unreasonable.

[111] Mr King submitted that,

"All Qantas A380 pilots and most other Qantas international pilots are and will be on a form of leave or stand down for some many months or even years waiting until they also can continue to operate as pilots with Qantas . The A380 pilots are of the belief that they will probably be waiting on stand down or leave for at least several years until the large capacity aircraft return to the Qantas operation. It is largely anticipated (as mentioned by the Respondent) in the Termination Document that was forwarded to me (see document 'B') that I would have had to wait until approximately May/June 2022 to transition to the domestic fleet which is well before I would be required for A380 operations.

My leave options would more than cover this amount of time. The document also states, "that training for 74 pilot vacancies that have been awarded may be deferred until the training year commencing 1st July 2021 accordingly, we anticipate that the earliest that training for any future vacancies might take place is in or around May/June 2022" (see document 'B').

I believe that this information is misleading as approximately half of those 74, are pilots of a different rank therefore a more correct number to affect my course date would about 37 pilots/Captains to train before me so it follows that the estimated training date as stated for me is overly conservative.

However all this information about the 37 pilots to begin training before me is probably not even relevant as the Enterprise Agreement Document applying to this situation states clearly in this Section:

Availability and timing of vacancy in Short Haul

Short Haul Enterprise Agreement 2020 (EBA8)

16.3.2

The Company will advertise initial vacancies planned for a training block annually. This will occur in April each year unless deferred for operational reasons after consultation with the Association.

16.3.15 Re-scheduled or deferred training course dates

(a) Training course dates may be rescheduled within a training block.

(b) A training course that is deferred beyond the end of the relevant training block will be deemed to be cancelled unless the Company and the Association agree to continue to defer it into the next training block.

Therefore, it follows that my training position will be much sooner than that stated in (Document 'B') as my seniority will have me on the first course of B737 training.

Terminating the employment of a 36 + year Senior Officer of the company (with a good record as stated by Mr Jim Morton and -see references by my direct managers

document ‘H’ and ‘I’) under these COVID 19 circumstances is I believe a somewhat harsh decision by the Respondent especially when the various leave options were readily available to manage the situation so that neither I nor the company were disadvantaged.

I believe that this comes under the section ‘any other relevant matters’ in the context of this matter.

As this situation is ‘centrally relevant to the consideration of weather a dismissal was unfair it should be given adequate consideration. (Fair work act s.387{h})

Clause 40 regarding LWOP and Part C of Schedule 1 to EA 10 are also relevant regarding the lack of hardship on the employer to meet my requests. In this regard, should LWOP be necessary, Qantas may grant such leave terminating at the commencement date of any training associated with the award of a 737 vacancy. As for Qantas’ concern regarding precedent, the argument appears to be based on age again, as surely there can be no other detriment ie: there is no entitlement to payments, superannuation, leave, loss of licence insurance etc. under clause 40. The only apparent entitlement is to staff travel.

The impact of the Respondents decision to unnecessarily terminate my employment as a pilot has been harsh as it had a large negative impact on my personal and economic situation. I have always (since my first flying lesson at 18 years of age see document ‘L’) been a keen and fully dedicated Aviator/Pilot. To have my very hard earned and maintained career taken away from me unnecessarily by the company I served very well for 36 + years (over 30 years as a B747 & A380 Jet Captain) when I had many years to continue as a pilot with the company, is, I believe harsh, unreasonable and possibly unjust.

It was my intention to continue to fly as a Domestic B737 Captain with Qantas for many years into the future. I am a very healthy and fit person/pilot as proven by the extreme official Bi-Annual medical examinations I undertake and always pass to a high standard. My dexterity and ability to think quickly is also proven by the extensive Flight-testing regime that I undertake many times a year as an Airline Pilot. I have no restrictions on my Airline Pilot’s Licence that would have any adverse effect.

I am currently still active in the workforce at this time as a heavy (Heavy Rigid 25,000kg) truck driver doing mainly night shifts, some in excess of 10 hours long on a medium term contract with Australia Post. This is a low paid and relatively low skilled and a somewhat mundane occupation however it is very hard for a pilot to find a replacement occupation in the aviation sector in normal times and it is especially hard during this pandemic period. Our skills as aviators are very specialised, so it is even harder to find satisfying work outside the sector.

I am not comfortable being retired at what I believe is an early age for me. This was confirmed to me during the many months that I did not work following my final flight in March 2020 I became very bored and unhappy. I still need the work structure in my life.

My capacity to remain as a Qantas employee was able to be met in exactly the same

way as it is being met by my A380 Captain colleges who are currently Stood Down or on some form of their leave awaiting the return of the A380 aircraft from the USA desert storage facility (probably for some years to come according to the CEO in his FY Results speech to the ASX 20 August 2020).

I believe that all A380 pilots should all be treated in the same or similar way; however, I have been treated less favourably.

I have been forced to retire because of my age when I should also be on leave as they are. I am able to carry out all the inherent requirements of my employment now, even though my age is more than 65 years (leave etc and B737 operations).

Capacity:

I have always been, and still are able to do the work I was employed to do by Qantas, that being to fly Qantas aircraft as a pilot even though I am now over 65 years of age.

I was employed to be a Qantas Pilot. (see Document 'K' letter of employment)

The assignment of my training position on the B737 Domestic Fleet has been delayed for some months totally because of the effect that the COVID 19 pandemic has had on the world.

I believe this should be seen as an exceptional once in a lifetime negative circumstance. I am hoping that consideration is given to this fact, leading to my reinstatement.

The Respondent is using clauses reserved for exceptional circumstances e.g. the stand down provisions (cl 15.6) in recognition of the unprecedented situation. Furthermore, the government has recognised this with temporary changes to the Fair Work Act in the form of JobKeeper variations in Part 6-4C of the Fair Work Act. For Qantas to accept these variations in support of their business but not recognise the exceptional circumstances facing their employees is hypocritical and not fair at best.

The head of the Qantas Human Resources Department Mr. Jim Morton stated that Qantas management was concerned that if they continued to keep me employed after 65 years of age with no B737 training position immediately available it would be setting a negative precedent for Qantas into the future. This was stated by him during the telephone Mediation Conference with the Commission on the 4th Jan 2021 which was mediated by Freja Soininen as the Conciliator for the Fair Work Commission.

I disagree with this line of thought based on the fact that (one case is shown by Capt. John Smith's letter see document 'D') it has been done before many times and my situation is being caused by a once in a lifetime event. I had my formal request to move to the Domestic Fleet in the system many months before the Pandemic began to affect the world and I would have moved there at about July 2020 if not for that event. Any other pilot making this request to move to the B737 in the future will not be making the request prior to this once in a lifetime event therefore creating a different

set of circumstances so my being reinstated cannot set a negative precedent for the Respondent."

[112] Qantas submitted in respect of Mr Peggie's application (and similarly in relation to Mr King), that,

Other relevant matters (s.387(h))

"47. The inability to perform the inherent requirements of a position does not trigger an obligation on an employer to create another position or to find work that the employee can do. There is no requirement on an employer to reorganise its system of work so that an employee with incapacity is allocated only the work that he or she can do or would like to do.

48. Nonetheless, as a considerate employer, Qantas did consider whether there were any other roles into which the Applicant can be redeployed.

49. Having regard to the skills and experience of the Applicant and the severe reduction in flying across its network caused by the impacts of the COVID-19 pandemic, Qantas was unable to identify any roles into which the Applicant could be redeployed in the near or reasonably foreseeable future. Notably, the Applicant has not been able to identify any such roles, despite having the opportunity to do so right up until the last day of his employment.

The Applicant cannot be transferred to short haul work because there is no available vacancy

50. At the time of the termination, his employment was as a First Officer A380. Prior to his termination he had bid for a short haul transfer, but it had not been granted by the award of a vacancy.

51. The premise of the Applicant's submission is that he is entitled to transfer to a short haul position in Qantas' domestic operations as part of ordinary career progression. The Applicant contends that by terminating his employment Qantas has denied the Applicant a "workplace right" or he has been prevented from exercising a workplace right. That premise is flawed.

52. While it is a term of the LHEA that a long-haul pilot may bid for a vacancy in a lower category, the award of a vacancy is dependent upon there being a vacancy and the pilot's seniority at the relevant time. There is no right to a short haul vacancy, notwithstanding Qantas has been able to accommodate bids in the past. The entitlement to bid is one thing, a guaranteed award of a vacancy at the time one is sought is another thing entirely.

53. In most recent years a small number of Qantas long haul pilots will seek to extend their flying careers beyond international retirement age by bidding to transfer to short haul. In the past non-COVID environment such bids have normally been successful because there were vacancies available due to the capacity of short haul flying and because the pilot presumably had the requisite seniority to be awarded the vacancy. But for COVID-19, the Applicant's request to bid for a transfer may have been successful. But none of those facts evidence any right to a short haul position

where no vacancies exist or any right to ongoing employment in the hope that such an opportunity may materialise in the future.

54. That flawed premise of there being a guaranteed entitlement to a short haul vacancy ultimately undermines the Applicant's submission that it is unfair or unjust for Qantas to deny him the opportunity to take leave or to remain in a stood down capacity until that purported entitlement materialises. The Applicant had a right to bid for a vacancy, but he has no "workplace right" to short haul role.

55. Immediately prior to the Applicant's termination Qantas established that the Applicant's bid to be transferred could not be accommodated because there were no pilot vacancies in short haul. Qantas also ascertained that due to a significant backlog in training and due to the operational impacts of COVID-19 there are unlikely to be any vacancies in the foreseeable future. At the time of the termination, it was Qantas' expectation that most likely there would not be any training for future vacancies before May/June 2022 at the earliest. The evidence comfortably demonstrates these facts.

56. Fairness does not dictate that Qantas must keep the Applicant in employment or find the Applicant work to do or to keep the Applicant on leave based on speculation that work may become available in the future particularly given that the Applicant was one among a broader group of pilots within the same age bracket, and Qantas had to ensure it was able to operationally apply the same and consistent approach across the board.

57. Further, the Applicant contends that the request to be transferred to short haul constitutes a request for flexible working arrangements under section 65 of the FW Act. Qantas denies that this constitutes a request of the kind contemplated by section 65. To the extent that it is (which is denied), Qantas had reasonable business grounds to deny the request given it was not possible for such a request to be accommodated in circumstances where there were no vacancies available in short haul.

The Applicant cannot remain in a stood down position

58. It is neither reasonable nor appropriate for the Applicant to remain indefinitely "stood down" from a position he cannot perform. By reason of his inability to perform the inherent requirements of the First Officer position, the Applicant cannot be stood up when flying returns on the A380 fleet and operational conditions improve.

