IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA284/2023
[2025] NZCA 20

BETWEEN	ANJELA SHARMA Appellant
AND	AIR NEW ZEALAND LIMITED Respondent

Hearing:	11 March 2024
Court:	Katz, Whata and Gault JJ
Counsel:	R J B Fowler KC and E J Moreton for Appellant J Q Wilson, A M Boberg and T M J Sheils for Respondent
Judgment:	21 February 2025 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis together with usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by Katz J)

Para No.

Introduction

[1] On 2 July 2019, Air New Zealand Ltd (Air NZ) wrote to Anjela Sharma, a Nelson based lawyer, informing her that because of her "recent intimidatory and aggressive behaviours towards [Air NZ] staff" she was banned for 12 months from travelling on Air NZ flights (the travel ban). Ms Sharma's existing travel bookings were refunded.

[2] Ms Sharma challenged the travel ban in the High Court, first by way of interim injunction, and then at trial. She advanced two causes of action.

(a) The first was for breach of contract. Specifically, Ms Sharma alleged that Air NZ had breached its "Conditions of Carriage", which provided that Air NZ, in the reasonable exercise of its discretion, may refuse to carry a passenger in various circumstances, including where the passenger had been given notice in writing that Air NZ would not carry them after the date of such notice. Ms Sharma claimed that Air NZ had not exercised its contractual discretion to impose the travel ban reasonably.

(b) The second cause of action was for breach of the Fair Trading Act 1986 (FTA). Specifically, Ms Sharma alleged that Air NZ had made various misrepresentations regarding her entitlement to access the Air NZ Lounge at Nelson Airport (Koru Lounge) when she embarked on an overseas trip with her family on 1 December 2018.

[3] Ms Sharma's interim injunction application was dismissed by Davison J, who found that there was no serious question to be tried (the injunction judgment).[1] Ms Sharma then proceeded to trial in the High Court, following which Tahana J dismissed both of Ms Sharma's causes of action (the High Court judgment).[2]

[4] Ms Sharma now appeals the High Court judgment. The travel ban expired over four years ago, on 2 July 2020.

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1 *Sharma v Air New Zealand Ltd* [2020] NZHC 230 [injunction judgment].
2 *Sharma v Air New Zealand Ltd* [2023] NZHC 1005 [High Court judgment].

Factual background

The December 2018 Nelson lounge incident

[5] On 1 December 2018 Ms Sharma, her husband Christopher Leaper, and their six children (together, the family) embarked on a trip from Nelson to New Delhi, India. The children were aged from about 15 to 26 at the time. The family had purchased their tickets from Singapore Airlines and all their travel was ticketed with that airline. The first leg of their journey, an economy class domestic flight from Nelson to Auckland, was operated by Air NZ. For the international portion of their journey, the family were travelling Singapore Airlines business class.

[6] Ms Sharma gave evidence (which was not disputed at trial) that after the family had checked in, an Air NZ staff member at the check-in desk at Nelson Airport told them they could proceed to the Koru Lounge, which they did. When the family's boarding passes were scanned at the entrance to the Koru Lounge, however, the scanner flashed red, indicating the ticket holders were not eligible to enter. The family asserted that they were entitled to use the lounge, and the lounge host on duty, Kara Matuszewski, allowed them to enter while she made further enquiries.

[7] Ms Matuszewski checked the Koru Lounge access chart, which confirmed that the family were not entitled to enter the lounge. She then contacted her team leader, Sheryl Whyte, who came to the Koru Lounge to speak to Ms Sharma. Ms Whyte asked Ms Sharma to talk outside the lounge, but Ms Sharma declined to do so. The discussion therefore took place in the relatively confined and public space of the lounge.

[8] Ms Sharma's evidence was that she informed Ms Whyte that the family were traveling business class on Singapore Airlines and presented their travel itinerary as proof. Ms Whyte's evidence was that Ms Sharma, accompanied by three of her sons, surrounded her and insisted on their entitlement to be in the lounge. Another lounge guest complained about the disturbance. Ms Sharma's daughter videoed part of the incident. Ms Whyte ultimately allowed the family to remain in the lounge and departed.

[9] The recollections of Ms Matuszewski and Ms Whyte were recorded in three contemporaneous documents. Those documents recorded, amongst other things, that there was "some sort of trouble every time this woman travels from Nelson" and that every time Ms Matuszewski had welcomed a guest into the lounge, the family "would pretend to be her, mock her voice, and mimic her very loudly" and that Ms Matuszewski "felt extremely humiliated because everyone could hear". Ms Matuszewski's evidence was that the family had made various offensive or insulting comments about her while in the lounge, including calling her "stupid" and "racist"; questioning why Air NZ "hire[d] stupid people"; and commenting that she was "probably too fucking stupid". Her evidence was corroborated by Ms Whyte, who the Judge found to be an honest witness.[3]

[10] The Judge found that "one or more of the family made a comment that led Ms Matuszewski and Ms Whyte to believe they were being accused of being racist".[4] The Judge further stated that:

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

The 2018 unruly passenger report and formal warning letter

[11] Following this incident, an operational safety report was prepared by Lisa Stewart, Passenger Services Manager, which prompted an investigation by Karon Martin, an Air NZ security advisor, under the supervision of her manager, Jason Legge. As part of her review, Ms Martin considered the contemporaneous reports provided by Ms Matuszewski and Ms Whyte. Ms Martin confirmed that the family had not been eligible for lounge access in Nelson. She also reviewed information about Ms Sharma's previous conduct at Nelson Airport, which raised issues of concern. Ms Martin compiled an "unruly passenger report". This resulted in Ms Sharma being sent a formal warning letter on 21 December 2018. That letter

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3 At [147].
4 At [156].

was authored by Giles Carter, Senior Manager of Security. It stated that Ms Sharma and her family had entered the Koru Lounge without permission and upon entry had "displayed loud and aggressive behaviour which was unacceptable, inappropriate and upsetting for our [Air NZ] staff and other passengers".

[12] The warning letter provided links to information regarding Air NZ's Conditions of Carriage and Koru Lounge terms and conditions, and explained that:

> To give further clarity to [Koru] Lounge access availability, in order to access Koru membership benefits, all travel must be on Air NZ operated and ticketed flights, regardless of class of travel. On this occasion, as your travel is booked on a Singapore Airlines ticket you and your family are not eligible for Lounge entry in Auckland when flying home to Nelson on 1st January [2019].
>
> Failure to comply, breach or non-acceptance of these conditions will result in you not being permitted to enter the lounge, board a flight at the time of check-in/boarding, being off-loaded, and/or being banned entirely from flying on [Air NZ's] services in the future.

[13] On receipt of the warning letter, Ms Sharma (who was still overseas at the time) contacted Air NZ's customer relations team to inform them that the family were "very upset". She requested an "urgent response". On 28 December 2018, the customer relations team responded, again explaining why the family were not entitled to access the Koru Lounge for their domestic flights. Nevertheless, the family (unsuccessfully) attempted to access the Auckland Koru Lounge upon their return to New Zealand on 1 January 2019, while awaiting their return domestic flight to Nelson. One of Ms Sharma's sons covertly audio recorded the conversation at the lounge entrance.

Restrictions placed on check-in processes

[14] Following the issue of the warning letter, Air NZ implemented an alert in its systems requiring members of the family to check in at the counter rather than at the electronic kiosks. On some occasions members of the family were also asked to provide identification. Internal Air NZ documents indicate that the check-in restrictions were imposed because of concerns that the family might attempt to travel under each other's names, as one of Ms Sharma's sons had allegedly done this previously. Andrew Leckie, Head of Regional Airports, requested that Ms Sharma be informed about the check-in restrictions when they were implemented, but it appears

that no-one did so.[5] Reports from Air NZ staff as early as 3 February 2019 indicate that Ms Sharma was questioning the new check-in restrictions.

Ms Sharma's March 2019 email to the chief executive

[15] On 7 March 2019, Ms Sharma sent an 11-page email to Christopher Luxon, who at the time was the chief executive officer of Air NZ. Ms Sharma gave her perspective of the 1 December 2018 Nelson lounge incident, and strongly criticised the conduct of Air NZ's staff. She referred to Ms Matuszewski as "an ice queen", which the Judge found to be disparaging, given that Ms Matuszewski was "simply doing her job" and was "correct about the access rules".[6] Ms Sharma also complained about the staff at the Auckland Koru Lounge who had (correctly) declined to permit the family to enter on their return trip from Mumbai, India.

