

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA485/2025  
[2026] NZCA 115**

BETWEEN                      JETCONNECT LIMITED  
   Applicant  
  
AND                                PHILLIP TIGHE-UMBERS  
   Respondent

Court:                            Katz and Campbell JJ  
  
Counsel:                        M W O'Brien and J O P Plunket for Applicant  
   R E Harrison KC for Respondent  
  
Judgment:                      14 April 2026 at 11.00 am  
(On the papers)

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**JUDGMENT OF THE COURT**

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- A    The application for leave to appeal is granted on the following question of law:**
- Does non-compliance with cl 3(4) of sch 3A to the Employment Relations Act 2000 of itself mean that a purported termination under cl 3(3) constitutes an unjustifiable dismissal under s 103A?**
- B    Costs are reserved pending determination of the appeal.**
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**REASONS OF THE COURT**

(Given by Campbell J)

[1] Jetconnect Ltd (Jetconnect) applies for leave to appeal a decision of the Employment Court finding that Jetconnect had unjustifiably terminated the employment of the respondent, Captain Phillip Tighe-Umbers.<sup>1</sup> Captain Tighe-Umbers opposes the application.

## **Background**

[2] Jetconnect dismissed Captain Tighe-Umbers from his employment as a pilot on 24 April 2022 for non-compliance with the COVID-19 Public Health Response (Vaccinations) Order 2021. Captain Tighe-Umbers pursued a personal grievance claim in the Employment Relations Authority (the Authority) on the basis he was unjustifiably dismissed. He was unsuccessful.<sup>2</sup>

[3] Captain Tighe-Umbers challenged the Authority's determination in the Employment Court. Among other things, he claimed his dismissal was unlawful because Jetconnect had failed to ensure all other reasonable alternatives to dismissal were exhausted, thereby breaching cl 3(4) of sch 3A to the Employment Relations Act 2000 (the Act).

[4] Schedule 3A, now repealed, contained provisions relating to COVID-19 vaccinations.<sup>3</sup> Under cl 3(3)(b), Jetconnect had the right, because of Captain Tighe-Umbers' vaccination status, to terminate his employment by providing him three months' paid notice. This right was subject to cl 3(4), which provided:

Before giving a termination notice under subclause (3), the employer must ensure that all other reasonable alternatives that would not lead to termination of the employee's employment agreement have been exhausted.

[5] Judge King, in a decision dated 4 July 2025, analysed the interaction between sch 3A and the general test in s 103A(2) for justifiable dismissal, namely "whether

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<sup>1</sup> *Tighe-Umbers v Jetconnect Ltd* [2025] NZEmpC 136, [2025] ERNZ 505 [Employment Court determination].

<sup>2</sup> *Tighe-Umbers v Jetconnect Ltd* [2024] NZERA Auckland 234.

<sup>3</sup> Schedule 3A of the Employment Relations Act 2000 was enacted on 26 November 2021 and repealed on 26 November 2024.

the employer's actions ... were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred". The Judge said:<sup>4</sup>

[43] ... Section 103A already required an employer ... to consider and consult on possible alternatives to termination; sch 3A made that obligation explicit. It clearly placed an obligation on an employer who was terminating an employee under sch 3A to ensure all other reasonable alternatives that would not lead to termination had been exhausted. While exhausted may seem like a high bar, the reality was that only reasonable alternatives needed to be exhausted, not every possible alternative, and clearly not those which were unreasonable. In effect, sch 3A cl 3(4) provided a clear direction to employers to ensure they considered all reasonable alternatives before termination; it did not create a more stringent test on an employer to justify a dismissal under s 103A.

[6] The Judge, after a careful review of the circumstances leading to the termination, held that a reasonable alternative to termination was offering to place Captain Tighe-Umbers on leave without pay (LWOP) while Jetconnect retrained its existing pilot workforce. Jetconnect had not exhausted that alternative, instead adopting an inflexible company-wide position that it would not grant LWOP. This was inconsistent with its obligation under cl 3(4) of sch 3A to consider all other reasonable alternatives to termination.<sup>5</sup> The Judge concluded:

[63] In summary, I have found that, in its decision to terminate Captain Tighe-Umbers, Jetconnect failed to ensure that all other reasonable alternatives to termination were exhausted, thereby breaching sch 3A cl 3(4). No fair and reasonable employer could have said it was not in a position to approve any period of LWOP in the above circumstances. Jetconnect's decision to refuse to grant Captain Tighe-Umbers LWOP and instead move to terminate his employment was unjustified.

[7] The Judge did not engage in any further analysis under s 103A as to whether Jetconnect's actions "were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred".

### **Jetconnect's application for leave to appeal**

[8] Under s 214(1) of the Act, a party may appeal from the Employment Court to this Court on a question of law, but only if this Court grants leave. By s 214(3), leave may be granted only if the question of law involved in the proposed appeal is one that

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<sup>4</sup> Employment Court determination, above n 1.

<sup>5</sup> At [61].