59. Furthermore, because the Applicant does not have any right to a short haul role, it is inappropriate to utilise the stand down provisions of the LHEA to continue the
Applicant's employment indefinitely on speculation that a vacancy might arise in the distant future.

60. There is also a substantial economic impact on Qantas which cannot be ignored. If the Applicant were to remain stood down until a vacancy arose, the Applicant would continue to accrue annual leave, long service leave and sick leave during that period. That is an unreasonable and unfair impost on Qantas. The business and operations of the Company have been severely impacted by the COVID19

pandemic and Qantas should not be required to indefinitely bear the cost of employing long haul pilots who cannot and will never be able to return to long haul flying.

It was unreasonable for the Applicant to take paid leave or leave without pay on an indefinite basis

61. In considering the reasonableness of Qantas' decision not to allow the Applicant to take leave, the Commission should have regard to the financial cost if leave had been granted and the operational cost/benefit if the Applicant did not secure a short haul role in 2022 or later.

62. If the Applicant was to take leave until a vacancy arose, a significant cost would accrue to Qantas. The Applicant would continue to accrue annual leave, long service leave and sick leave during that period. Any decision to permit leave on an indefinite basis would likely have a flow on effect for other pilots in similar circumstances to the Applicant resulting in the further accumulation of cost to the business.

63. If a vacancy arises, the Applicant will have to undergo a period of paid training. Based on previous experience, long haul pilots who successfully transfer to short haul at or around the long haul retirement age of 65 will only fly for an average of 2.5 years before retiring, and about 30% of those pilots at or around the long haul retirement age of 65 will not pass the training program to transfer to short haul.

64. In any event, it is neither reasonable nor appropriate for the Applicant to remain on paid leave or leave without pay on an indefinite basis in a position which he cannot perform in the hope that a vacancy might arise in the distant future.

There is no differential treatment as between the Applicant and Captain John Smith

65. Qantas has not treated the Applicant any differently to other pilots who have turned 65 years of age.

66. There is no standard practice of long-haul pilots being placed on leave from age 65 until such time there is a vacancy available in short haul. The circumstances of Captain Smith are materially different given that he had already been awarded a vacancy in short haul and Qantas had allowed him to take a couple of weeks of leave prior to the commencement of the domestic aircraft training course. The email from Captain John Smith is neither evidence of a standard practice for which the Applicant contends nor is it evidence of a general practice at Qantas to allow leave to be taken if a vacancy in short haul has been awarded.

The Applicant was not redundant and not entitled to severance pay

67. The role of First Officer A380 on Qantas long haul operations is not redundant and the Applicant is not entitled to any severance payment.

68. The Applicant was not terminated because his position was redundant or because he was excess to Qantas needs. The Applicant was terminated because he cannot perform the inherent requirements of that ongoing role.

69. Even if the Applicant's position was redundant (which is denied), Qantas would be required to follow relevant processes under the LHEA before it could terminate his employment. Those processes require compulsory redundancies to be effected in reverse order of pilot seniority, such that it would be most unlikely that the Applicant would be made compulsorily redundant.

The Applicant is not entitled to voluntary redundancy (VR)

70. By reason of the COVID-19 pandemic there will be no flying for the majority of Qantas Long Haul pilots for at least 12 months and even when international flying does return, it is expected that there will be significantly less flying for a number of years. As a result, some aircraft fleets have already been retired (the 747s) and other fleets are unlikely to operate for at least two years.

71. Qantas has undertaken a review of Qantas's Long Haul flying to determine whether there is a need to reduce its pilot workforce. This process was undertaken in accordance with the terms of the LHEA and it identified 1 July 2022 as the earliest date Qantas anticipated flying might resume across all of its fleets. This was the reference date to assess the number of pilots needed to support the Qantas network. Qantas projected that it would have a surplus of at least 196 pilots as of 1 July 2022, taking into account natural attrition.

72. On or around 10 July 2020, Qantas offered a VR package to long haul pilots. Qantas considered expressions of interest in the VR program from all Qantas Long Haul pilots who would otherwise continue to be employed with Qantas in Long Haul after 1 July 2022 (i.e. only those pilots who will be contributing to the pilot surplus as at that date).

73. Long haul pilots such as the Applicant who are subject to mandatory long-haul retirement on or before 1 July 2022 are not eligible (as has been confirmed in the relevant communications with pilots) as they will not be contributing to the pilot surplus that the VR program is designed to address.

The Applicant's personal and economic situation

74. The Applicant contends that the termination is harsh because of its impact on his personal and economic situation. His personal situation is not unique (supporting two sons in tertiary education) and he is not alone in bearing the impact of COVID-19.

75. The Applicant has not suffered any financial loss or damage on account of his dismissal. On dismissal the Applicant was provided notice of termination and paid all outstanding accrued entitlements, including in respect of annual leave and long service leave. His final payment on termination was $158,065.90 (gross) or $85,841.53 (net), and he received an additional JobKeeper payment.[39]

76. Even putting the Applicant's case at its highest, his only loss is the loss of chance to secure a short haul vacancy at some time in the future.

[39] Like submissions were made in respect of Mr King albeit with different figures.

77. The Applicant has enjoyed long, secure, rewarding and well-remunerated employment as a Qantas long haul pilot. The Applicant has been on actual and constructive notice for his entire flying career at Qantas that he would be precluded from flying internationally upon reaching the age of 65 (initially 58). He has worked with a cohort of pilots the majority of whom retire at that age and it is reasonable to expect that a pilot in the position of the Applicant would arrange his life and finances around that reality. Even if the Applicant had hoped to continue flying beyond 65 it is reasonable to expect a pilot in his position would plan for the prospect that circumstances might not enable to do so (for reasons of health or other exigencies).

78. The Applicant has a duty to mitigate any claimed loss by making efforts to secure alternative employment. He says he will find it difficult to find work comparable to what he expected in short haul but he gives no evidence of what he has done to find
work. His "expectation" of a short haul pilot income into the future is based on a false assumption (as discussed above).

79. The Applicant is not precluded from seeking alternative employment elsewhere, including as a pilot.

80. By any reasonable measure, the payments made to the Applicant on the termination of his employment should be sufficient to enable him to weather a period of unemployment.

Employment Record

81. The Applicant cites his long employment record, his loyalty to Qantas and his commitment to aviation as factors which weigh in favour of a finding that his termination was harsh, unjust or unreasonable.

82. Qantas accepts that the Applicant has been a good and loyal employee. Qantas would like to think that it has been a generous and supportive employer and that the Applicant's long service is at least in part attributable to the career opportunities it has given the Applicant.

83. The Applicant's service is commendable but it does not undermine the valid reason for his dismissal or otherwise impugn Qantas' decision.

COVID19 and the Fair go all round

84. The procedures and remedies referred to in the Objects of Part 3-2 of the FW Act are intended to ensure that the "fair go all round" is accorded to both the employer and employee concerned. The interests of both parties must be considered.

85. The Application is framed by the COVID19 pandemic and must be viewed in its proper context. The pandemic has devastated the aviation industry worldwide, impacted every airline in the world, resulted in huge job losses, stand-downs and universal uncertainty about the future of the industry. The impact of this unprecedented disruption on Qantas and its workforce has been huge and is ongoing.

86. The Qantas Group has had to take unprecedented, urgent and drastic steps to limit cash outflows and raise equity to ensure that it has sufficient reserves to fund the eventual return to flying. In particular, when the time comes for resuming flying operations, the Group will need substantial financial resources to meet the substantial costs preparing for flying operations before receiving any revenue associated with those costs). It will not be possible to resume these operations if the Group's cash reserves have been exhausted or are otherwise insufficient.

87. The pandemic presents long term challenges, as there is real doubt about the timeframe and extent to which demand for flying (particularly international passenger flying) will return. The Group has determined that, in order to match the projections of reduced demand for air travel in the longer term, it will necessarily need to become a smaller airline for years to come.

88. The Applicant is not alone in losing his aviation job in the midst of this pandemic. He is perhaps fortunate not to have lost his job because of the pandemic as many hundreds of other have. The Applicant has enjoyed long term secure employment with Qantas for an entire career, right up until when most international long haul pilots would opt for retirement. Qantas has endeavoured to prolong his career but it can't.

89. As stated earlier, put at its highest the Applicant's case is that he lost the chance to secure a short haul vacancy at some time in the future. The loss of that remote chance is unfortunate, but it is just one of the unavoidable and irreversible impacts of the pandemic. Qantas is not responsible for the changed circumstances and the impact of the pandemic is not being disproportionately borne by the Applicant.

90. In all the circumstances, termination of the Applicant's employment was not harsh, unjust or unreasonable.

[113] In reply Mr Peggie submitted that,

Qantas' does not address the main issues in my case which are:

1. The A380 aircraft will not operate again until 2023. Pilots will not operate that aircraft to any destination where the over 65's rule applies until that time.
2. The only reason I am said to not be able to fulfil the inherent requirements of the role is because of the over 65's rule. Accordingly, I am able to fulfil the inherent requirements until 2023 and the return of the A380 aircraft to service.
3. I joined Qantas in 1984. I am one of the most senior first officers in the company.
4. It is very likely that Qantas will advertise vacancies on the B737 aircraft prior to 2023. If that were to occur, and I was employed by Qantas, I would bid for those vacancies. Because of my seniority I would almost certainly be awarded one of those vacancies. Provided there is a vacancy, and I was among the most senior pilots bidding for the vacancy Qantas does not have a discretion to deny me the position.
5. If I was successful in transferring to the B737 aircraft, I could continue to operate the B737 aircraft in the future, as the over 65's rule does not apply to its operations.

To dismiss an employee because of a pandemic and when there is a viable position for them to occupy after 36 loyal years' service is harsh, unjust and unreasonable.

Inherent requirements, roster and position

A pilot can be rostered for other duties.

These may be training and checking, administrative, leave or endorsement on another aircraft type. In my circumstances I was rostered to be stood down or to be on annual leave for the foreseeable future. My current title of A380 First Officer ignores the fact that this aircraft is not currently being operated by Qantas and will not again before 2023.

There remain pilots employed by Qantas who are referred to as B747 First Officers, yet Qantas has retired that aircraft.

Because of Covid pilots on the A380 and B747 have been stood down for extended periods. We have had no work to do for about a year and will not have any work to do for the next two or so years. It is possible that Qantas will never operate an A380 again. To be without flying work for three years is well beyond any sense of temporary. The titles of these pilots will remain until there is a change in the pilot's deployment. This stand down is not simply a short-term thing that does not affect the inherent requirements.

It is not reasonable to suggest that I currently cannot perform the "inherent requirements" of the role in circumstances where there is no meaningful role for me to perform.