[16] The Judge found that Ms Sharma had omitted material information from her complaint letter to Mr Luxon, including the fact that a fellow lounge patron had requested they lower their volume. Furthermore, Ms Sharma had complained about the public nature of the confrontation in her letter, while failing to inform Mr Luxon that this was due to Ms Sharma's refusal to step outside the lounge to discuss the matter, as Ms Whyte had requested.[7]

The April 2019 Wellington Airport incident

[17] On 14 April 2019, Ms Sharma had a further unpleasant interaction with Air NZ staff. This incident occurred at Wellington Airport, with staff members Dayana Joseph and her manager, Janine Hamilton, both of whom gave evidence at trial. Ms Hamilton's team manager report from the day described Ms Sharma as "extremely abrasive", noting that Ms Joseph was so upset she "burst in to tears". Later, in an operational safety report, Ms Joseph described Ms Sharma as having behaved in a "very rude manner".

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5 At [221(f)].
6 At [148] and [159].
7 At [148].

[18] Ms Sharma had covertly recorded part of her interaction with Ms Joseph and Ms Hamilton (the initial part of the interaction, which was between only Ms Sharma and Ms Joseph, was not recorded). In the recording Ms Sharma can be heard suggesting to Ms Hamilton that Ms Joseph was getting "emotional about little things" due to the fact that she was pregnant.

[19] The Judge acknowledged that Ms Sharma's covert recording of the exchange demonstrated her frustration over being unable to meet Air NZ's identification requirements, which she had not been notified in advance about, as her school-aged sons did not carry identification.[8] The issue of concern, however, lay in the way Ms Sharma expressed her frustrations to Ms Joseph. The Judge noted that the fact that Ms Joseph was genuinely upset was corroborated by evidence from both Ms Joseph and her team leader Ms Hamilton that she had to take the rest of the day off work.[9] Overall, the Judge found this incident illustrative of Ms Sharma's general lack of awareness as to the impact her behaviour has on others:

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

Ms Sharma's 24 June 2019 email to the chief executive

[20] On 24 June 2019, Ms Sharma sent Mr Luxon a second email, this time complaining about the April 2019 Wellington Airport incident. Ms Sharma said that the "hostility" directed towards her family had been "completely awful" and described Air NZ's treatment of her as "insidious". Ms Sharma also made insulting comments

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8 At [196].
9 At [205].

about Ms Hamilton, Ms Joseph, Ms Stewart and even Mr Luxon himself. For example, Ms Sharma stated that:

> Then a lady- I presume she was a lady, however she came across as being somewhat mannish, started abusing me, telling me to wait, and publicly raising her voice at me.

[21] Ms Sharma was also highly dismissive of Ms Joseph's distress stating that:

> The attendant then put on a show of tears, and we were accused of causing her to cry-it was so apparent that we were being set up. The attendant insisted that I talked to the Team Leader. I told her I did not want to talk to the Team Leader, but we simply wanted to check in and go to the lounge-this is when she put on a show of tears -however I fail to understand exactly why, other than that this was a deliberate set up.

[22] Ms Stewart was a particular target of Ms Sharma's ire. In addition to describing her as being "on a venomous mission" she asserted that Ms Stewart has "an axe to grind"; that she had "written defamatory comments about us"; that "it [was] so obvious that Ms Stewart is behind it"; and that she had "embellished her story to the point of lying". Ms Sharma also stated in her email that:

> What have we done to deserve this type of hostile customer treatment? That was my question at the time, and it remains that. I taped the interaction, because it was completely hostile towards us, and we felt strongly that it was a deliberate attempt to set us up for failure.
>
> …
>
> From now on, I will be recording all interactions between us and [Air NZ] at kiosk check-in.

[23] The Judge found that Ms Sharma's claims in the email that Ms Hamilton was "abusing" her, "publicly raising her voice", and "aggressively" shutting her son down were not supported by Ms Sharma's covert recording of the Wellington Airport incident.[10]

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[10] At [200].

Air NZ's response to Ms Sharma's second email to Mr Luxon

[24] On 1 July 2019, Hugh Roberts (Air NZ's senior legal counsel) responded to Ms Sharma's second email to Mr Luxon. He described the email as "distasteful and insulting" and stated further that:

> … It is clear from your email to Mr Luxon, that you don't consider that you are in anyway responsible for the position that you now find yourself in and that you have no awareness of the effects of your behaviour.
>
> Given the tone of your email, we have no confidence that your intimidatory and aggressive behaviour toward our staff won't be repeated when you travel with us again.
>
> While [Air NZ] will always endeavour to exceed our customer's expectations, we are very clear that we have obligations to our staff and we will not tolerate ill treatment of them by any customer.
>
> I have forwarded the email that you sent to Mr Luxon to our Group Security Team with a recommendation that they review your eligibility to access both the Koru Lounge and [Air NZ] operated flights.

[25] Mr Roberts forwarded his email to Air NZ's security team. He recommended that Air NZ not renew Ms Sharma's Koru membership, stating that "it's time to put an end to Ms Sharma's travel with us for a period".

[26] Ms Sharma responded to Mr Roberts' email the same day, asserting that she had not mistreated any Air NZ staff, and that was a "fabricated litany of lies". Ms Sharma said that the way her family had been treated was "completely distasteful" and "unprofessional".

The June 2019 Nelson Airport incident

[27] Meanwhile, on 25 June 2019 (the day after Ms Sharma's email to Mr Luxon, and prior to Mr Roberts' response), Ms Sharma had a conversation with an Air NZ staff member, Cheryl Gillooly, at the Nelson Airport Air NZ check-in desk, during which Ms Sharma made a number of negative statements about Ms Stewart, who was Ms Gillooly's manager. Again, Ms Sharma covertly recorded this conversation.

[28] Ms Gillooly subsequently reported to Ms Stewart that she had dealt with a "disgruntled customer" and told Ms Stewart what the customer (Ms Sharma) had said

about her. This deeply upset Ms Stewart, who started "shaking and crying". Ms Stewart asked Ms Gillooly to write down what had happened, and Ms Gillooly did so. Her handwritten notes summarise her conversation with Ms Sharma as follows:

> She asked me why everytime she checks in she has to show ID. I replied im really sorry but I didn't know as this was the truth as I had no idea of past issues with this customer.
>
> She made it very clear she was taking it further, above [Ms Stewart].
>
> My initial reaction was very unsure as I said above, I didn't know any past.
>
> At the end of the conversation, she mentioned that I'm the only one that actually has been nice to her.
>
> All & all the experience was very hard to deal with. I found this particular customer very hard to deal with & very disrespectful.
>
> So I asked Mrs Sharma for Id as [the] system prompted me to ask for Id. Then she told me her opinion about [Air NZ] & [Ms Stewart].
>
> She proceeded to ask me what my opinion is of [Ms Stewart], I said to her it's not my place to comment about any staff member. I said to her she is nothing but good to us here at [Air NZ].
>
> She then said to me that she has sent a detailed email to [Mr] Luxon this morning telling him of her disgust with [Ms Stewart].
>
> She also said she has no respect for Air NZ & [Ms Stewart].
>
> She also said [Ms Stewart] is out to make [her] Air NZ journey a bad one. [Ms Stewart] has a vendetta against [her] & [her] family.
>
> Finally she told me [that] [Ms Stewart] will have trouble coming her way once [Mr Luxon] had received her detailed e-mail.
>
> At the time I was in shock at her words, but just know that all the words coming out of her mouth were negative & malicious.

[29] Two days later, Ms Gillooly met with Ms Stewart (who was still shaken) and Grant May, Nelson Airport Manager. Mr May asked Ms Gillooly to write down everything that had happened as far as she could remember. This was recorded in email form. Ms Gillooly qualified her recollection of the incident by stating that Ms Sharma was "shooting lots of words at her" and repeating herself, making it "hard to remember everything" because it was like "quick fire remarks". Ms Gillooly recalled, however, that Ms Sharma had said in relation to Ms Stewart "why doesn't she piss off back to [Christchurch]". Ms Sharma had also said a couple of times that Ms Stewart had a vendetta against her. Ms Sharma had referred to a recent email she

had sent to Mr Luxon and said that he would "deal with" Ms Stewart. Ms Sharma kept asking Ms Gillooly what she thought of Ms Stewart and what the other staff thought of her. Ms Gillooly said that Ms Sharma was very forceful in her tone when asking "what do you think of [Ms] Stewart" and had used Ms Stewart's name repeatedly. Ms Sharma was "aggressive about the company and [Ms Stewart]". Ms Sharma said she didn't know why Ms Stewart did not like her, as she had not done anything to her. Ms Sharma also said that "Air NZ is a sham", that she had put a lot of money into the company, and they just made her experience a bad one.

