

Summary of Decision

13 December 2013



Jetstar Airways Pty Limited v Monique Neeteson-Lemkes

C2013/5863

1. This decision concerns an appeal against a decision of Commissioner McKenna issued on 16 August 2013 in which the Commissioner reinstated Ms Neeteson-Lemkes to her role as a domestic flight attendant with Jetstar Airways Pty Limited on the basis that her dismissal was harsh, unjust and unreasonable.
2. The Full Bench found that there was a significant error of law in the Commissioner's decision. Section 387(a) of the *Fair Work Act 2009* (Cth) requires a decision-maker when considering whether a dismissal was harsh, unjust or unreasonable to take into account, amongst other things, whether there was a valid reason for the dismissal. The Full Bench found that there was nothing in the decision that indicated that that matter was taken into account in the determination that the dismissal was harsh, unjust and unreasonable. As a result permission to appeal was granted and the decision of the Commissioner quashed.
3. The Full Bench decided to re-determine the matter and issue a further decision pursuant to s.607(3)(b) of the Act.
4. In re-determining the matter the Full Bench found there was a valid reason for Ms Neeteson-Lemkes's dismissal based on her medical incapacity to perform the requirements of her position at the time of the dismissal. However the Full Bench found that the dismissal was harsh, unjust and unreasonable for the following reasons:
 - i. Jetstar relied on a psychological diagnosis that, as demonstrated by the subsequent evidence at the hearing, was highly controversial, and did not make a proper attempt to obtain the views of Ms Neeteson-Lemkes's treating practitioners about that diagnosis;
 - ii. Jetstar failed to give Ms Neeteson-Lemkes a proper opportunity to respond to the reason for dismissal, in that it did not provide her with a copy of the medical report containing the controversial diagnosis which it relied on to dismiss her;
 - iii. Jetstar failed to make reasonable efforts to afford Ms Neeteson-Lemkes the return to work benefits of Jetstar's Return to Work Policy.

5. In regards to remedy the Full Bench determined that the medical evidence adduced at the hearing before the Commissioner was unsatisfactory in various respects. As a result the Full Bench found that a final conclusion on whether Ms Neeteson-Lemkes was medically fit to be reinstated to her position as a Jetstar flight attendant could not be made on the basis of that evidence.
6. The Full Bench found it necessary for there to be a further hearing on the question of remedy, in which the parties would have an opportunity to adduce additional expert medical evidence concerning Ms Neeteson-Lemkes's fitness to be returned to her position. The Full Bench noted that the most desirable course would be for the parties to jointly instruct an independent forensic psychiatrist to prepare a new report based on a current assessment of Ms Neeteson-Lemkes and a review of all the health reports, records and other material to date. In addition, the Full Bench expected Ms Neeteson-Lemkes herself to give evidence as to her current state of health.
7. The Full Bench also invited the parties to consider whether the matter could be settled, having regard to the reasons for decision. It was noted that a member of the Commission could be made available to assist in that process if such a request was made.
8. It was also noted by the Full Bench that it had been reported in a number of Australian media outlets that law enforcement authorities in the Republic of South Africa had made allegations of criminal conduct of the most serious kind concerning Ms Neeteson-Lemkes and had stated an intention to take steps to have Ms Neeteson-Lemkes extradited to South Africa. Although this issue had not been raised by either party in the proceedings before the Commission, the Full Bench did not consider that it was entitled simply to ignore it on that basis, since it raised issues as to public interest and the practicability of reinstatement. The Full Bench stated that it expected at the further hearing to receive from the parties any available and reliable information about the reported matters, and submissions based on any such information, so that it could decide the case in a way which was properly informed and not contrary to the public interest.

[\[2013\] FWCFB 9075](#)

- *This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.*

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