I agree that if the A380 were to return to flying, and I was a First Officer on it (and over 65) then it would be reasonable for Qantas to terminate my employment. However, there is no need to do that now. The decision to terminate my employment means that I lose the opportunity to obtain a vacancy on the B737 aircraft.

The respondent states at [26]: "he has never worked other than as a long-haul pilot," This is not accurate, the work I regularly did was precisely the same as "Short Haul" crew. The statement implies there is some difference in the work done by long haul pilots and short haul pilots. This is not really true. The formal distinction is simply the aircraft type. However, short haul also means short domestic trips and I have done that kind of work over many years.

Fundamentally, as a pilot employed by Qantas, I was entitled to be awarded a vacancy as a short haul pilot if I chose to bid for one. The fact that I had not previously bid for one is not relevant.

Qantas Airways Limited v Christie (1998) 193 CLR 280 (Christie),

The Christie case is illuminating on many points and in particular rostering requirements. If there were no rostering problems for over 65 pilots, then the Christie ruling would have been different. At the time of my dismissal and for the foreseeable future there were no rostering issues based on age. Qantas is unable to specify any destination that I was required to fly to within the foreseeable future that had an age restriction.

Mr Alley says that the effect of Christie is that long haul pilots approaching 65 have to either leave Qantas or transfer to short haul.

The Christie case did not occur in the middle of a pandemic which thwarted my opportunity to operate as a short haul pilot.

The inherent requirements have been met and there is no valid reason for dismissal.

The roster I wanted beyond the 65 and COVID-19 was short haul: no rule of 65 issues, no seniority special clauses, no special treatment. The intention from the age discrimination statute is to ensure that reasonable opportunities from an employer are not denied based on age.

No available vacancy

The respondent's claim: "The Applicant cannot be transferred to short haul work because there is no available vacancy".

Covid-19 stymied the transfer to Short Haul last year.

Qantas have indicated that the B737 aircraft will be back to pre-Covid levels by the middle of this year.

In normal years Qantas advertises 20-30 vacancies for first officers on the B737. Qantas will need to do that for next year and for the year after to have enough crew to operate the aircraft at pre covid levels.

In the near future (and certainly before 2023) there will be vacancies for which I would have been eligible. My seniority amongst First Officers would ensure I was the first allocated a vacancy.

As I noted in my previous submission "I find the dismissal letter to be misleading as to the timing and availability of short haul vacancies." There has been no response to that. I would certainly expect vacancies in 2021. All vacancies will be available for bidding in order of seniority. Previous allocations will have expired and the process recommenced.

Remaining Stood down

The respondents claim: "The Applicant cannot remain in a stood down position".

I am not sure on what basis they say this. Qantas have kept A380 pilots stood down for the past 12 months and anticipate keeping them stood down for most of the next two years. The only times that Qantas takes pilots off stand down is to allow then to take periods of annual leave, and for short training sessions which last a day or a couple of days and which I would have been able to do.

By the time any requirement to be stood up on the A380 occurs there will be vacancies on B737, and I will have been entitled to a vacancy. There is no requirement for me to operate internationally on A380 aircraft.

Right to a short haul role

At [59] of the Respondents Submissions it says:

" the Applicant does not have any right to a short haul role".

This statement is only half true. I (like all pilots) had the right to a vacancy in short haul provided I was among the most senior that bid for it. Mr Alley agrees with this. He says at [27] "while a particular pilot may indicate a preference to bid for a transfer to short haul, the transfer is not guaranteed and there is no automatic right. A transfer is predicated upon there being an available vacancy in short haul operations and the particular pilot having the requisite seniority to successfully bid for the vacancy".

Impact on Qantas of keeping me employed.

At [60] of the Respondent's submissions they say:

There is also a substantial economic impact on Qantas which cannot be ignored.

The objection to the costs of taking leave are exaggerated and a little disingenuous.

Had I been permitted to stay and transfer to short haul (which would have involved a substantial reduction to my rate of pay), the cost to Qantas of my annual and sick leave entitlements would been substantially reduced.

Further, while it may be true that pilots continue to accrue sick leave while stood down that was not the case for me as the agreement has a cap on the amount of sick leave a pilot can accrue (365 days), and I had reached that cap.

Finally, I was (and am) willing to go onto a period of leave without pay for 12 or 18 months (or some other period if that works better) which would mean that there would be no cost to Qantas at all of me remaining employed.

Employment Record

My long, satisfactory and unblemished work record is acknowledged. 36 years and 25,000 flying hours need no further embellishment. A career as a pilot is challenged continuously and there are few professions that are subject to such frequent assessment and scrutiny with the job on the line. Customers expect the perfect outcome with every flight. An experienced and highly qualified pilot is taken for granted.

The respondent claims at [82]: Qantas would like to think that it has been a generous and supportive employer and that the Applicant's long service is at least in part attributable to the career opportunities it has given the Applicant.

The current circumstance indicates the complete opposite. In the past my relationship with Qantas has been a sound and respectful employer/employee one. I do not think the words "generous" and "given" could be used by Qantas. It is the other way round.

I would have thought my termination should at least have been postponed until a clear path could have been identified for me. To ignore that there is a once in a lifetime pandemic throughout these proceedings would be unreasonable and a travesty.

COVID19 and the Fair go all round.

The respondent refers to the COVID-19 pandemic and its costs and cash flows. As I mentioned earlier, Qantas had the opportunity to keep me stood down or on leave without pay until a short haul position was attained, or the A380 aircraft resumed operations.

Instead, Qantas chose to terminate me and pay out all my accrued entitlements. The option that I wanted would have delayed the cash outflow for several years at least and (because the B737 pay is lower) meant that it would ultimately be less.

I was not dismissed to help with the cash flow and any ongoing cost would be minimal.

The respondent claims at [88] and [89] that I did not lose my job because of the pandemic, that I lost a "remote" chance to a short haul position, that I should do what some other pilots do, that this is unavoidable, and my career can't be prolonged.

That is all incorrect. I lost the opportunity for a short haul vacancy, before I reached 65, because of the pandemic. I wanted an ongoing career, but Qantas withdrew its support at its own initiative notwithstanding the financial outcomes would have been preferable for both parties in the long term.

The COVID-19 effects on aviation resulted in there being a suspension in the industry. All pilot positions were frozen. All pilots were stood down. All sick leave was withdrawn. The role of employer/employee was put in a position of hiatus.

When the effects of COVID-19 are removed there will be a reassignment of many pilots in the Qantas fleet. Until then it would be harsh unjust and unreasonable to take advantage of this pandemic to isolate and take out a pilot from this workplace and dismiss him based solely upon him reaching a particular age. The stand down provision should be seen as just that: nothing is to happen to you as an employee until you are stood up. If you are stood up it should not be based on an unlawful discrimination.

Remedy

Qantas employs pilots who are over the age of 65.

I would like to be reinstated to the position of A380 First Officer (although that is simply the title).

I am willing to be reinstated on the condition that I agree to take leave without pay. This will eliminate any material cost to Qantas.

I am willing to commit to resigning from Qantas if I have not obtained a position on the B737 aircraft by the time Qantas restores the A380 to normal (rather than occasional) operation.

[114] In reply Mr King submitted that,

Summary of my position

I was terminated from my position as a pilot while stood down. My position at the time I was terminated was as a captain on the A380. Qantas has said that the A380 will not operate again until 2023.

The only reason that I was terminated was because Qantas says that I was unable to perform the inherent requirements of the position due to the requirement in some countries (not including Australia) that pilots must be aged less than 65. I was still able to perform all the other requirements of the position.

Qantas has said that the A380 will not operate again until 2023. This means there was no risk of a situation where I could not perform the inherent requirements until 2023.

I am one of the most senior pilots at Qantas. I wanted to transfer to the B737 aircraft. If this had occured then there would have been no issue around the age of 65 and inherent requirements as Qantas permits pilots to work on the B737 after the age of 65 (and for as long as they want, provided they still meet high standard Qantas required of its pilots.

Qantas normally advertises for vacancies on the B737 but did not last year because of Covid. Qantas has said that they expect the B737 to be back at pre Covid levels shortly. This will mean that they need to train more pilots onto that aircraft as many pilots left take VR and Early Retirement during the Covid period. Had I still been employed I would have been awarded one of those vacancies as they are awarded in seniority order and I am among the most senior.

Qantas raises the issue of cost of keeping me on when there was no guarantee I would move to the B737. In response I note that I offered to take as much leave without pay as was needed to ensure that I was not a cost burden on Qantas.

Detailed Response

The following are other matters referred to in the Applicants Reply Materials:

(Respondent)

10. On 22 February 2020, the Applicant sent Qantas a letter nominating his preference to transfer to a position as a Captain in short haul operations.

(Me)

The actual date that I formally nominated my preference to transfer to a position as a Captain in short haul operations was 16 Sept 2019 and updated some months after that.

….

(Respondent)

13. As of August 2020, approximately 74 pilots had been awarded vacancies in short haul and were awaiting to commence or complete their training, with no training likely to commence until after 1 July 2021. Training for any future vacancies was unlikely before May/June 2022.

(Me)

This statement is misleading for the following reasons:

I do not believe that this is true. Qantas says that the B737 will be back to pre-Covid levels by the next couple of months. I know a number of B737 pilots who have retired or resigned over the last 12 months. Simple maths says that Qantas will need to train a significant number of pilots onto the B737 aircraft in the short term. All current indications are that this fleet will require more pilots in the near future and will probably be a bigger division than it was pre-COVID.

Not all the 74 pilots are to be trained as Captains. It is likely that only about half will be captains (i.e. my rank) and the other half First officers.

If the training is not commenced by 30 June as Mr Alley suggests then the normal rule is that the pilots that have been awarded these vacancies lose them. This would mean that there is a likelihood that there will be a substantial number of vacancies in the next training year.

Even if I did not commence training until May/June 2022 it would still be more than 6 months before the earliest possible time when the A380 was going to restart and the earliest time when Qantas could honestly say that I did not meet the inherent requirements.

(Respondent)

22. In terms of the impact of the Chicago Convention on the Applicant's ability to perform the inherent requirements of his position, Mr King's circumstances are indistinguishable from those of Captain Christie in Qantas Airways Limited v Christie (1998) 193 CLR 280 (Christie), a High Court decision which is binding on the Commission.

(Me)

My situation is completely different from captain Christie for two reasons:

Firstly, and obviously, the aircraft I previously worked in is grounded and will not operate again until 2023. The earliest time in which I will be unable to fulfill the inherent requirements is 2023.

Secondly, I am not asking to be given any special rostering treatment. Capt. Christie circumstances arose when Qantas was a primarily international operator. He was asking for special rostering on the small subset of the Qantas routes which were in the domestic or local regional airspace to remain legal after his 60th birthday.