[30] Ms Gillooly also acknowledged in her statement that Ms Sharma was "nice" to her and that when Ms Sharma left the counter, she was happy with Ms Gillooly and gave her a high five, as Ms Gillooly had managed to get Ms Sharma and her sons checked in both in Nelson and for their return journey, avoiding any further check in difficulties. However, Ms Gillooly said the negative comments Ms Sharma had made about Ms Stewart and Air NZ had made her feel uncomfortable. She expressed concern that Ms Sharma was unstable as "her body language and aggressiveness was not normal human behaviour" and her "demeanour was quite aggressive".

[31] Ms Sharma's covert recording of the conversation was in evidence at trial. Based on the transcript of that recording, the Judge summarised the conversation as follows:

> [67] The transcript of the recording indicates that when Ms Gillooly asked Ms Sharma for identification, she said she did not know why she had to provide identification and said "it is all to do with [Ms] Stewart. Is she still here?" Ms Sharma said that Ms Stewart has "put a block on us and made all these allegations against our family." Ms Sharma told Ms Gillooly she had written to Mr Luxon the night before. She said Ms Stewart had accused them of "all these things", that Ms Stewart was from Christchurch, and that "[s]he doesn't know us at all but [has] a vendetta and it's just absolutely upsetting."
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> [68] Ms Gillooly checked them in for their return flight. Ms Sharma said, "Great, awesome. So we're checked in. We don't have to check in – great. Thank you." The conversation ended amicably.

[32] The Judge found that Ms Gillooly's account of the conversation had portrayed Ms Sharma in a more negative light than could be inferred from the recording, specifically:[11]

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

[33] Nevertheless, the Judge found that a "large part of Ms Gillooly's account [was] accurate".[12] She referred to various passages of the transcript that disclosed that Ms Sharma "was willing to speak negatively about Ms Stewart to Ms Gillooly and her reasons for doing so".[13] Ms Sharma had explicitly conveyed that she had an issue with Ms Stewart, mentioned having written to Mr Luxon, and used the term "vendetta".[14] The Judge found that it was "obvious that the information would likely be relayed to Ms Stewart, who would become upset".[15]

[34] The Judge noted that Ms Sharma's allegations against Ms Stewart were unfounded and that the actions that had been taken by Ms Stewart were appropriate in light of the nature of the comments that had been relayed to her by Ms Whyte and Ms Matuszewski.[16] Further, Ms Sharma's accusations against Ms Stewart were made in circumstances where Ms Sharma had been provided with Ms Stewart's report of the December 2018 Nelson Airport incident. Ms Sharma would therefore have been aware that any actions Ms Stewart had taken were not prompted "by any vendetta" but

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11 At [126].
12 At [135].
13 At [129].
14 At [128].
15 At [223].
16 At [130].

were based on reports to Ms Stewart from other Air NZ staff regarding Ms Sharma's behaviour which had prompted Ms Stewart to "take action".[17] Ms Stewart was entitled to be concerned about staff health and safety.[18] The Judge accepted that Ms Gillooly likely did feel uncomfortable when Ms Sharma criticised Ms Stewart, her colleague at Air NZ and that "[t]alking negatively to frontline staff about their fellow Air NZ employee would naturally cause staff to feel uncomfortable".[19]

[35] The Judge also noted that Ms Sharma had complained about Wellington Air NZ staff to Ms Gillooly. The Judge found, however, that contrary to Ms Sharma's assertions to Ms Gillooly, the transcript of the April 2019 Wellington incident did not disclose any "horrible" conduct on the part of Wellington staff, as alleged by Ms Sharma.[20]

The second unruly passenger report

[36] Ms Stewart submitted an occupational safety report based on Ms Gillooly's account of the exchange. Ms Stewart stated that she felt "intimidated and personally attacked in [her] own workplace". She expressed concern about being:

> … intimidated and concerned of what Ms Sharma is capable of, what she is trying to do to my professional career, and the effect that she could potentially have on my personal life outside of work if given the opportunity (Nelson is small).

[37] This prompted a further review by Ms Martin who, on 26 June 2019, prepared a second unruly passenger report. It referred to repeated incidents involving Ms Sharma and her family at Air NZ facilities, with a particular focus on the most recent incident, being the June 2019 Nelson Airport incident. The description of that incident in the unruly passenger report was based on Ms Gillooly's account. The report also referred to the December 2018 Nelson Koru Lounge incident and earlier

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17 At [138].
18 At [138].
19 At [128] and [223].
20 At [132].

complaints (by Ms Sharma and/or Mr Leaper) and interactions with the family dating back to 2005, which included the following:

> April 2017 – Complaint by Mrs Sharma regarding Lounge entry in [Nelson] for her family. Lounge staff following the rules which Mrs Sharma was not happy about
>
> May 2017 – [Nelson Koru] Lounge advised customer relations of a problem with the family each time they go in to the lounge
>
> May 2017 – A complaint regarding an Air Nelson cabin crew member who had not paid a bill for Mrs Sharma's services
>
> May 2017 – Expected a lounge voucher to be reinstated even though her family member had no entitlement. Voucher was reinstated, Mrs Sharma was not happy as expected an apology from two [Nelson Koru] Lounge staff members
>
> July 2017 – Issue at [Christchurch] airport where she picked up a pilot's bag from the fast bag trolley even though it was clearly labelled with Air NZ. Became very demanding when flight was cancelled, extreme behaviour in the [Christchurch] lounge
>
> Dec 2018 – Did not meet lounge terms and conditions on [Nelson] on a Singapore Airlines Business Class ticket. After entering the lounge, the family displayed loud and aggressive behaviour towards Air NZ staff. A warning letter was issued.
>
> [Nelson] Airport has also advised verbally there have been many instances at [Nelson] Airport where the family has behaved in a bullying manner and are very rude to the airport staff. These events have not previously been recorded in Korusafe.

[38] Ms Martin expressed the view in the second unruly passenger report that Ms Sharma's behaviour had been sustained over many years, involving intimidation and bullying that had caused significant emotional distress to staff. She stated that there was no evidence of remorse or accountability on Ms Sharma's part for the impact of her actions. Ms Sharma's behaviour was said to have escalated despite prior warnings, suggesting a disregard for Air NZ's policies and Conditions of Carriage. The report referred to the significant negative impact Ms Sharma's actions had had on Air NZ employees, including Ms Stewart and Ms Gillooly. It noted that Ms Stewart felt personally targeted and was particularly concerned that Ms Sharma had searched for her on LinkedIn (as Ms Sharma had mentioned twice to Ms Gillooly) and had repeatedly made derogatory remarks about her.

[39] Ms Martin assessed Ms Sharma's conduct as "intimidating, threatening and abusive" and of "major severity", justifying a ban. Her report concluded with a formal recommendation to issue a one-year ban letter to Ms Sharma, excluding her from Air NZ services for that period. Such a ban was seen as necessary to uphold the safety and security standards of Air NZ and protect staff from further harassment.

The decision to impose the travel ban

[40] On 2 July 2019, Mr Legge, Mr Carter, Mr Leckie and Mr May reviewed the second unruly passenger report and accompanying materials. They also considered the December 2018 Nelson Airport incident and Ms Sharma's 24 June 2019 email to Mr Luxon. They concluded that despite being warned, Ms Sharma had continued to engage in "repetitive and escalating unacceptable behaviour, bullying, and intimidation", justifying a ban.

[41] Ms Sharma was notified of the decision to impose the travel ban by letter dated 2 July 2019, from Mr Carter. Specifically, she was advised that, as a result of her "recent intimidatory and aggressive behaviours towards [Air NZ] staff", she would be banned for a period of 12 months. The tickets Ms Sharma had already booked and paid for were refunded.

The High Court judgment

[42] Ms Sharma's first cause of action was for breach of contract, namely an alleged breach of art 7.1.11 of Air NZ's Conditions of Carriage, which provides:

> **7.1 RIGHT TO REFUSE CARRIAGE**
>
> We and/or Our Operators may at any time prior to boarding refuse to carry you or your Baggage if, in the exercise of our reasonable discretion, we decide or establish any one of the following:
>
> …
>
> **7.1.11** we have notified you in writing that we would not, after the date of such notice, carry you on our flights or those of Our Operators. In this circumstance you will be entitled to a refund, less any reasonable service fee to cover our administration costs[.]

[43] Ms Sharma alleged that Air NZ had not exercised its discretion to refuse carriage *reasonably* in terms of art 7.1.11. Although the pleaded cause of action was that the travel ban as a whole breached art 7.1.11, the Judge accepted Air NZ's submission that the breach of contract claim can apply only in respect of the cancellation of Ms Sharma's booked flights as (subject to compliance with applicable laws) Air NZ is not obliged to sell a ticket to any person.[21] However, as the decision to cancel the existing bookings was inextricably linked to (and a necessary consequence of) the imposition of the travel ban, the Judge largely focused in her analysis on the decision to impose the ban. We will take the same approach.