“by reason of its general or public importance or for any other reason” ought to be submitted to this Court. The question of law must also be seriously arguable.<sup>6</sup>

[9] Jetconnect applies for leave to appeal on the following questions of law:

- a. Did the Employment Court err in its assessment under s 103A of the Employment Relations Act 2000?
- b. Did the Employment Court err in finding that a required alternative to a dismissal was for an employer to unilaterally vary an employment agreement with an employee?

[10] In advancing its application, Jetconnect adopts the Judge’s finding that cl 3(4) did not create a more stringent test on an employer to justify dismissal than s 103A.<sup>7</sup> Mr O’Brien, senior counsel for Jetconnect, says the Employment Court’s decision thus involved an assessment under s 103A and so is not limited to dismissals to which cl 3(4) applied; rather, it has wider application to any dismissal or action that an employee challenges under s 103A.

[11] In respect of the first question of law, Jetconnect proposes to argue that the Court made two material errors in its assessment under s 103A:

- (a) contrary to the s 103A(2) requirement to address what a fair and reasonable employer could have done in all the circumstances “at the time the dismissal ... occurred”, the Court wrongly took account of events occurring and circumstances arising after the decision to dismiss had been made; and
- (b) the Court failed to consider what a fair and reasonable employer *could* have done in all the circumstances and instead adopted a position of what a fair and reasonable employer *would* have done in all the circumstances.

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<sup>6</sup> *New Zealand Professional Firefighters Union Inc v Fire and Emergency New Zealand* [2021] NZCA 60, [2021] ERNZ 54 at [20].

<sup>7</sup> Employment Court determination, above n 1, at [43].

[12] In respect of the second question, Jetconnect proposes to argue that the Court applied s 103A in a manner inconsistent with its clear wording and with the object, in s 3(a)(iv), of protecting the integrity of individual choice. Mr O'Brien says the Court's finding necessarily entailed Jetconnect being able to unilaterally impose LWOP, ignoring Captain Tighe-Umbers' individual choice not to apply for LWOP. He submits that a fair and reasonable employer cannot be one which unilaterally varies the employment agreement between the parties. Further, it could not have been Parliament's intent to effectively require an employer to make unilateral variations to protect itself from claims that it has breached s 103A.

[13] Jetconnect says the two questions of law are of general and public importance because:

- (a) the proper construction and application of s 103A raise issues of fundamental importance to employment relationships and all dismissals or actions caught by s 103A; and
- (b) the second question raises important issues around the interrelationship between ss 3(a)(iv) and 103A of the Act, the applicability of well-established laws of contract and the prohibition on unilateral variation.

[14] Mr Harrison KC, counsel for Captain Tighe-Umbers, submits the Judge's finding that Jetconnect failed to comply with the duty imposed on it by cl 3(4) of sch 3A was a finding of fact, not law, and is therefore not appealable. He says that the "true legal effect" of cl 3 is that no analysis under s 103A was required: an employer's non-compliance with the statutory requirements of sch 3A must be seen as incapable of being justified in terms of s 103A. He also says that, sch 3A having been repealed, any question of law that might arise from the proposed appeal is not of general or public importance.

### **Should leave to appeal be granted?**

[15] We agree with Mr Harrison that the Judge’s finding of non-compliance with cl 3(4) of sch 3A was a finding of fact. A challenge to that finding does not raise any question of law.

[16] However, the Judge did not merely find there was non-compliance with cl 3(4). The Judge found that because of that non-compliance, Captain Tighe-Umbers had been unjustifiably dismissed. In reaching that finding, the Judge did not engage in any further analysis under s 103A. The Judge appears to have proceeded on the basis that (as Mr Harrison contended) the legal effect of cl 3 was that no analysis under s 103A was required. Jetconnect’s proposed appeal would therefore give rise to the following question of law: Does non-compliance with cl 3(4) of sch 3A to the Employment Relations Act 2000 of itself mean that a purported termination under cl 3(3) constitutes an unjustifiable dismissal under s 103A?

[17] We consider that this question is one of general or public importance, notwithstanding that sch 3A was repealed on 26 November 2024. Several claims of unjustified dismissals arising from (purported) terminations under sch 3A have been determined by the Authority or the Employment Court. The question of law identified above has not been squarely addressed.<sup>8</sup>

[18] We therefore grant leave to appeal on that question of law. If the question is answered “no”, an assessment under s 103A will be required. The parties’ submissions should address whether, in that event, this Court should make that assessment or refer the matter back to the Employment Court to make the assessment.

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<sup>8</sup> See, for example, *VMR v Civil Aviation Authority* [2022] NZEmpC 5, [2022] ERNZ 22; *Roe v Airbus New Zealand Ltd* [2025] NZERA Auckland 438; and *Harwood v Whangamata Golf Club Inc* [2022] NZERA Auckland 693.

## **Result**

[19] The application for leave to appeal is granted on the following question of law:

Does non-compliance with cl 3(4) of sch 3A to the Employment Relations Act 2000 of itself mean that a purported termination under cl 3(3) constitutes an unjustifiable dismissal under s 103A?

[20] Costs are reserved pending determination of the appeal.

Solicitors:

MinterEllisonRuddWatts, Auckland for Applicant

New Zealand Air Line Pilots' Association, Auckland for Respondent