I have an option that was not available at Capt. Christie's time – to bid for a vacancy on the B737 and operate domestic services. I have never asked to fly on the A380 post 65 which is effectively what Capt. Christie was asking for.

The Christie decision was based mainly on the Rostering Difficulties required, therefore the Qantas appeal was allowed.

In my case I would be participating equally with all other pilots in the short haul operations.

….

(Respondent)

26. The Applicant's submission that he was employed as a "pilot" and occupied the position of "pilot" in some generic sense must be rejected. It is a misconceived argument which is inconsistent with the facts and authority.

(Me)

There are numerous pilots who transferred to short haul not long prior to their 65th birthday and continued to work into their 70's. This is quite a common practice at Qantas.

The only reason I was unable to do this was because of Covid and the flow on effect on vacancies in short haul last year.

If the respondent accepts that at the age of 65 many pilots can and have had a transfer to the domestic fleet without being dismissed and then reemployed, then it must accept that they were employed as a "pilot" in the generic sense as they can no longer act as international pilots.

The information regarding Qantas pilots only being employed to be international pilots as was the case when Christie and I were employed, is very out of date because in the mid 1990's (long after I became hired) Qantas took over a domestic airline called Australian Airlines (ex TAA) and Qantas then had many domestic pilots who would only be required to fly domestically and not in the ICAO age protected airspace. I have had the option since the 1990's of bidding for vacancies on the B737 fleet and Qantas would not have opposed or prevented that occurring at any earlier time.

(Respondent)

27. The evidence establishes that at all material times the Applicant's position was that of a long-haul pilot Captain A380. He was employed as a long haul pilot, his contract of employment required him to fly anywhere in the world as directed by Qantas, he has never worked other than as a long haul pilot, he is covered by industrial instruments which apply exclusively to long haul pilots, Qantas documentation confirms him as a long haul pilot and he acknowledges that he cannot perform short haul work and there is no "direct entry" to short haul in the absence of an available vacancy which is awarded on the basis of seniority.

(Me)

I disagree that my contract is A380 pilot. I have worked on the A380 only over the last 10 or so years. Before that I worked on other aircraft. My contract did not change when I moved aircraft.

I can and have performed short haul work in other airlines and also in Qantas on the B747 and the A380.

I am wishing to transfer to the short haul where all the flying work is domestic (no restricted airspace).

The issue around "direct entry" is misleading. I agree that I would only be able to go to the B737 if there was a vacancy. I am very confident there will be a vacancy in the next 2 years. I am one of the most senior pilots in Qantas so I feel very positive that I would obtain such a vacancy which are awarded on seniority.

(Respondent)

35. But for COVID-19 and the grounding of the A380 fleet, the terms of the Applicant's employment would require him to be available to perform service internationally. The grounding of the fleet does not alter his contractual obligations or the inherent requirements of the position he occupied. He cannot make himself available for international service now or at any time in the future.

(Me)

I agree that if Covid had not occurred and I had remained on the A380 then I could not do the inherent requirements. However, Covid did occur and the A380 fleet was grounded.

Qantas cannot have it both ways.

The reason that I was not able to transfer to the B737 prior to my 65th birthday was because of Covid.

In the meantime, I can perform the inherent requirements of being an A380 Captain, to the extent they currently exist. No Qantas A380 pilot will be required to crew an international service now or at any time in the foreseeable future (2023) as the A380 aircraft are in long term storage in the USA.

But for the COVID-19 I would be continuing my career by now by operating on the Qantas Domestic network as a B737 Captain.

(Respondent)

By reason of his inability to perform the inherent requirement of his position, the Commission should find that Qantas had a valid reason to terminate the Applicant's employment. Qantas has not engaged in unlawful age discrimination. On that question, the High Court decision in Christie is a complete answer.

(Me)

As above – I can perform the inherent requirements at the moment as there are no international services. Christie does not mention the situation where the aircraft was grounded for 3 years.

The Christie case information is very different and irrelevant this case.

(Respondent)

In most recent years a small number of Qantas long haul pilots will seek to extend their flying careers beyond international retirement age by bidding to transfer to short haul. In the past non-COVID environment such bids have normally been successful because there were vacancies available due to the capacity of short haul flying and because the pilot presumably had the requisite seniority to be awarded the vacancy. But for COVID-19, the Applicant's request to bid for a transfer may have been successful.

(Me)

I agree with this statement.

I note that there will very likely be fresh vacancies that I would be awarded prior to the A380 ceasing to be grounded.

(Respondent)

That flawed premise of there being a guaranteed entitlement to a short haul vacancy ultimately undermines the Applicant's submission that it is unfair or unjust for Qantas to deny him the opportunity to take leave or to remain in a stood down capacity until that purported entitlement materialises.

(Me)

I have not said I had a guaranteed entitlement.

Rather, I have said that I have a guaranteed entitlement to be awarded a vacancy on the basis of seniority, and that it is very likely that such vacancy will arise in the next two years.

(Respondent)

Immediately prior to the Applicant's termination Qantas established that the Applicant's bid to be transferred could not be accommodated because there were no pilot vacancies in short haul. Qantas also ascertained that due to a significant backlog in training and due to the operational impacts of COVID-19 there are unlikely to be any vacancies in the foreseeable future. At the time of the termination, it was Qantas' expectation that most likely there would not be any training for future vacancies before May/June 2022 at the earliest. The evidence comfortably demonstrates these facts.

(Me)

I disagree that there are or were unlikely to be any vacancies in the foreseeable future.

The latest information as at the 29th Feb'21 on the progress of the expansion of the Domestic B737 fleet is that as of March this year the bases are to be operating at the following levels:

Sydney: 63%

Brisbane: 100%

Perth: 78%

Adelaide: 81%

Melbourne: 17%

These numbers indicate that it will not be very long until all B737 bases are operating at 100% and probably much more than the pre-pandemic levels due to the reduced COVID-19 activity pus the roll out of the various Vaccines and the fact that the Qantas domestic fleet's biggest competitor Virgin is not now or in the future anticipated to not be operating at anything like the pre Qantas levels and Tiger Airlines is now out of business. It launched around two dozen new domestic routes. It is also anticipated that there is a large building of demand by the public for holiday travel so that the B737 pilot training is probably going to start very soon and continue for some time. This information indicates that the pre-COVID levels will be exceeded and therefore B737 training to start soon. (please see article 'A' Qantas Currently Holds 70% Of The Australian Domestic Market) ….

> Qantas Currently Holds 70% Of The Australian Domestic Market, by Andrew, March 2, 2021
>
> A resurgent Qantas is quietly stamping its authority on the Australian market. The airline now commands a 70% domestic market share. That's the result of a combination of internal and external factors, all skilfully parlayed by Australia's national airline into its present powerful position. It's undoubtedly good news for Qantas. Whether it's in the long-term interests of the airline industry and the traveling public is another matter.
>
> There are many reasons to be optimistic says Qantas CEO
>
> Many readers will see Qantas as a long-haul international airline. But short-haul domestic flying is the airline's engine room and makes up the bulk of its revenues.
>
> Over the last decade, Qantas' domestic market share has hovered around the 60% mark. Included in that market share figure are domestic Jetstar and QantasLink operations. In 2007, Qantas' domestic market share was around
>
> 63%. In the 12 months to June 30, 2016, it was down to 57%. Market share was back up to 63% in the 12 months to June 30, 2020. Now, domestic market share is up even more, bedding down at 70%.
>
> "There are many reasons to be optimistic," said an upbeat Qantas CEO, Alan Joyce, at an investor's briefing last week. "Our (domestic) competitive position

is likely to be the strongest in a decade, with about a 70% capacity share, the leading premium airline service and low-cost carrier in the market."

While the domestic market in Australia is recovering, it's still a way off from its 2019 highs. Nonetheless, Qantas expects its mainline domestic services to run at 80% of its 2019 levels this quarter and Jetstar domestic flying to approach 100% of 2019 levels.

"I think we're getting a lot more confident. And I think more confidence is coming in every day as the risks are reducing," Alan Joyce said.

"We've got Anzac Day, Easter, and the school holidays all lined up. On the basis that (local) borders remain open, and we don't see further lockdowns, you can expect demand to build to that 80%."

A combination of factors are boosting domestic business at Qantas

There is a combination of factors that benefits Qantas. Despite recently posting a multi-billion dollar half-yearly loss, the airline remains in a strong financial position with ample cash reserves.

They've got the money to bolster services. Qantas has also become more nimble. They've learned how to better take aircraft in and out of service as demand warrants. There's also a management team installed in the Sydney HQ that doesn't miss a beat (or an opportunity).

Over 2020, Qantas built up its intrastate, regional flights. It launched around two dozen new domestic routes. Local border restrictions are easing considerably and this time around, the restrictions look likely to stay eased. Meanwhile, its key competitor, Virgin Australia, was in the process of downsizing and very nearly went out of existence altogether.

"Virgin has shrunk considerably. Tiger's gone," said Qantas' Andrew David at the briefing. Virgin Australia's turmoil proved a boon for Qantas. Not only did they pick up corporate accounts and premium frequent flyers from Australia's second airline, ad hoc leisure travellers moved across to either Qantas or Jetstar in droves. Virgin Australia's troubles are a key reason why Qantas domestic is now so dominant.

Is Qantas' market dominance good for everyone else?

One of Qantas' less publicly stated goals will be to lock in this market share and reap the rewards as capacity grows. You can't blame Qantas for that.

Short-term, this isn't a big issue for your average punter. There's a nice price war on as all the players in the domestic market vie to get more people in the air. Those cheap fares are even extending into the premium cabins on some domestic airlines. But like or loathe Qantas, longer-term, this kind of market dominance isn't ideal.

Once things recover fully, having an airline own 70% of the market isn't good for passengers or the airline industry. It throws up barriers to and suppresses

competition. For the traveling public, it's likely to lead to higher fares down the track. It's not a monopoly but it's also not an open and competitive market.

Whether the other domestic airline industry players, Virgin Australia and Rex, can counter this dominance remains unknown. Right now, it seems unlikely.

Here is further information about the future of Qantas Domestic growth:

ASX/Media Release

HY21 Results Speech – Qantas Group CEO Alan Joyce

Sydney, 25 February 2021

Group Domestic

Domestically, both Qantas and Jetstar were cash positive in the half. In fact, 99 per cent of the time we were able to fly, we generated positive cashflow.

This tells you two things:

Firstly, that people are keen to travel when they have confidence on borders.

Secondly, we are managing our network and our costs closely, so we can seize on opportunities but not get caught out when things suddenly change.

Airlines usually have a summer schedule and a winter schedule.