[44] In both the High Court and in this Court, the parties agreed that the phrase "in the exercise of our reasonable discretion" in art 7.1 should be interpreted in a manner consistent with what is known as the "default rule". The default rule refers to a contractual term that Commonwealth courts have at times implied into contracts in order to constrain the exercise of an absolute or unqualified contractual discretion. Hence, the Judge quoted the agreed interpretation of the express reasonableness requirement in art 7.1.11 as follows:[22]

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

[45] The classic formulation of the default rule was articulated by Leggatt LJ in *Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd (No 2)* as follows:[23]

> … the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably. That entails a proper consideration of the matter after making any necessary inquiries.

[46] The term "unreasonably" in this context applies in a sense analogous to the *Wednesbury* standard of unreasonableness (irrationality), namely that a decision is

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21 At [105]. This aspect of the Judge's decision was not challenged on appeal, as Mr Fowler, counsel for Ms Sharma, confirmed in oral submissions at the appeal hearing. Mr Fowler further accepted that Air NZ is not a monopoly supplier of essential services.

22 At [86], quoting the injunction judgment, above n 1, at [66].

23 *Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd (No 2)* [1993] 1 Lloyd's Rep 397 (CA) at 404; and Stephen Kós "Constraints on the Exercise of Contractual Powers" (2011) 42 VUWLR 17 at 22–21.

irrational to the extent that no reasonable contracting party could have exercised their discretion in that way.[24] Obviously, this sets a high threshold before a court will intervene.[25]

[47] The Judge also briefly considered the landmark decision of the United Kingdom Supreme Court in *Braganza v BP Shipping Ltd*.[26] A key point of contention in that case centred on whether both limbs of the reasonableness test articulated by Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* should be included in an implied term constraining the exercise of the employer's discretion in that case.[27] Lady Hale held that they should.[28] Hence, the Court was required to consider the reasonableness of the decision-making process, not just the rationality of the outcome.[29] As a result, the Court was required to consider if the decision-maker had taken into account the "right matters ... in reaching the decision".[30] Specifically, the decision-maker was required to take into "account those considerations which are obviously relevant to the decision" and "exclude extraneous considerations".[31] This expanded version of the default rule is commonly referred to as the *Braganza* duty or the *Braganza* approach. *Braganza* largely aligned the Court's approach to the review of the exercise of contractual discretion with principles of judicial review in public law, where both the decision-making process and the outcome are scrutinised.

[48] The *Braganza* decision arose in an employment or relational context. The Court in *Braganza* expressly left open the question of the extent to which procedural judicial review objections could arise in commercial contracts.[32] In New Zealand, as

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24 *Woolley v Fonterra Co-operative Group Ltd* [2023] NZCA 266, [2023] 3 NZLR 405 at [95]; and *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 233 (CA).

25 *Ludgate Insurance Co Ltd v Citibank NA* [1998] Lloyd's Rep IR 221 (CA) at [35]–[36].

26 High Court judgment, above n 2, at [88]–[94]; and *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661.

27 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, above n 24, at 233–244.

28 *Braganza v BP Shipping Ltd*, above n 26, at [30], per Lady Hale DP and Lord Kerr SCJ.

29 At [29].

30 At [24].

31 At [29]. Lord Hodge and Lord Kerr SCJJ concurred, at [53]. Lord Neuberger P and Lord Wilson SCJ (dissenting), at [103], said there was no inconsistency in regard to his approach and the approach of Lady Hale P and Lord Hodge SCJ. Lady Hale P, at [30], expressed that she believed Lord Neuberger P agreed on the test to be applied.

32 At [32], per Lady Hale DP and Lord Kerr SCJ; and Lord Hodge and Lord Kerr SCJJ (concurring) at [54].

the Judge noted in the High Court judgment, there has been no explicit endorsement of the *Braganza* approach.[33] Ultimately, however, it was not necessary for the Judge to determine the applicability of the *Braganza* approach to the facts of this case because:

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

Instead, the Judge stated that she would consider:

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

[49] In this context the Judge noted that, where the reasonable exercise of discretion is required, a lay decision-maker is not expected to investigate to the same standard as a court of law:[34]

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

[50] The Judge concluded that in assessing the exercise of Air NZ's contractual discretion, the applicable legal principles required consideration of:[35]

(a) The context of the terms of carriage between Air NZ and consumers, including the reasonable expectations of parties to that contract;

(b) Whether Air NZ acted honestly and in good faith;

(c) Whether Air NZ acted arbitrarily or capriciously; and

(d) Whether Air NZ's decision is unreasonable in the *Wednesbury* sense.

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33 High Court judgment, above n 2, at [93], citing *Woolley v Fonterra Co-operative Group Ltd*, above n 24, at [460].

34 High Court judgment, above n 2, at [96], quoting *CVG Siderurgicia del Orinoco SA v London Steamship Owners' Mutual Insurance Association Ltd* [1979] 1 Lloyd's Rep 557 (QB) [*The Vainqueur José*] at 577.

35 High Court judgment, above n 2, at [101], citing: *C & S Kelly Properties Ltd v Earthquake Commission* [2015] NZHC 1690; *Braganza v BP Shipping Ltd*, above n 26; *The Vainqueur José*, above n 34; and *Canaan Farming Dairy Ltd v Westland Dairy Company Ltd* [2022] NZHC 2524.

[51] Applying that interpretation to the facts, the Judge found that there were investigative flaws in Air NZ's decision to impose the travel ban on Ms Sharma because:[36]

(a) Air NZ decided to impose the ban without first requesting recordings of Ms Sharma's interactions with its staff, despite being aware of their existence (as Ms Sharma had referred to them in her 24 June email to Mr Luxon); and

(b) the 2019 unruly passenger report exaggerated the malice of Ms Sharma during her conversation with Ms Gillooly.

[52] The Judge found that Air NZ was not required to consult with customers before exercising its discretion to refuse carriage. However, where a customer has indicated they possess recordings and intends to make further recordings, obtaining those recordings would have ensured the accuracy of the information Air NZ relied upon.[37] Ultimately, however, nothing turned on Air NZ's failure to do so, as the Judge found that the recordings "corroborated much of Air NZ's concerns" and were "unlikely to have changed the outcome of the decision".[38]

[53] The Judge found that Air NZ's motive or purpose in imposing the travel ban was a legitimate desire to protect its staff.[39] Given the Judge's various factual findings about Ms Sharma's conduct (which we have summarised in some detail above), the Judge was satisfied that the decision to impose the travel ban was a reasonable exercise of Air NZ's discretion under art 7.1.11. The decision was not arbitrary, capricious, made in bad faith, or unreasonable. Nor did the investigative flaws render the decision so unreasonable that no reasonable decision-maker could have made it.[40]

[54] The Judge also dismissed the FTA cause of action, for reasons we address further at [92] below.

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36 High Court judgment, above n 2, at [221(a)].
37 At [221(b)].
38 At [221(c)].
39 At [214] and [216].
40 At [226].

What level of investigation did the "exercise of reasonable discretion" in art 7.1 require?

[55] We first address Air NZ's challenge to the Judge's finding that there were investigative flaws in its decision-making process. This was the subject of Air NZ's notice of intention to support the High Court judgment on other grounds. Specifically, Mr Wilson submitted that the Judge erred in finding that "it would have been prudent" in the circumstances for Air NZ to ask for copies of Ms Sharma's covert recordings and that it was an investigative flaw not to do so.[41]

[56] Determining what level of investigation was required in the circumstances turns on the correct interpretation of the phrase "in the reasonable exercise of our discretion" in art 7.1. We emphasise that this is not a case regarding the correct interpretation of an absolute or unfettered contractual discretion. Rather, art 7.1 includes an express reasonableness requirement. Ms Sharma's breach of contract claim is therefore based entirely on the alleged breach of an *express* term of the Conditions of Carriage (art 7.1.11). She does not plead or rely on any *implied* terms. Hence the cases regarding the correct approach to the interpretation of absolute or unfettered contractual discretions and what (if any) terms should be implied into such contracts (such as *Abu Dhabi National Tanker Co* and *Braganza)* are only relevant indirectly, to the extent we discuss below.

The correct interpretation of art 7.1

[57] On appeal, the parties' submissions proceeded (as they had in the High Court) on the basis that the correct interpretation of the express reasonableness requirement in art 7.1 is one that aligns with the default rule. We note that it is our view that other interpretations of the express reasonableness requirement are potentially available. However, as we did not hear any arguments proposing a different interpretation, we proceed (as the Judge did) on the basis of the parties' agreement that the article should be interpreted in a way that largely mirrors the default rule (as formulated prior to *Braganza*), as set out in the quote at [44] above.

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41 At [122] and [221(a)].

[58] We also note that the Judge had regard to the purpose of the contractual discretion (as set out at [53] above), which we also see as highly important to any assessment of the reasonableness of the exercise of Air NZ's discretion. It has long been recognised that contractual discretions must be exercised for a proper purpose. For example, in *Equitable Life Assurance Society v Hyman*, Lord Cook referred to "the principle that no legal discretion, however widely worded … can be exercised for purposes contrary to those of the instrument by which it is conferred".[42] In some cases, this has been identified as an aspect of the default rule. For example, in *Braganza*, Lady Hale accepted consistency with the contractual purpose as a requirement of the default rule.[43]

[59] As this Court recently observed in *Bank of New Zealand v Christian Church Community Trust*, "proper purpose" may be the appropriate lens through which to assess the exercise of contractual discretion, on a standalone basis.[44] Specifically, this Court considered the "proper purpose" lens to be "the most promising approach to ascertaining the (implied) limits of a contractual power or discretion" with reference to a recent article on the topic by Professor Paul Davies and Lord Sales in which they suggested that:[45]

> [A]ny restrictions need to be found through the normal techniques of interpretation and implication, and that these usually have the effect that contractual powers must be exercised for a proper purpose. The application of these techniques will sometimes indicate that the parties intended that a discretion should be unlimited or that extensive restrictions should apply.

[60] Here, however, given the parties' agreement that art 7.1.11 should be interpreted a manner analogous to the default rule, we will consider contractual purpose in that context, rather than as a standalone approach to ascertaining whether Air NZ exercised its discretion reasonably.

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42 *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 (HL) at 460, per Lord Cooke.

43 *Braganza v BP Shipping Ltd*, above n 26, at [27], per Lady Hale DP and Lord Kerr SCJ.

44 *Bank of New Zealand v Christian Church Community Trust* [2024] NZCA 645 at [135]. See also Lord Sales "Use of Powers for Proper Purposes in Private Law" (2020) 136 LQR 384 at 396 suggests analogies to *Wednesbury* are "unhelpful" and argues that the default rule should be replaced with a general requirement that a power is exercised for proper purpose. Lord Sales suggests contract should look instead of *Wednesbury* unreasonableness to the proper purpose doctrine in administrative law, and its equivalent equitable doctrine of "fraud on the power".

45 *Bank of New Zealand v The Christian Church Community Trust*, above n 44, at [123]; and Paul S Davies and Lord Sales "Controlling contract discretions: Wednesbury reasonableness, good faith and proper purposes" (2024) 140 LQR 106 at 106.

[61] When considering what the purpose of art 7.1.11 (and art 7.1 more generally) is, we have regard to the fact that Air NZ is a private company. It is common ground on appeal that Air NZ is not a monopoly supplier of essential services. As the Judge accepted, Air NZ is therefore under no general legal obligation to any person to carry them on its flights. Any obligation arises only pursuant to contract — here, the Conditions of Carriage — that apply once a person has purchased a ticket.[46]

[62] In the 12 months prior to June 2019 (the period relevant to this appeal), Air NZ carried almost 18 million passengers, or roughly 50,000 passengers per day. Air NZ's evidence was that safety, security, and staff and customer wellbeing are a critical focus for it throughout its network, consistent with its obligations as an airline operator under the Civil Aviation Act 1990 and as an employer under the Health and Safety at Work Act 2015. In addition, under the Civil Aviation Act, Air NZ is required to ensure its activities are carried out safely and in accordance with prescribed safety standards and practices.[47]

[63] Against this background, the discretion to refuse carriage in art 7.1 is clearly designed to provide Air NZ with a high degree of flexibility to decline to carry a passenger if there is a reasonable basis for doing so. Further, art 7.1 has been included for the sole benefit of Air NZ. Subject to the requirement to exercise its discretion reasonably, Air NZ is entitled to act in its own commercial interests. Air NZ is able to unilaterally refuse carriage to a passenger in a wide range of circumstances (set out in art 7.1) which are broadly aimed at: ensuring the safety of the flight, passengers, crew and property; ensuring legal and regulatory compliance; operational and security considerations; preventing fraud and ensuring compliance with contractual terms; protecting the overall passenger experience and the airline's reputation; managing financial risk; and deterring repeat misconduct and reducing the risk of repeated incidents.

[64] Article 7.1.11 recognises that there may also be other situations where Air NZ considers it necessary or desirable to refuse carriage to a passenger. Hence, Air NZ may refuse future carriage to any passenger who has been expressly notified in writing

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46 High Court judgment, above n 2, at [105].

47 Civil Aviation Act 1990, s 12(3). See also the Civil Aviation (Offences) Regulations 2006, sch 1.

of such a decision.[48] The provision for a refund (less administrative fees) promotes fairness, by compensating such a passenger for unused portions of their ticket. As Air NZ is not a monopoly supplier of essential services, the passenger will then be able to make alternative travel arrangements (albeit possibly less convenient arrangements) to their destination.

[65] Here, the Judge found that Air NZ's purpose or aim in imposing the travel ban was a desire to protect its staff.[49] That is clearly a legitimate purpose in terms of art 7.1 and Mr Fowler KC, for Ms Sharma, did not suggest otherwise. Rather, Ms Sharma's challenge is a factual one. She argues, in essence, that it was irrational, capricious or arbitrary for Air NZ to exercise its discretion to refuse to carry her because she does not, in fact, pose any threat to staff wellbeing.

Did the Judge impose too high a standard of investigation on Air NZ?

[66] Mr Fowler supported the Judge's finding that it was an investigative flaw for Air NZ not to have requested copies of Ms Sharma's covert recordings, largely for the reasons given by the Judge. He submitted that Air NZ had an obligation to request copies of the recordings and review them, given the pivotal role of Ms Sharma's conversations with Air NZ's front-line staff in the travel ban decision. Mr Fowler also submitted that Ms Sharma should have been provided with an opportunity to respond to Ms Gillooly's complaint.

[67] Mr Wilson argued that the Judge imposed too high a standard of investigation on Air NZ in all the circumstances. He submitted that a thorough investigation, to the level suggested by the Judge, is not required.[50] Mr Wilson also took issue with the Judge's finding that Air NZ was "on notice" of the existence of the covert recordings, in any meaningful sense. He noted that it was not until 24 June 2019, some six months after Ms Sharma and her family began making covert recordings of their interactions with Air NZ staff, that Ms Sharma made two passing references to the possibility

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48 It is common ground that in this case, although the link between the opening words of art 7.1 and art 7.1.11 is grammatically awkward, it is the decision to notify Ms Sharma that she would not be carried that had to be exercised reasonably rather than any subsequent decision to refuse carriage on the basis that she has been notified.

49 High Court judgment, above n 2, at [214] and [216].

50 Citing *The Vainqueur José*, above n 23, at 577.

of such recordings, in a late-night four-page email to Mr Luxon. Even then, Ms Sharma only disclosed that she had "taped" the April 2019 incident, but not that she (or her family members) had recorded other incidents. Nor did Ms Sharma provide the recording of the April 2019 incident or a transcript of it to support her complaint to Mr Luxon. Further, when Ms Sharma commenced this proceeding in July 2019, the affidavits filed in support of the injunction application did not disclose or refer to the recordings of the relevant interactions. Ms Sharma only provided this evidence in reply.

[68] Mr Wilson noted that, at least in some instances, the recordings do not appear to record the entire conversation. He submitted that, in any event, Air NZ would be entitled to take a dim view of a passenger making covert recordings of conversations with its frontline staff. Apart from any "moral hazard", he argued that there is an inherent unfairness to a covert recording that this Court should not overlook. Specifically, he submitted, any recording may not capture the whole of a discussion (with the party making the recording controlling when the recording begins and ends). The party making the recording may also steer the discussion to create a self-serving record.