During COVID, Qantas and Jetstar have had new schedules at least once a week.

On the revenue side, we've been able to add capacity and routes to take advantage of changing demand patterns.

This ability will benefit us well beyond COVID. And it comes on top of the product and service advantages that both Qantas and Jetstar have built over the years – which will continue to set us apart in this new market we're entering.

Hopefully, domestic border closures will soon be a thing of the past. With the vaccine now rolling out to frontline and quarantine workers, the odds of that are improving every day.

That's why we're so focused on recovery.

At the same time as managing the daily realities of this pandemic, we've also redesigned our business. These changes mean the Qantas Group of 2021 will be able to repair itself much faster than a pre-COVID Qantas Group could.

That ultimately helps position us for opportunities.

Whether that's new destinations, moving ahead with Project Sunrise or growing into opportunities in the domestic market.

For all the challenges and hardship, we are more and more optimistic about our future. Thank you.

Government Assistance

I want to acknowledge the Federal Government's continued assistance of aviation and the broader economy. Airlines have had the benefit of:

- Job Keeper
- reduced aviation charges
- and the opportunity to keep flying key domestic, regional and freight routes that would otherwise be unviable. That's provided work for our people and vital transport links for the nation.

Job Keeper is by far the biggest form of assistance, and there's an important distinction about the payments we received.

Most companies were able to use their whole Job Keeper benefit as a wage subsidy. But with so many of our people literally grounded – with no work to do – Job Keeper acted as a social safety net for individuals, more than as a wage subsidy for Qantas.

And we are very grateful it did.

(Me)

Qantas has had all this assistance from us taxpayers because of this once in a life-time event, the COVID-19. All I have been asking for is the ability to be given leave without pay (so as not to create a cost for the company) and then to be stood up with all previous rights, seniority and benefits, when my seniority number (earned since the 16th March 1984) rewarded me with a training position on the domestic fleet.

I would now like to be reinstated to this position back into Qantas .

(Respondent)

Furthermore, because the Applicant does not have any right to a short haul role, it is inappropriate to utilise the stand down provisions of the LHEA to continue the Applicant's employment indefinitely on speculation that a vacancy might arise in the distant future.

(Me)

I would have the right to a short haul role.

I am not asking to utilise the stand down provisions of the LHEA but have offered to take leave without pay to eliminate any costs to Qantas until a vacancy arises.

Phrases used by the respondent such as "speculation that a vacancy might arise in the distant future" are disingenuous and misleading at best. There are vacancies on the B737 almost every year. It has been the Qantas growth aircraft for the last 20 years.

Barring unforeseen events, they will need new pilots next year and the year after and into the future.

(Respondent)

There is also a substantial economic impact on Qantas which cannot be ignored. If the Applicant were to remain stood down until a vacancy arose, the Applicant would continue to accrue annual leave, long service leave and sick leave during that period. That is an unreasonable and unfair impost on Qantas. The business and operations of the Company have been severely impacted by the COVID-19 pandemic and Qantas should not be required to indefinitely bear the cost of employing long haul pilots who cannot and will never be able to return to long haul flying.

(Me)

There would be no ongoing or accrued costs to Qantas by me if I am on leave without pay (which has been my request – see my response letter Doc. 'A') until I fly for the short-haul division. To suggest otherwise is misleading once again.

Further, if Qantas had agreed to my request they would have delayed the my payout at termination of my earned leave of $262,859.97 (gross). Because B737 wages are lower, had I retired from that aircraft in the future with the same amount of accrued leave the payout would have been very much less.

(Respondent)

If the Applicant was to take leave until a vacancy arose, a significant cost would accrue to Qantas. The Applicant would continue to accrue annual leave, long service leave and sick leave during that period. Any decision to permit leave on an indefinite basis would likely have a flow on effect for other pilots in similar circumstances to the Applicant resulting in the further accumulation of cost to the business.

(Me)

This is simply not true. Pilots in leave without pay do not accrue leave.

(Respondent)

If a vacancy arises, the Applicant will have to undergo a period of paid training. Based on previous experience, long haul pilots who successfully transfer to short haul at or around the long-haul retirement age of 65 will only fly for an average of 2.5 years before retiring, and about 30% of those pilots at or around the long-haul retirement age of 65 will not pass the training program to transfer to short haul.

(Me)

I do not anticipate that I will not pass the training program to transfer to short haul. I have had a very good record of passing difficult flying and other training courses and exams throughout my whole flying career. It is a fact that I was one of a very small group of pilots to be counted as the youngest ever B747 International Jumbo Jet Airline Captains ever in the world, at the age of 35 years in October 1990. I now have 25,000 flying hours of which over 18,000 are as a Jumbo jet Captain.

I always spend many months prior to the start of all courses by preparing fully with extensive and relevant study.

I had been studying intensively for my upcoming domestic B737 course prior to the notification of my dismissal last year. I believe that the experience that I would continue bringing to Qantas flight operations will be well received by many people. It is my intention to work for many years into the future. It will be my intention to continue this B737 domestic course study as soon as I get access to the relevant training documents again when and if I am reinstated by Qantas with all previous rights, privileges and seniority. (See Doc 'H')

As to the suggestion that I would only operate for 2.5 years or something like that:

My intention and desire is to work into my 70's

If this was a reason for Qantas' action it would be age discrimination.

(Respondent)

In any event, it is neither reasonable nor appropriate for the Applicant to remain on paid leave or leave without pay on an indefinite basis in a position which he cannot perform in the hope that a vacancy might arise in the distant future. Qantas rejects the Applicant's assertion that representations were made to him to the effect that he could remain employed on either paid leave or leave without pay until such time there was a vacancy in short haul.

(Me)

The talk here about being on remaining on leave without pay for an "indefinate basis" in the hope that a vacancy "might arise" is very misleading and somewhat disingenuous by the respondent.

I make two points in response.

The first is that if I was still allocated to the A380 at the time it resumed normal operations I would have no concern about being terminated.

The second is that the discussion around leave was my attempt to reduce the cost on Qantas. All the other A380 pilots are stood down and continuing to accrue leave. I can and will be able to perform all the requirements of the role of A380 pilots until at least 2023 when international services resume.

Mr Alleys statement refers to my conversation with him.

My recollection of the representations made to me on a phone call with Mr. Alley are very clear and different to that stated here as I was very elated and relieved at the end of that phone call. Mr. Alley even took the time to point out to me that he had put more annual leave on my roster which was taking me well into the next month beyond my 65th birthday to begin with. I do remember that there was no such question by me suggesting "what would happen if the business did not decide to allow someone like me to remain on leave without pay" because there was no need for a question like that. We had just been discussing the fact that I would have to be prepared to wait until the

domestic fleet was back to 100% operations and then requiring more Captains and that there were a couple of dozen Captains to train prior to me and this could take many months. I was very pleased and stated that I would be very happy to wait me turn. All I can say is that this phone call was made by a very good manager who was possibly under a lot of work pressure at that time, due to the extra workload that COVID-19 had created for him as the manager tasked with making these decisions. Perhaps he did not recall the conversation as accurately as he could have because of that.

Soon after this phone call with Mr. Alley, I phoned several of my close friends with details of this call, to share my good news. I have confirmed with them recently regarding these details and they all confirm the details are as I recall them as stated here. I equate this situation to my having a form of contemporaneous notes about this call.

The offer was made to me, this offer was accepted by me and consideration was given to me, that being the many months (to November 2020) of pay in one form or another from my birthday (July 2020) and my continued roster over this same period.

(Respondent)

There is no standard practice of long-haul pilots being placed on leave from age 65 until such time there is a vacancy available in short haul. The circumstances of Captain Smith are materially different given that he had already been awarded a vacancy in short haul and Qantas had allowed him to take a couple of weeks of leave prior to the commencement of the domestic aircraft training course. The email from Captain John Smith is neither evidence of a standard practice for which the Applicant contends nor is it evidence of a general practice at Qantas to allow leave to be taken if a vacancy in short haul has been awarded.

(Me)

There is no standard practice of most of the pilots in Qantas being stood down and the aircraft being grounded.

My reason for including the information about pilots (including Capt. J. Smith) going on leave prior to commencing their short-haul training was to show that it can and has been done in the past. I would like the opportunity to do the same because of the negative effect that the COVID-19 pandemic has had on my training B737 domestic position. It would be a “Fair thing” for the Respondent to do.

(Respondent)

The Applicant contends that the termination is harsh because of its impact on his personal and economic situation. The Applicant submits that although he has found alternative employment, he is required to work long night shifts which is lowly paid and unskilled work. However, his personal circumstances are not unique, and he is not alone in bearing the impact of COVID-19. By any reasonable measure, the payments made to the Applicant on the termination of his employment should be sufficient to enable him to weather any financial difficulties he might face (for which no evidence has been led).

(Me)

The information given by me relating to my contract job with Australia Post was not intended to be related to my suffering any significant financial hardship although it is obvious that I would be much better off if I was earning a Captains salary for many more years. The information was given to describe how I am not comfortable being retired as I am a highly motivated person who wishes to work for many years into the future.

I don't feel ready to be retired at what I believe is an early age for me. This was confirmed to me during the many months that I did not work following my final flight to Australia from L.A. in March 2020 during this COVID shutdown as I became very bored and unhappy not working. I still wish to have a work structure in my life for many years into the future.

I plan to work into my 70's and want to do so as a pilot which is what I have done for the last 36 years.

(Respondent)

In any event, the Applicant has not suffered any financial loss or damage on account of his dismissal. On dismissal the Applicant was provided notice of termination and paid all outstanding accrued entitlements, including in respect of annual leave and long service leave. His final payment on termination was $262,859.97 (gross) or $141,996.13 (net).

(Me)

I find it difficult to understand the statement by the respondent "the Applicant has not suffered any financial loss or damage on account of his dismissal" when it should be obvious that any income that would otherwise have been earned beyond my dismissal date (especially the many dollars a year earned as a B737 Captain) is very different to earning no income from that date when in both cases the reimbursement for my untaken leave entitlement would have had to be paid to me. It should be obvious that there is a financial loss or damage to me in the one case compared to the other.

The very thought (as is insinuated above) that I should be happy with a payment, at long last, of a hard-earned sum of money (for leave not given for decades due to the short pilot establishment numbers) as if it was some sort of gift by the respondent to compensate me for a preliminary dismissal, is not very fair.

It is disingenuous of the respondent to claim in Para. 67) that I have not suffered any financial loss due to my dismissal. I had the potential to earn a good salary for many years into the future as a short haul Captain and then still be paid for the accumulated leave that was owed to me by Qantas for the many months of leave that I was not able to take during my career due to the pilot staffing levels and workload. The main loss however that I have suffered from this dismissal has been the possible loss of a continued very hard earned and maintained career (many people have no idea about the many possibly career ending exams that an airline pilot is required to pass in each year of his career). I consider the huge financial loss of continued salary to be the secondary loss. The Gross payout for my residual leave that I received recently was

always going to have to be paid to me. I had earned it and the respondent legally owed it to me.

The Fair Work Act Section ---- mentions Hardship due to financial reasons etc and I was addressing this point. It should be evident to any person that to be terminated and receive monies owed by the respondent with no future regular income is a very different situation in financial terms to the chance of earning a significant income for many years further into the future and then still be paid the sum of money legally owed by the respondent for the accrued unused leave.

(Respondent)

The Applicant has enjoyed long, secure, rewarding and well-remunerated employment as a Qantas long haul pilot. The Applicant has been on actual and constructive notice for his entire flying career at Qantas that he would be precluded from flying internationally upon reaching the age of 65 (initially 58).

(Me)

It is not correct to state that my career would have had to end at 65. My expectation was to continue with my career for many years past 65 by moving to the short haul domestic fleet even though I always fully accepted that my international career was to end at 65. The COVID-19 changed this situation for me.

(Respondent)

He has worked with a cohort of pilots the majority of whom retire at that age and it is reasonable to expect that a pilot in the position of the Applicant would arrange his life and finances around that reality.

(Me)

It is not my concern at what age other pilots wish to retire, it so happens that I have adequately covered myself financially for retirement even though I have been through a recent divorce and still have private school and other fees to pay as I have dependent teenagers. My submission regarding the Australia Post job is to convey the fact that I am not ready to retire for many years to come due to my desire to maintain a self-respect, dignity and remain fully active. I feel the need to at least be in the work force structure even though the present financial compensation is low compared to what I have been used to.

(Respondent)

Even if the Applicant had hoped to continue flying beyond 65 it is reasonable to expect a pilot in his position would plan for the prospect that circumstances might not enable to do so (for reasons of health or other exigencies).

(Me)

There was no statement by me that I had not planned for the prospect of my job ending for one reason or another because it is a fact that I have done so, however I still wish to work.

It should be obvious that an extra benefit of my continuing to work is that the future will be more comfortable for me and my children.

(Respondent)

The Qantas Group has had to take unprecedented, urgent and drastic steps to limit cash outflows and raise equity to ensure that it has sufficient reserves to fund the eventual return to flying. In particular, when the time comes for resuming flying operations, the Group will need substantial financial resources to meet the substantial costs preparing for flying operations before receiving any revenue associated with those costs. It will not be possible to resume these operations if the Group's cash reserves have been exhausted or are otherwise insufficient.

(Me)

One way for Qantas to have preserved some cash reserves last year would have been to have kept me on the seniority list on a form of leave or LWOP instead of terminating my employment and triggering in excess of a one quarter of a million-dollar payment to me for the leave entitlement owed to me. This payment would have been delayed until I did eventually retire in probably 5 to 10 years from now and then be paid to me as a much lesser amount (much lower pay rate as a domestic B737 Captain), had I not been stood down prematurely.

(Respondent)

The pandemic presents long term challenges, as there is real doubt about the timeframe and extent to which demand for flying (particularly international passenger flying) will return. The Group has determined that, in order to match the projections of reduced demand for air travel in the longer term, it will necessarily need to become a smaller airline for years to come.

(Me)

This is what I have been saying all along International flying will probably take some years to return fully. The Domestic Airline division is already returning quickly and will probably much bigger than it was Pre-Pandemic due to increased demand and reduced competition. (See my answer to question 55 and the attached public statements by the CEO Allan Joyce.)

(Respondent)

The Applicant is not alone in losing his aviation job in the midst of this pandemic. He is perhaps fortunate not to have lost his job because of the pandemic as many hundreds of others have.

(Me)

This is not correct at all because I have lost my job as a result of the Pandemic because in the normal course of events my job was to continue as a Qantas short haul pilot as correctly stated by the respondent in Paragraph 53. of this document. All the other Qantas pilots will continue in their career in the airline unless they have decided not to continue by accepting the very large Voluntary Retirement or Early Retirement

payments to them by the respondent. I would not have accepted one of these payments at the expense of my further career.

(Respondent)

The Applicant seeks "reinstatement" - but he does not say to what position, job or status.

(Me)

I wish to be reinstated to my position as A380 Captain.

I have proposed that I be reinstated to that position but on leave without pay so as to not cause Qantas any costs.

(Respondent)

Reinstatement of the Applicant to an "on-leave" position, whether it be paid or unpaid, would also be a fiction and futile. No purpose would be served by putting the Applicant back into employment, in a leave situation, where there is no capacity for the Applicant to return to his previous position and where it may be unlikely the Applicant can be transferred to a short haul role prior to the leave being exhausted Furthermore, the Applicant would be required to repay to Qantas all amounts which were paid to him as accrued leave on termination.

(Me)

My reinstatement to a position of leave without pay would definitely not be futile as it would be the "Fair" thing to do so I could take bid for a B737 vacancy.

There should be no requirement for the repayment of monies that were owed to me for many years for working instead of taking leave due often to the staffing levels not being adequate which was often the case. Many pilots who have remained employed have exhausted their leave balances.

I am not angry but very disappointed that Mr. Doug Alley was overruled by someone after I believe he made a fair decision in my case."

Other relevant matters - s.387(h) - consideration

[115] I consider the following matters to be most relevant to the determination of whether the dismissal of the Applicant was harsh, unjust or unreasonable:

a) The long and loyal service of the Applicants. There was evidence that, to assist Qantas, the Applicants have taken long service leave during business downturns, relinquished leave at other times and worked additional hours when there were too few pilots.

   Qantas concedes that the Applicants were good and loyal employees.

   The argument being that this was a time for Qantas to repay that loyalty.

This factor weighs in favour of finding that the dismissals were harsh.

b) The financial situation that Qantas found itself in as a result of the COVID pandemic.

Mr Alley gave the following further evidence about the impact of the COVID-19 pandemic on Qantas:

> 35. In order to understand the approach taken by Qantas in relation to the termination of employment for Messrs King and Peggie, it is important to contextualise it having regard to the matters identified below.
>
> 36. The COVID-19 pandemic resulted in the closures of domestic and international borders. In late March and early April 2020, Qantas experienced a 93% reduction in passengers in domestic flying and a nearly 100% reduction in passengers in international flying, against the equivalent period in 2019.
>
> 37. As a result, Qantas had to limit cash outflows (by ceasing payments of rent, ceasing payments to suppliers, renegotiating terms with other suppliers and deferring various payments), and raise equity to ensure that it had sufficient cash reserves to fund the eventual return to flying. On 5 May 2020, Qantas announced to the market that it had sufficient liquidity if current conditions persisted until at least December 2021, on an average net cash outflow rate of $40 million per week from 30 June 2020. A copy of the ASX announcement is attached to this statement and marked "Attachment DA-6".
>
> 38. On 25 June 2020, Qantas announced a three year plan to guide the business through the COVID crisis to recovery (Plan)[40]. A key component of the Plan was to preserve as many jobs as possible, however, one of the cornerstones of the Plan was to right-size the Group's workforce, fleet and other costs according to demand projections. In particular, the plan announced that:
>
> > a). at least 6,000 jobs from across Qantas would be made redundant (approximately 20 per cent of the total workforce);
> >
> > b). approximately 15,000 of the Qantas workforce would be on extended stand down due to there being no useful work;
> >
> > c). about 100 aircraft across Qantas and Jetstar would be grounded for at least 12 months; and
> >
> > d). Qantas' remaining 747 Fleet would be retired immediately and the A380 Fleet be in storage for the foreseeable future.

[40] A copy of the ASX announcement was "Attachment DA-7" to Mr Alley's Statement.

39. Following the announcement of the Plan, on 20 August 2020, Qantas released its 2020 financial year results[41] which showed amongst other things:

a). a $124 million underlying before tax profit for the 12 months ending 30 June 2020, which represented a 91% reduction compared to the prior year;

b). a $2.7 billion statutory before tax loss;

c). in the second half of the 2020 financial year, Qantas experienced a $4 billion drop in revenue due to COVID and associated border restrictions;

d). from April to 30 June 2020, the revenue of Qantas fell by 82%; and

e). Qantas expecting a significant underlying loss in the 2021 financial year.

40. Having regard to the above context and the lack of available work, Qantas has taken the following steps to manage its pilot workforce:

a). the stand down of almost all long haul pilots;

b). the rotating stand down of its short haul pilots;

c). the retirement of the B747 fleet;

d). in or around July 2020 Qantas commenced a voluntary redundancy program in long haul. The program was a response to the longer term structural surplus of long haul pilots caused by the retirement of the B747 fleet, the reduced amount of flying across Qantas' long haul fleet, and the expectation that there will be significantly less international flying for a number of years after operations resume. Analysis identified that by 1 July 2022 (this was earliest date that we anticipated that flying would resume at significant levels) there would be 196 surplus pilots. However, the voluntary redundancy program was not made available to pilots who due to natural attrition, would not contribute to the projected surplus at the reference date of 1 July 2022. This included the cohort of pilots who could not perform the inherent requirements of their position having attained the age of 65 prior to 1 July 2022. Approximately 185 long haul pilots exited Qantas under the terms of the voluntary redundancy program in December 2020;

e). as an alternative option for those long haul pilots who

[41] A copy of the ASX announcement was "Attachment DA-8" to Mr Alley's Statement.

were not eligible for voluntary redundancy, Qantas also made available in or around October 2020, an ATO approved (at least in part) "Early Retirement Scheme" for pilots reaching their retirement age prior to 1 July 2022. For pilots, it gave the option of certainty rather than simply remaining on stand down through to retirement age. The program was presented to long haul pilots on the basis that it was unlikely that there would be any vacancies in short haul in the foreseeable future (the reasons for which are set out in paragraphs 47 and 51.a) below). The program opened on 8 October 2020 and the election to participate had to be made by 30 October 2020, and was open to pilots who elected to retire during this period prior to reaching the age of 65. Approximately, 50 of the 55 pilots eligible to participate in the program elected to take early retirement. This program closed in 2020 together with the voluntary redundancy program. Neither Mr King or Mr Peggie were eligible to participate in the early retirement program given they had both reached the mandatory retirement age prior to the program opening; and

f. in parallel to the voluntary redundancy and early retirement programs, Qantas has been forced to make decisions about the management of pilots who have already turned 65, or who were approaching 65 and who had elected not to participate in the early retirement program. With respect to these employees, Qantas determined it would be best to implement a show cause process which was undertaken with Messrs King and Peggie.