[69] In our view, Air NZ's failure to request copies of Ms Sharma's covert recordings was not an investigative flaw. If procedural steps are specified in a contract, then obviously they must be followed. Here, the only express process obligations set out in art 7.1 are that Air NZ write to the customer advising of the decision to refuse to carry them and refund their tickets. There is no contractual obligation to consult, to conduct a specific inquiry or investigation, or to provide reasons. As noted in the quote at [48] above, in the High Court Ms Sharma expressly disavowed reliance on the *Braganza* extension to the default rule and did not seek to argue that *Braganza* type process requirements are included in art 7.1

(correctly interpreted).[51] Accordingly, there is no basis for holding a private contracting party such as Air NZ to the same standard of decision-making as the state. Nor (as the Judge noted) is the decision-maker required to investigate to the same standard as a court of law.[52]

[70] In our view, the wording of art 7.1, combined with the broader contractual context and purpose (summarised at [42] above), indicates that Air NZ's contractual discretion to refuse carriage to a passenger was not intended to be unduly fettered by technical or complex procedural requirements. This ensures that Air NZ (which at the time carried approximately 50,000 passengers per day) can respond promptly and effectively to a wide range of matters that may warrant refusing carriage to a particular passenger, sometimes in circumstances of real urgency. Given the nature of air travel and the inherent risks involved (including security risks, risks to the health and safety of staff and other passengers, weather events, pandemics, technical issues and so on), it is clearly appropriate for Air NZ to have a significant degree of flexibility, and scope for the exercise of reasonable judgment, when making decisions to refuse carriage to a passenger. Hence, the express process requirements in art 7.1.11 are of very limited scope.

[71] The Judge was correct to find that there was no obligation for Air NZ to consult with Ms Sharma before exercising its discretion under art 7.1.11. The Judge erred, however, in finding that Air NZ's failure to request copies of Ms Sharma's covert recordings was an investigative failure. Rather, when exercising its decision, it was reasonable and appropriate for Air NZ to rely on its own (extensive) internal documentation, including the reports made by various staff members of their

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51 The *Braganza* decision was not referred to in either Ms Sharma's notice of appeal, or her written submissions in support of her appeal. However, in response to a minute from this Court seeking clarification of Ms Sharma's legal position on appeal (issued after Ms Sharma's submissions had been filed), counsel for Ms Sharma advised that "it was never Ms Sharma's case that all process issues were irrelevant absent a *Braganza* extension of the default rule" and that counsel had also now received instructions to seek to argue on appeal that the expanded default rule articulated in *Braganza* should apply in New Zealand. Air NZ strenuously opposed Ms Sharma's (informal) request for leave to raise this new issue, on the ground of prejudice. This Court declined to grant leave to Ms Sharma to (very belatedly) raise this new argument. As set out in the quote at [54] above, however, the Judge did consider aspects of Air NZ's decision-making process, to the extent it was relevant to assessing the rationality of Air NZ's decision and whether Air NZ acted in good faith, rationally and consistently with its terms of carriage when it imposed the travel ban. We take the same approach.

52 High Court judgment, above n 2, at [96].

interactions with Ms Sharma (which demonstrated a fairly consistent pattern of behaviour over an extended period) and the internal investigations that had been undertaken in response to those reports.

Did the Judge err in finding that Air NZ had not breached art 7.1.11?

[72] We now turn to consider whether the Judge erred in finding that Air NZ had not breached art 7.1.11 of its Conditions of Carriage. Ms Sharma raised five key issues, which we will deal with in turn.

The June 2019 Nelson Airport incident

[73] Ms Sharma's first ground of appeal was that the comments she had made to Ms Gillooly did not support the imposition of the travel ban. This ground of appeal relied heavily on the differences between Ms Sharma's covert recording of the exchange and Ms Gillooly's own account. Mr Fowler submitted that the Judge had materially understated the differences. For the reasons we have outlined above, Air NZ cannot be faulted procedurally. It was entitled to rely on Ms Gillooly's account of her interaction with Ms Sharma.

[74] In any event, in terms of the substantive merits of Mr Fowler's submissions on this issue, it is our view that the Judge did not err in finding that although Ms Gillooly had overstated the degree of Ms Sharma's hostility, a "large part of Ms Gillooly's account [was] accurate".[53] It was also open to the Judge to accept (as she did) Mr Legge's evidence that he would have arrived at the same decision if he had heard the covert recordings.[54] Ms Sharma's comments to Ms Gillooly in the recording, when seen in their broader context (including the December 2018 incident and Ms Sharma's 24 June email to Mr Luxon), raise a number of legitimate issues and tended to support Air NZ's assessment that Ms Sharma had engaged in a pattern of behaviour in her interactions with frontline Air NZ staff that raised staff welfare concerns.

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53 At [135].
54 At [221(c)].

Ms Sharma's 24 June 2019 email to the chief executive

[75] Ms Sharma's next ground of appeal was that the Judge had erred in finding that remarks that Ms Sharma had made in her 24 June 2019 email to Mr Luxon (set out at [20] to [23] above) were relevant and material to the travel ban decision. Ms Sharma denied making personal attacks in that email, arguing that her statements were not intended to insult but to highlight perceived flaws in staff conduct. Mr Fowler emphasised, as part of the broader context, that an incorrect allegation had been made in Air NZ's December 2018 warning letter. Specifically, the letter had stated that the family had entered the Nelson Koru Lounge without permission, when the correct position was that they had been permitted to enter by Ms Matuszewski while their lounge access entitlement was further investigated. Mr Fowler further submitted, as part of the relevant context, that Ms Sharma had good reason to be confused and concerned about the subsequent (and unexplained) imposition of check-in restrictions on her family. Against this background, Mr Fowler queried whether any of what Ms Sharma said in her 24 June 2019 email was "particularly remarkable".

[76] We find this submission unpersuasive. Ms Sharma's 24 June 2019 email is not simply a courteous email (or even a terse or annoyed email) to Air NZ's chief executive seeking to correct an incorrect statement in the warning letter, or requesting an explanation as to why the family were no longer able to check in at the electronic check in kiosks. Such an email would, of course, have been unobjectionable. The email that Ms Sharma sent, however, displayed a high degree of antagonism and hostility towards specific, named, Air NZ staff members. It was insulting and derogatory about those staff members and others, including Mr Luxon and Air NZ itself. We do not find it surprising that Ms Sharma's email was referred to Air NZ's Senior Legal Counsel, Mr Roberts, for response, or that in his reply, Mr Roberts referred to the email as "distasteful and insulting" and declined to engage substantively with its content. Mr Roberts had legitimate grounds for the concern stated in his response that:

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

[77] The content of the email (including that a staff member had been reduced to tears as a result of her interaction with Ms Sharma) supported the Judge's findings that Ms Sharma demonstrated "a lack of awareness of the impact of her conduct on others", "showed no compassion or empathy" for Air NZ's frontline employees, and, in particular, "no compassion for Ms Joseph's position".[55] The tone and content of the email also suggested an unwillingness to engage constructively with Air NZ on any issues of concern and instead to blame and insult individual Air NZ staff.

The April 2019 Wellington Airport incident

[78] The next ground of appeal related to the April 2019 Wellington Airport incident, details of which are set out at [17] to [19] above. Mr Fowler submitted that the Judge had erred by referring to this incident at all. He argued that this constituted an impermissible "back filling" or "ex post facto" justification of the travel ban, as neither of the two decision-makers who gave evidence, Mr Carter and Mr Legge, were aware of it at the time of their decision.

[79] We accept that the occupational safety report in relation to this incident, which the Judge referred to, was not before the decision-makers at the time of their decision. However, the decision-makers were aware of this incident, as they had before them Ms Sharma's account of it, which is the focus of her 24 June 2019 email to Mr Luxon. For the reasons outlined previously, Ms Sharma's own account of the April 2019 incident gave rise to legitimate staff welfare concerns. Her email describes a contentious and unpleasant interaction with frontline Wellington Airport staff. It discloses a hostile attitude to those staff in circumstances where it is apparent, even on Ms Sharma's account, that they were simply trying to do their jobs. Further, it was apparent from the email that during the incident a frontline staff member had cried as a result of her interaction with Ms Sharma. Ms Sharma demonstrated a lack of empathy or compassion by minimising or belittling this response in her email — referring to the staff member as having simply "put on a show of tears" and suggesting that those tears were part of a "set up".

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55 At [199] and [221(a)(i)].

[80] It was open to Air NZ's decision-makers, and the Judge, to consider Ms Sharma's account of the April 2019 incident in the context of other incidents such as the December 2018 incident and the 25 June 2019 incident. Viewed through that lens, the April 2019 incident further supports Air NZ's view of a concerning pattern of behaviour in Ms Sharma's interactions with its frontline staff, even without reference to the April 2019 occupational safety report or any other contemporaneous reports.

Previous complaints and customer feedback

[81] The next ground of appeal was that the Judge erred in finding that Air NZ's reference to Ms Sharma's historical customer feedback during its investigation and decision-making process did not breach Air NZ's privacy policy. Mr Fowler also submitted that some of Ms Sharma's customer feedback was irrelevant, trivial or stale.

[82] The Judge rejected the submission that Air NZ's reference to this material was contrary to its privacy policy for the following reasons:

> [218] I consider that previous complaints by Ms Sharma provide insight into Ms Sharma's conduct when engaging with Air NZ staff. They may corroborate or weigh against Ms Sharma's conduct being inappropriate. I consider they were relevant to Air NZ's investigation.
>
> [219] Further, the Air NZ privacy policy provided that complaints or concerns can be used in relation to any "vital interest" or "legitimate interest," including to "manage customer and employee safety and security." I accept that Air NZ was therefore entitled to consider complaints it held under its privacy policy when considering the risk a customer might pose to staff health and safety.
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> [220] I accept that in the context of investigating Ms Sharma's conduct, it was also appropriate for Air NZ to consider complaints by Mr Christopher Leaper as they may also disclose information that is relevant to the investigation of Ms Sharma. Those complaints, however, were only relevant to the extent that they did disclose information relevant to Ms Sharma.

[83] We find no error in the Judge's analysis. Although some aspects of Ms Sharma's complaint/feedback history were benign (and there is no evidence they were given any weight), other aspects were relevant to Air NZ's exercise of its discretion. For example, as set out in the quote at [37] above, the relevant material included references to: an incident in April 2017 regarding a complaint by Mrs Sharma regarding lounge entry at Nelson Airport for her family; an incident in

May 2017 where the lounge staff at Nelson airport "advised customer relations of a problem with the family each time they go in to the lounge"; and a note that in May 2017 Ms Sharma had expected a lounge voucher to be reinstated even though her family member had no entitlement. As the Judge found, the privacy policy explicitly allowed the use of customer complaints or feedback for any "legitimate interest" (including to "manage customer and employee safety and security").[56]

Did the Judge err by focusing on Ms Sharma rather than on Air NZ's decision-making process?

[84] Mr Fowler submitted that the Judge erred by focussing on Ms Sharma and her behaviour rather than on the reasonableness of Air NZ's decision-making. For example, the Judge referred to: Ms Sharma being willing to speak negatively to frontline staff or in letters to the chief executive about other staff; her lack of compassion and empathy; and her lack of awareness as to the impact of her behaviour on others. Mr Fowler referred to the background context we have summarised at [75] above in support of a submission that Ms Sharma's behaviour was understandable and therefore did not warrant a ban.

[85] In our view, the Judge did not err by carefully analysing Ms Sharma's conduct in the context of considering the reasonableness of Air NZ's decision-making. The two are inextricably linked. Whether Air NZ's decision to impose a travel ban on Ms Sharma was irrational, arbitrary, or capricious largely turned on whether Ms Sharma's conduct justified such a ban. Air NZ's view was that "Ms Sharma's behaviour was continuing to deteriorate and needed to be stopped for the safety, security and wellbeing of [Air NZ] staff and other customers". In assessing whether Air NZ had reached that view reasonably, it was necessary (indeed essential) for the Judge to carefully analyse Ms Sharma's behaviour and attitudes in her interactions with Air NZ staff. As we have noted at [76] above, a passenger is obviously entitled to raise any concerns they may have, provided they do so in an appropriate manner. However, the right of customers to make appropriate enquiries or complaints, or to express their grievances, does not trump the right of staff to work in a safe and respectful environment.

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[56] At [219].

Conclusion

[86] In conclusion, the Judge did not err in finding that Ms Sharma had failed to establish that Air NZ had breached art 7.1 of its Conditions of Carriage. Prior to imposing the travel ban, Air NZ engaged in a process of information gathering, evaluation, and review consistent with its internal policies. The decision was made by four senior staff who were independent of the employees who had raised concerns about their interactions with Ms Sharma. Despite the warning issued to Ms Sharma on 21 December 2018, the decision-makers concluded (based on a clear evidential foundation) that her inappropriate interactions with staff had continued — both in person and through written communications.

[87] Lesser options might have been available, but Air NZ's exercise of its discretion was not irrational in the sense that no reasonable airline could have acted that way in the circumstances. Nor can Air NZ be said to have acted arbitrarily or capriciously. It had sound reasons for imposing the travel ban, based on staff welfare concerns. Air NZ did not act on a whim or caprice, and its decision was in accordance with the contractual purpose for which the discretion was conferred. There is no evidence of any bad faith. The Judge was accordingly correct to dismiss the breach of contract cause of action.

Did the Judge err in dismissing the Fair Trading Act cause of action?

[88] We now turn to consider whether the Judge erred in dismissing the FTA cause of action. Mr Fowler submitted that the Judge made several errors in her assessment of this cause of action. In particular, he challenged the Judge's finding that any misleading conduct by Air NZ, in relation to Ms Sharma's lounge access entitlements on 1 December 2018, had not caused Ms Sharma any loss.

[89] Air NZ, on the other hand, supported key aspects of the Judge's reasoning (including on the issue of causation). Ms Boberg, who argued this ground of appeal for Air NZ, further submitted that Ms Sharma had failed to prove any misleading conduct. She noted that conduct that is confusing to a claimant is not necessarily misleading. Rather, this Court has held that "conduct that merely induces a state of wonderment as to the true state of affairs is not sufficient to establish an

infringement".[57] Liability may arise only "where the misleading conduct induces a positive misunderstanding that is incorrect".[58] As this Court observed in *Geddes v New Zealand Dairy Board*, "the fact that some people might not understand an accurately stated but complex regime, does not render the statements unfair or misleading."[59]

The pleadings

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

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

(i) Ms Sharma and her family having business class tickets; and

(ii) Ms Sharma being a Koru member and flying on an Air NZ flight to Auckland;

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

(b) creating rights of entry that were so complex and confusing that even its own staff were unable to determine with clarity Ms Sharma's entitlement to enter the Koru Lounge;

(c) Air NZ staff advising Ms Sharma that when she and her family checked in that she could proceed to enter the Koru Lounge; and

(d) Air NZ staff at the Koru Lounge erroneously stating to the Air NZ decision-maker that members of the plaintiff's family who were in the lounge only had premium economy tickets, which error was unknown to that decision-maker.

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57 *Fonterra Co-operative Group Ltd v McIntyre and Williamson Partnership* [2016] NZCA 538 at [172].
58 At [172].
59 *Geddes v New Zealand Dairy Board* CA180/03, 20 June 2005 at [112].

[91] Ms Sharma pleaded that, as a result of this misleading conduct, she had suffered loss and damage in the sum of $15,000 due to:

(a) the ongoing effect of the notation in Ms Sharma's Air NZ record that she was subject to a 12-month travel ban and "the effect of that record on [her] travelling convenience and freedom both in New Zealand and elsewhere"; and

(b) mental distress from inconvenience and anxiety.

The High Court judgment

[92] The Judge made several factual findings in respect this cause of action that were favourable to Ms Sharma. These included that both the "lounge finder" tool on the Star Alliance website (which Ms Sharma's son had accessed) and the lounge access policy were confusing.[60] Ultimately, however, the FTA cause of action failed due to lack of causation. Specifically, the Judge found that Ms Sharma had failed to establish that she had suffered or was likely to suffer loss or damage *by* the alleged misleading conduct, as required by s 43 of the FTA.[61] Rather:

> [251] Air NZ was entitled to issue the warning letter given the insults directed at Ms Matuszewski. While the Koru lounge access rules were background context for the 1 December 2018 incident, I do not accept that they were the reason for the warning letter or the subsequent banning decision.
>
> [252] In those circumstances the requirements under s 43 are not made out and I am not satisfied that the loss suffered was caused by any representations regarding lounge access.

Did the Judge err in finding a lack of causation?

[93] We first address Ms Sharma's challenge to the Judge's finding that, even if Air NZ had misrepresented the family's lounge access entitlements, she had failed to prove that she had suffered loss or damage caused *by* the alleged misleading conduct. If the Judge's finding on this issue is correct, then Ms Sharma is not entitled to the relief she seeks and this aspect of her appeal must necessarily fail.

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60 High Court judgment, above n 2, at [239] and [246].
61 At [250]–[251].

[94] Mr Fowler submitted that it was the confusion over the family's entitlement to lounge access that triggered the December 2018 Nelson lounge incident. This in turn initiated the chain of events that ultimately led to the imposition of the travel ban and the pleaded harm, which flowed from that ban.

[95] In order for a claimant's loss to be caused *by* the defendant, it is necessary to show that the claimant was actually misled or deceived and that the defendant's conduct was an operating cause of the claimant's loss or damage (that is, there must be a "clear nexus" between the conduct and the loss).[62] In our view, the Judge was correct to find that even if Air NZ had made misleading or confusing statements regarding the family's entitlement to access the Nelson Koru Lounge on or before 1 December 2018, this was simply background context. It was not directly causative of the travel ban imposed seven months later, on 2 July 2019. Rather, to the extent that the December 2018 incident was relevant to the travel ban decision, it was due to the inappropriate response of Ms Sharma and her family to any confusion that may have arisen. Their behaviour caused considerable distress to Ms Matuszewski, who (as the Judge noted) was simply trying to do her job.