41. In addition to the above, I also note the following:

a). flying as of today remains extremely limited on long haul fleets and the A380 currently remains grounded through to November 2023;

b). to avoid long haul pilots losing skills Qantas commenced a mandatory "Pilot Preservation Program". That program was initially open to those long haul pilots occupying a category as a Captain or First Officer on the B787 and A330. The program has since been extended and is now mandatory for all Captains and First Officers on the A380 and commenced on Monday, 22 February 2021. I understand that the decision was made to extend the program to A380 pilots because it helps to preserve the option of bringing the A380 back into service at an earlier date if required, although no decision has been made as at the time of executing this statement to bring the A380 fleet back into the air prior to 2023;

c). Qantas is currently in discussions with AIPA about temporary COVID-19 variations to the LHEA. These discussions are primarily centred on two matters; a reduction in

the minimum guarantee of hours across all long haul fleets to enable more pilots to be stood up sooner as work returns; and the associated creation of temporary COVID-19 vacancies on the A330 and B787 fleets with the intention that these vacancies be made available to A380 pilots so that the flying can be shared as flying returns; and

d). on 25 February 2021, Qantas provided its half yearly update to the market. In this update, amongst other things, it announced that Qantas had posted an underlying loss before tax of $1.03 billion and a statutory loss before tax of $1.47 billion.[42]

More recently it has been reported that the impact of the COVID-19 pandemic on Qantas includes around $5 billion and losses and the loss of 9,400 across the group.

This factor weighs against finding the dismissals were harsh, unjust or unreasonable.

c) The additional costs that Qantas would incur if it continued to stand-down the Applicants.

The evidence is that standing-down employees is not without cost to Qantas. Stood-down employees continue to accrue leave entitlements. Leave entitlements must be paid out when used or otherwise sit on the balance sheet.

A company faced with the significant losses that Qantas has experienced is entitled to seek to minimise the accrual of additional leave.

The evidence of Mr Alley was that:

i. "Mr Peggie would continue to accrue annual leave, long service leave and personal leave during this period of time. Hypothetically, if Mr Peggie remained stood down for one year he would accrue 42 days of annual leave, 9 days of long service leave and 21 days of personal leave. This would be approximately $33,260 in respect of annual leave and long service leave based on the top pay rate for an A380 First Officer. . The value of the 21 days of personal leave is more difficult to quantify because this will depend on whether it is taken and if so, when. However, assuming that such leave is taken as a continuous block of long term sick leave, the value of the leave would be approximately $20,100."[43]
ii. "The hypothetical cost to Qantas of allowing Mr King to remain employed while either being stood down or taking accrued leave for one year is approximately $50,400 in respect of accrued annual leave and long service leave based on the top pay rate for an A380 Captain. The value of the 21 days of personal leave is more difficult to quantify because this will depend on whether it is taken and if so, when. However, assuming that such leave

[42] A copy of the ASX announcement "Attachment DA-9" to Mr Alley's Statement.

[43] Statement of Douglas Peter Alley, Exhibit 16, paragraph 51.b.

is taken as a continuous block of long term sick leave, the value of the leave would be approximately $30,440."[44]

This factor weighs against finding the dismissals were harsh, unjust or unreasonable.

d) Not dismissing the Applicants would have enabled Qantas to delay the pay out of significant entitlements – in respect of Mr King, $262,859.97 and in respect of Mr Peggie, $158,065.90. Cash reserves could have been preserved.

However, it is not for the Commission to tell an employer how to manage its balance sheet. The Commission does not stand in the shoes of the employer.

The fact that Qantas could have made a different financial decision does not mean that the one they made was not sound and defensible.

This is a neutral consideration.

e) Leave without pay would not have resulted in Qantas incurring additional leave accruals. Section 22 of the FW Act provides that service is not counted during any period of unpaid leave or unpaid authorised absence.

Qantas did not have answer to why it could not grant the Applicants' leave without pay.

This factor weighs in favour of finding that the dismissals were harsh.

f) The fact that the Applicants have, because of the COVID pandemic, been treated differently to other long-haul pilots in the past who successfully transferred to short-haul.

The evidence is that, all things being equal, in a normal world, the Applicants would likely have transferred to short-haul operations. Likely their respective bids to transfer would have been successful.

The differential treatment is as a result of the impact of the COVID-19 pandemic on Qantas and the delay/backlog it has caused to its B747 training.

This is not the fault of Qantas. The differential treatment is a neutral consideration.

g) The COVID pandemic is a once in a lifetime event and it could be argued that it was a time when Qantas could have decided to make additional concessions for the Applicants so that they could stay employed for a longer period awaiting transfer to being short-haul pilots.

Qantas has maintained that it would not be appropriate or reasonable to allow the Applicants to remain stood-down in a role which they were no longer able to

[44] Statement of Douglas Peter Alley, Exhibit 16, paragraph 60.

perform for the sole purpose of waiting for a vacancy in short-haul to arise.

It seems that the basis for the contention that it "would not be appropriate or reasonable…" was the speculative nature of any future vacancies in short-haul and the likely long period of time until any vacancies might potentially arise.

Of course, all of that speculation is a direct result of the impact of the COVID-19 pandemic on the airline industry.

In these unprecedented economic times many efforts have been made to maintain connections between employees and employers. One such example is the JobKeeper scheme. Qantas was a beneficiary of JobKeeper.

The decision of Qantas not to allow a special measure for the Applicants in response to a once in lifetime event, weighs in favour of finding that the dismissals was harsh.

h) Whether there were reasonable alternatives to dismissal (e.g. maintain the employment relationship so that the Applicants could wait out a period of time to transfer to short-haul).

Mr Alley gave the following evidence about the transfer process for long-haul pilots in the lead up to their 65th birthday.

26. In order to manage the employment of those pilots approaching the age of 65, Qantas will issue long haul pilots with an "age 64" letter (Age 64 Letter). This letter notifies the long haul pilot of the fact that in a year's time they will be unable to fulfil the inherent requirements of their position, at which point their employment will be terminated given the restrictions imposed by the ICAO convention preventing them from flying to a majority of international airspaces. The letter presents the pilot with two options:

a). the first is to nominate to retire from their employment with Qantas upon turning 65 years of age; or

b). the second is to indicate a preference to bid for a transfer to a position of a pilot on an aircraft in short haul operations. Domestic operations in Australia are unaffected by the age restrictions imposed by the ICAO Convention as the ICAO Convention has not been adopted as local law.

27. While a pilot may indicate a preference to bid for a transfer to short haul, the transfer is not guaranteed and there is no automatic right. A transfer is predicated upon there being an available "vacancy" in short haul operations and the particular pilot having the requisite seniority to successfully bid for that vacancy.

28. The SHEA requires the company to advertise any vacancies in short haul operations and sets out the mechanism by which these vacancies are to be filled. In broad terms, vacancies are filled on the basis of seniority and through

a pilots "specific bid" for that vacancy by way of a pilot's "Letter of Preference". A pilot bidding for a vacancy may include a "self-restriction" on that vacancy which means the pilot can nominate when the bid for a vacancy will become effective. For example, where a long haul pilot wants to transfer into short haul upon turning 65, the pilot will bid for the vacancy at some time in the preceding 12 months, but in order to maximise their time on their existing long haul fleet, the pilots can include a self-restriction on that bid such that it becomes effective around the time the pilot turns 65.

29. Qantas will periodically determine how many vacancies it will advertise by reference to the short haul "planning divisor". The planning divisor refers to the specific hours projected to be allocated to pilots of a specific category and base at the end of the pattern planning/ roster build process. Flight operations uses a planning divisor in short haul of around 68 hours per 28 day bid period (which is about 3 hours less than the optimum hours for each bid period specified at RM18 of the SHEA). This is to say having regard to the total number of hours to be flown in the 28 day period, and allowing for sufficient reserve coverage and the taking of leave, pilots actively flying in the bid period should on average be rostered to around 68 hours of flight time. Accordingly, Qantas ordinarily advertises sufficient vacancies to keep pilots numbers in each category at a level which will allow for the annual forecasted planning divisor to sit at around 68 hours per bid period. Qantas does not externally advertise short haul vacancies, rather all short haul vacancies are filled from within the ranks of existing long haul and short haul pilots on the basis of seniority.

30. Prior to the COVID-19 pandemic and due to demand, short haul pilots were typically flying around 73 hours per bid period. This was hard up against what is known as the "maximum planning divisor" of about 75 hours set out at RM18 to the SHEA. Where the "maximum planning divisor" is breached it means that the pilot establishment numbers are too low, and Qantas is required to meet with the Australian and International Pilots Association (AIPA) to " discuss the reasons, timeframe, ramifications and possible effects on establishment (see RM18 of SHEA).

31. For completeness I note that the SHEA contains "minimum guarantee hours" of 53 hours and 24 minutes per 28 day bid period. These are the minimum hours for which a short haul pilot is to be paid in a bid period regardless of how little flying may be rostered. During my employment with Qantas and prior to the COVID-19 pandemic, I am not aware of the rostered hours ever falling at or below the minimum guarantee hours.

32. Prior to the COVID-19 pandemic, any long haul pilot approaching the age of 65 and wanting to transfer to short haul was usually able to secure a vacancy given the capacity of flying available in short haul. The natural attrition amongst short haul pilots (either by way of short haul pilots leaving Qantas or transferring to long haul) has always meant that there have been sufficient advertised vacancies in short haul to more than accommodate the small subset of our senior long haul pilots who want to transfer rather than retire at the age of 65. To the best of my knowledge, and during my employment with Qantas, I am not aware of a situation where a vacancy in

short haul was created for the specific purpose of allowing a 65 year old long haul pilot to transfer from long haul to short haul.

33. Historically, most long haul pilots upon turning 65 choose to retire rather than transfer to short haul. Over my time as Head of Base Operations, I would estimate that at least 85% of our long haul pilots retire on or before turning 65. The option of transferring to short haul to end one's career is not attractive to most long haul pilots. There will be a range of reasons for this but in my view the most significant are the much lower pay rates in short haul, short haul flying is considered more high paced and dynamic in nature than long haul flying, and because the endorsement training to become a short haul pilot is extensive (approximately between 14 and 20 weeks) and requires a significant amount of personal study.

34. The COVID-19 pandemic has significantly reduced the number of available hours in short haul operations, and has led to an unavailability of vacancies in short haul.

The evidence of Mr Alley was that, in relation to the likelihood of a transfer to a domestic position:

> "47. In relation to the preliminary view reached by Qantas [that the Applicants' indicated a preference to transfer to short haul, could not be accommodated because there were no pilot vacancies available (at the time or in the reasonably foreseeable future) due to the significant reduction in demand in domestic flying caused by the COVID-19 pandemic], I make the following observation about the state of available vacancies in short haul. There were approximately 78 pilots who had been awarded vacancies in short haul in April 2019 for the 2019/2020 training year but were yet to commence or complete their training course. Qantas did not anticipate any training on the B737 fleet (the aircraft used to service short haul flying) to commence prior to 30 June 2021 and that it was possible that the 78 vacancies already awarded might be deferred until the training year commencing 1 July 2021 (which is subject to agreement with AIPA in circumstances where the training course had yet to commence). This meant that the earliest any training could commence for any future vacancies was unlikely to take place until at least May/June 2022."

What was apparent from Mr Alley's evidence was that, in ordinary circumstances, the Applicants would most likely have continued in employment as short-haul pilots, having elected to do so in the lead to their 65th birthdays. However, these are not ordinary times.

It may not be (as the Applicants sort to characterise it) a "right" that they had to transfer to short-haul (and certainly not a "workplace right" as that is defined in s.341 of the FW Act), but they certainly had a legitimate expectation that, under normal circumstances, they would have been successful in their bids to transfer.

However, the evidence is that there were a number of long-haul pilots awarded vacancies in short-haul in April 2019 that, by the time of the hearing before me, still had not undertaken training – it having been delayed.

The back-log in training is relevant. It means that when the Applicants might be successful in their bids to transfer to short-haul, is uncertain.

Even if the delayed courses are cancelled and future bids favour the Applicants because of their seniority, I could not, with any certainty, be satisfied when the Applicant's would transfer to short-haul operations.

If Qantas commences flying to countries with high vaccination rates (such as Singapore, the UK, US, Japan and Canada) from mid-December 2021, then, likely training in B747s will open up in early 2022. That would be that an entire year would have passed since the dismissals.

Even that timeline is speculative. It is based on factors beyond Qantas' control.

Consequently, it would require maintaining an employment relationship (for the purpose of facilitating a future possibly training opportunity) for an indefinite period.

This factor (the uncertainty about when the Applicants might transfer to short-haul) weighs against finding the dismissals were harsh, unjust or unreasonable.

[116] The Applicants contend that they ought to have remained employed on leave without pay during this period of COVID disruption in order to allow them time to transfer to short-haul (domestic) pilot positions. They contend that, in circumstances where they were being stood-down, they were not required to fly internationally. They contend that, had they continued in employment on leave without pay, they would be a in a position to be transferred into a domestic pilot role in due course. They further contend that continuing their employment without pay would not be an impost on Qantas.

[117] However, to put them back into the position they would have been on 12 November 2020 (Mr Peggie) and 2 December 2020 (Mr King) such that they are reinstated to a position where they are on leave without pay would require them to repay the significant moneys already paid to them. To allow them to retain those monies would be akin to treating them as being on paid leave during that time. Paid leave would require Qantas to accrue additional leave for the Applicants in circumstances were Qantas is seeking to, not unreasonably, reduce costs. It was Mr King's submission that he should not be required to repay moneys paid to him. The complexity associated with "unscrambling the egg" weighs against finding that the dismissals were harsh.

[118] Mr Alley gave the following evidence about why, in all the circumstances, Qantas decided to terminate the employment of the Applicants.

> 51. To have allowed Mr Peggie to remain in employment (stood down or otherwise) would have been unreasonable having regard to the following additional factors:
>
> > a). even though at the time of termination there were no vacancies and we considered it was unlikely for any vacancies to arise in short haul for the foreseeable future, the volatility surrounding the COVID-19 pandemic has continued to create uncertainties. For example, the border closures arising from the Northern Beaches outbreak in December 2020 and January 2021 reduced

Qantas' domestic network to 48% of pre- COVID-19 capacity (as opposed to previous forecasts of 76% by this point). This translated to approximately only 55% of short haul pilots being stood up. Further, short haul pilots who have been stood up are flying significantly less hours at around the minimum guarantee of hours than pre-COVID-19 averages of 65 to 70 hours. At the time of signing this statement there remains no vacancies in short haul. It is possible that vacancies may arise sooner than anticipated (as compared to the circumstances in October/November 2020) given the vaccine rollout in February 2021, but it remains unclear as to when these vacancies will arise in the future. Further, there currently remains a backlog in training for short haul as described in paragraph 47 above, and there is currently no plan to advertise any short haul vacancies as part of the annual April bulk allocation for the 2021/2022 training year;

b). while there might be no immediate cash cost to Qantas to allow Mr Peggie to remain stood down until such time a vacancy arose, Mr Peggie would continue to accrue annual leave, long service leave and personal leave during this period of time. Hypothetically, if Mr Peggie remained stood down for one year he would accrue 42 days of annual leave, 9 days of long service leave and 21 days of personal leave. This would be approximately $33,260 in respect of annual leave and long service leave based on the top pay rate for an A380 First Officer. The value of the 21 days of personal leave is more difficult to quantify because this will depend on whether it is taken and if so, when. However, assuming that such leave is taken as a continuous block of long term sick leave, the value of the leave would be approximately $20,100. This is a significant cost to Qantas in circumstances where Qantas continues to be hamstrung by the COVID-19 pandemic as described in paragraphs 37 and 39 above. Although Mr Peggie's entitlement to this leave did not form part of the reasons for termination, the potential cost to accrue the leave is relevant tb the reasonableness of continuing to employ Mr Peggie in circumstances where he could no longer perform the inherent requirements of his role; and

c). I caused an analysis to be undertaken to determine the financial cost to Qantas to train age 65 long haul pilots who successfully bid for a vacancy in short haul, and to understand the historical rate of 65 aged pilots passing or failing the training and their length of the service once they pass their training. Over the last ten years, Qantas' records show that it has awarded about 33 vacancies in short haul to 65 aged pilots. Of the 33 long haul pilots, 10 (30%) did not pass the training (as compared to a passing rate of 99% for pilots not in the 65 age bracket). I understand that the average tenure for a short haul pilot who passed their training and transitioned shortly after their 65th birthday is about 2.5 years. In relation to the financial cost, the short haul training program would cost Qantas approximately (based on the payment of wages for the duration of the program) $105,000 and $70,000 for a A380 Captain and A380 First Officer respectively. Having regard to the fairly high failure rate (as compared to other cohorts), the reasonably short tenure, and the investment cost to Qantas which all need to be understood in the context of the COVID-19 pandemic and the impact this has had on the business (see paragraphs 37 and 39 above), it was not unreasonable for Qantas to have decided to terminate Mr Peggie's employment rather than to allow him to remain employed indefinitely

(in a position which he could no longer perform) until such time a vacancy arose in short haul (which remains uncertain).

….

60. For the same reasons set out above in paragraph 51, it would have been unreasonable to allow Mr King to have remained employed (stood down or otherwise) with Qantas. The hypothetical cost to Qantas of allowing Mr King to remain employed while either being stood down or taking accrued leave for one year is approximately $50,400 in respect of accrued annual leave and long service leave based on the top pay rate for an A380 Captain. The value of the 21 days of personal leave is more difficult to quantify because this will depend on whether it is taken and if so, when. However, assuming that such leave is taken as a continuous block of long term sick leave, the value of the leave would be approximately $30,440.

[119] As explained above, the possible answer to the concern about continuing to accrue leave balances is to have allowed the Applicants to be on leave without pay. Qantas could have then avoided paying out more than $420,000 as between the Applicants.

[120] However, there is no answer to the uncertainty about when vacancies in short haul might arise and the volatility surrounding the COVID-19 pandemic (there have been further lockdowns since this case was heard) and the uncertainties that it continues to create.

Conclusion

[121] The FW Act requires an assessment to be made about whether a termination is harsh, unjust or unreasonable, and therefore, unfair. As has often been explained that a dismissal may be:

a) unjust because the employee was not guilty of the misconduct on which the employer acted,

b) unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and or

c) be harsh in its consequences for the personal and economic situation of the employee

[122] Whether the dismissal of each of the Applicants was harsh is most relevantly the question before me.

[123] In the present matter it would have been possible for Qantas to keep the Applicants stood-down or employed on leave without pay during a time when they had both passed their 65th birthdays and were not required to fly. This may have allowed the Applicants a further opportunity to transfer to domestic pilot duties. To do so would have cost Qantas little in comparison to the reduction of livelihood (significant noting how much pilots earn) suffered by the Applicants.

[124] However, the fact that Qantas did not do that does not render the dismissals unfair.

[125] Faced with the massive losses that it has incurred as a result of the COVID-19 pandemic Qantas is entitled to count every penny and seek to reduce future costs and liabilities on its balance sheet. It owes that duty to its shareholders. That is why its decision

not to continue with the stand-down was not unreasonable.

[126] In so far as Qantas could have continued employment (on a leave without pay basis), leaving Messrs Peggie and King in the departure lounge awaiting a move to short-haul, it may have been a considerate thing to do in these "unprecedented times" for the benefit of good and loyal employees.

[127] Having regard to the exceptional service of Messrs Peggie and King it would have been nice if Qantas had continued to warehouse them until they found positions in the domestic network. However, the fact that Qantas decided differently also does not render the dismissals unfair. Qantas was entitled to have regard to the entirely uncertain future about when training might open up that would facilitate a transfer of Messrs Peggie and King to the domestic network.For these reasons, having considered each of the matters specified in s.387, the Commission, as presently constituted, is not satisfied the dismissal of the Applicants was harsh, unjust or unreasonable. Accordingly, I find the Applicants' dismissals were not unfair.

[128] Finally, even if I had found that the dismissals were unfair, I would not have reinstated the Applicants. It would be a case of requiring Qantas to continue employment with no appointed date for the resumption of actual service. Reinstatement is "meant to be real and practical, not illusory and theoretical."[45]

[129] The reinstatement would require Qantas and the Applicants to agree that they be on leave without pay in order to relieve Qantas of the obligation to continue to accrue leave for the Applicants. I cannot order the parties to reach such an agreement as a part of a reinstatement order. Orders for reinstatement cannot be conditional on other events.[46]

Disposition

[130] The Commission, as presently constituted, is satisfied that the Applicants were protected from unfair dismissal, but that the dismissals were not unfair. Consequently, their applications for an unfair dismissal remedy must be dismissed.

[131] Orders to this effect will be issued with this decision.

COMMISSIONER

[45] *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539, [33].

[46] *Sportsmed v Cartisano* [2015] FWCFB 1523 and *Toll Holdings v Johnpulle* [2016] FWCFB 108.

Appearances:

Mr Peggie for himself.
Mr King for himself.
Mr Jonathan Forbes of counsel (as his Honour then was) for Qantas, instructed by Mr James Banh, solicitor, Herbert Smith Freehills.

Hearing Details:

17 March 2021 and 11 June 2021.

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