[96] As the Judge found, Air NZ was entitled to issue the warning letter in response to the December 2018 Nelson lounge incident.[63] The letter noted the family's unacceptable behaviour in the lounge and clearly explained Air NZ's lounge access policy, including the requirement for domestic travel to be on Air NZ operated and ticketed flights. The letter also explained the potential consequences of any failure to comply with lounge access conditions. Given the apparent belief of some (or all) family members that they were entitled to domestic lounge access on their trip, despite being ticketed with Singapore Airlines, it was clearly appropriate (and indeed helpful) for Air NZ to set out the correct position in writing, with the links to online sources for further information that were included in the letter.

[97] Any confusion regarding lounge access entitlements should therefore have been resolved by the warning letter, and the follow up letter Air NZ sent, which reiterated the correct position. Any confusion that may have existed on 1 December

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62 *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [29].
63 High Court judgment, above n 2, at [251].

2018 cannot justify or excuse either the behaviour that occurred that day, or Ms Sharma's subsequent conduct in 2019, which ultimately culminated in the travel ban. The Judge was correct, in our view, to conclude that there was no causative link between any misleading statements that may have been made by or on behalf of Air NZ regarding lounge access entitlements and the losses Ms Sharma allegedly suffered because of the imposition of the travel ban.

[98] Given our conclusion on this issue, Ms Sharma's FTA appeal cannot succeed. It is therefore not strictly necessary for us to consider her other FTA grounds of appeal, which relate to whether Air NZ did in fact mislead Ms Sharma over the family's lounge access entitlements. We will, however, briefly address those grounds of appeal, for completeness.

Alleged misrepresentation by Singapore Airlines (as an "agent" of Air NZ)

[99] The first pleaded misrepresentation (summarised at [91(a)] above) was that Air NZ, *through its agent Singapore Airlines,* misrepresented the relevant lounge access rules to Ms Sharma. Air NZ denied this pleading in its statement of defence and stated further that Singapore Airlines was not an agent of Air NZ. Ms Sharma was accordingly required to prove this allegation, on the balance of probabilities.

[100] Ms Boberg submitted that the Judge's analysis overlooked that the pleading was one of misleading conduct by Singapore Airlines, as agent for Air NZ. The Judge instead addressed a somewhat different argument that appears to have been advanced on behalf of Ms Sharma at trial but was not pleaded.

[101] We accept that submission. No attempt appears to have been made at trial to prove that Singapore Airlines was an agent of Air NZ and had made any misleading statements regarding lounge access in that capacity. Rather, oral evidence was given (and the Judge accepted) that the lounge finder tool on the Star Alliance website was confusing.[64] One of Ms Sharma's sons also asserted in oral evidence that the Star Alliance lounge finder tool could be accessed through both the Singapore Airlines

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64 At [239].

and Air NZ websites.[65] Such evidence falls far short, however, of establishing on the balance of probabilities that Singapore Airlines made misleading representations to Ms Sharma regarding lounge access entitlements, *as an agent* for Air NZ.

[102] Presumably because it was not a focus of argument, the Judge made no factual finding as to whether Singapore Airlines had made any misrepresentations to Ms Sharma, as agent for Air NZ. We note, however, that the evidence is that the family were ticketed with Singapore Airlines and at all relevant times were customers of that airline, not Air NZ. Any internet searches that members of the family may have undertaken regarding lounge access entitlements were therefore presumably made for the purpose of determining their lounge access entitlements as Singapore Airlines customers, as they were not customers of Air NZ. We were not referred to any documents or other evidence that suggested that Singapore Airlines had made any representations to Ms Sharma or her family regarding lounge access, as an agent for Air NZ. Nor does the agency allegation appear to have been put to any of the Air NZ's witnesses in cross-examination. In our view, this pleaded allegation has simply not been proved.

[103] Even if an agency relationship had been proved, however, this aspect of the FTA claim would face a further significant obstacle. Specifically, Ms Sharma's evidence does not appear to establish that she was personally aware of any statements made by Singapore Airlines (whether on the Star Alliance website or otherwise) regarding lounge access entitlements prior to the December 2018 Nelson lounge incident. Rather, Ms Sharma's evidence in both her reply affidavit and under cross-examination was that she became aware of the internet search "when we were in Singapore in the lounge" on 31 December 2018, "to try and understand the warning letter".

Did the Judge err in finding that any confusion over entry into the Nelson Koru Lounge was only for a short time?

[104] Mr Fowler submitted that the Judge erred in finding that any confusion over entry into the Nelson Koru Lounge was only for a short time. This ground of appeal

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65 At [235].

relates to the allegation of misleading conduct set out at [91(c)] above, namely that an Air NZ frontline staff member engaged in misleading conduct by advising the family to proceed to the Koru Lounge after they had checked in. The Judge found in relation to this allegation that:

> [248] In terms of Air NZ staff informing Ms Sharma to go to the [Koru Lounge], Air NZ submits that any confusion caused was clarified when the boarding passes flashed red when scanned, indicating they were ineligible for entry. Air NZ says any confusion was therefore only for a short time and was clarified when Ms Matuszewski and then Ms Whyte spoke with Ms Sharma. I accept this submission.

[105] Mr Fowler argued that this finding is inconsistent with subsequent events and actions that perpetuated the initial confusion.

[106] We find no error in the Judge's analysis of this issue. In addition, we accept Ms Boberg's submission that a customer is not granted access to the Koru Lounge at check-in, but by the lounge host on entry. As a longstanding Koru member, Ms Sharma would have been aware of this. When they arrived at the Nelson Koru Lounge, the family's boarding passes scanned red, indicating that they were not eligible for entry. That event superseded any incorrect advice that may have been given at check in and reflected the correct position.

Did the Judge err in finding that the "premium economy" statement was not likely to mislead or deceive?

[107] Ms Sharma pleaded that Air NZ engaged in misleading and deceptive conduct by:

> Air NZ staff at the Koru lounge erroneously stat[ing] to the Air NZ decision-maker that members of [Ms Sharma's] family who were in the lounge only had premium economy tickets, which error was unknown to that decision-maker.

We assume that the decision-maker being referred to in this context is the author of the warning letter.

[108] The factual background to this allegation is that, following the December 2018 Nelson Koru Lounge incident, Ms Whyte stated to Ms Stewart that some members of the family were flying premium economy rather than business class on the

international leg of their journey. Ms Stewart included this (incorrect, but ultimately irrelevant) information in her written report to Ms Martin, the investigator who prepared the first unruly passenger report. The Judge accepted that Air NZ staff had "erroneously stated that some of Ms Sharma's family were in premium economy" but found that this "cannot have been likely to mislead or deceive Ms Sharma because she knew this was incorrect".[66]

[109] Ms Sharma challenged this finding on appeal. Mr Fowler submitted that the Judge's finding cannot be reconciled with the fact that the subject matter of the whole confusion was eligibility to enter the lounge.

[110] We accept Ms Boberg's submission that this aspect of Ms Sharma's FTA claim is misconceived. Ms Sharma's allegation, in essence, is that in *internal* Air NZ communications (which Ms Sharma later received copies of through discovery in this proceeding) Ms Whyte misled *other Air NZ staff*, by incorrectly stating that some of the family members were travelling premium economy. Ms Sharma does not plead that the allegedly misleading statement was made to her, or that she was misled by it.

[111] An internal communication within Air NZ is not a statement to Ms Sharma (or indeed the public). An incorrect statement made by Ms Whyte to Ms Stewart cannot have misled or deceived Ms Sharma. Further, as the Judge pointed out, even if the statement had been made to Ms Sharma, she could not have been misled by it as she knew it was incorrect. Indeed, on Ms Sharma's evidence, she advised Ms Whyte that all of the family were travelling business class, showed Ms Whyte their travel documents, and Ms Whyte was "happy with that".

Conclusion on appeal relating to the FTA cause of action

[112] In conclusion, there is no merit in any of Ms Sharma's grounds of appeal against the Judge's dismissal of the FTA cause of action. The Judge was correct to find that the FTA cause of action had not been proved.

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66 At [249].

Result

[113] The appeal is dismissed.

[114] The appellant must pay the respondent costs for a standard appeal on a band A basis together with usual disbursements. We certify for two counsel.

Solicitors:
Bartlett Law, Wellington for Appellant
Bell Gully, Auckland for Respondent