

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 6
5308885

BETWEEN	A	
	Applicant	
A N D	PACIFIC	BLUE
	EMPLOYMENT	AND
	CREWING LIMITED	
	Respondent	

Member of Authority:	James Crichton
Representatives:	Tim McGinn, Counsel for Applicant John Rooney, Counsel for Respondent
Investigation Meeting	8, 9 and 10 February 2011 at Christchurch
Submissions Received:	12 August 2011 from Applicant 29 September 2011 from Respondent
Date of Determination:	12 January 2012

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant (“A”) was employed by the respondent (Pacific Blue) as a pilot and he had served in that capacity from 20 August 2008 down to his summary dismissal on 25 May 2010.

[2] An application to the Authority alleging unjustified dismissal was promptly filed by A seeking substantive relief and interim reinstatement pending the consideration of the substantive claim.

[3] The interim reinstatement application was disposed of by the Authority in its interim determination dated 26 July 2010 in which interim reinstatement was granted but on a garden leave basis only. A was at the time the Authority issued its interim determination, unable to fly as a consequence of the order of the Civil Aviation Authority (CAA).

[4] That decision was promptly challenged by Pacific Blue who on 4 August 2010 filed a challenge to the determination and an application for a stay of proceedings.

[5] On 20 August 2010, His Honour Judge Couch issued his judgment on the challenge setting aside the Authority's decision to reinstate A on an interim basis.

[6] The substantive investigation meeting was completed just prior to the devastating Christchurch earthquake on 22 February 2011 and the extensive file on the matter remained in the Authority's Christchurch building from the date of the earthquake down to the week commencing 18 July 2011, when members of a Department of Labour team were able to access the Authority's building by agreement with the Canterbury Earthquake Recovery Authority (CERA). As a consequence of that action by the Department of Labour, the extensive file on this matter was able to be provided again to the Authority member and the process of determination was then able to be undertaken.

[7] In the meantime, counsel for the applicant, Mr McGinn had similar difficulties. Like the Christchurch Authority, Mr McGinn's practice was conducted from rooms in a building similarly affected by the earthquake and within the so-called "red zone". It follows that Mr McGinn also was unable to access his files and thus unable to complete submissions on the matter, until comparatively recently. Mr McGinn's submissions have now come to hand and the Authority has been able to commence the process of determining the matter. The delay in concluding this matter within an appropriate timeframe is regretted.

Employment relationship problem

[8] As previously noted in this determination, A was dismissed summarily from his position as a pilot with Pacific Blue effective 25 May 2010. According to the letter of dismissal issued the day of the dismissal, the termination was effected because of the events of 10 June 2009 and *its apparent consequences*.

[9] That event was a social occasion at A's home involving A and a number of colleagues from Pacific Blue. All of the participants consumed alcohol in varying quantities (some to excess) and each of the participants was allegedly given a product called *Red Alert* by A. *Red Alert* the Authority was told, is a natural herbal product and is not illegal.

[10] Some hours after this social occasion, one of the participants was admitted to hospital with the symptoms of a drug or alcohol overdose. That participant was in Pacific Blue uniform when she was admitted to the hospital. A was suspended from duty to enable Pacific Blue to conduct an investigation.

[11] The upshot of that investigation was that by letter dated 1 October 2009, Pacific Blue issued A with a final written warning. That final written warning was in very detailed terms and was accepted by A.

[12] On 19 November 2009, Pacific Blue advised A that it had become aware that A was suspected by Police of supplying a Class C controlled drug and A was advised that Pacific Blue was contemplating suspending A from duty to enable the Police to complete their inquiries. Pacific Blue then suspended A.

[13] On 16 February 2010, Pacific Blue were advised that the Police investigation into A had concluded and that no charges would be made.

[14] Contemporaneously with that, Pacific Blue presented A with a copy of a toxicology report which had been prepared on the young female participant at the 10 June 2009 party together with a transcript of Pacific Blue's interview with the young woman concerned. The toxicology report was dated 15 September 2009 although Pacific Blue did not obtain a copy until sometime later. Pacific Blue's position is that the toxicology report disclosed that the young woman had Benzylpiperazine (BZP) in her system. A was asked how the BZP would have got into the young woman's system if all she had taken at his house was a herbal pill.

[15] Pacific Blue were dissatisfied with A's responses to those inquiries and determined to summarily dismiss A on 25 May 2010.

Issues

[16] It will be convenient if the Authority considers the following issues:

- (a) The issues up to and including the final written warning;
- (b) The suspension after the final written warning;
- (c) The events up to and including the termination of the employment.
- (d) The question of good faith

The events leading up to the final written warning

[17] It is fundamental to A's claim that Pacific Blue erred in considering past issues, albeit apparently unsubstantiated ones, in its consideration of disciplinary responses to A's current behaviour. Indeed, it is A's conviction that, to quote from the Authority's first determination on this matter dated 26 July 2010, that Pacific Blue "... *relied on a number of earlier incidents of a disciplinary nature to build a case against [him] notwithstanding that those earlier disciplinary incidents had already been comprehensively disposed of*".

[18] The first of these incidents took place in January 2009 and involved an incident at Potts Point in Sydney wherein it was alleged that A had misused alcohol while overnighing in Sydney. The matter was investigated and no action was taken against A. In his evidence to the Authority, Captain Geoffrey Lowe, Pacific Blue's Flight Operations Manager, indicated that although no action was taken "... *there was concern about A's conduct*". Captain Lowe also drew attention to the fact that the letter from Pacific Blue concluding the matter referred to the fact that the airline could refer back to this episode, at a later stage.

[19] A particularly draws the Authority's attention to the fact that, in respect of this Potts Point incident, he was never given a complete and adequate summary of what it was that he was supposed to have done and Pacific Blue's conclusion was "*there is insufficient evidence ... to make a conclusive finding on these allegations*". So, the argument goes, despite an inadequate process (the absence of proper notification of the actual allegation), and the absence of any finding of fault, it is common ground that Pacific Blue sought to continue to rely on this episode. That is the effect of the letter concluding the matter as Captain Lowe correctly points out in his evidence to the Authority, and the Potts Point matter continued to be relied on by Pacific Blue as its inquiries into A's behaviour continued into the future. A says this is not fair because there was no disciplinary consequence and indeed no finding at all against him in relation to Potts Point and, that aside, he was never clear from what Pacific Blue told him, just exactly what it was that he was accused of.

[20] A makes a similar complaint about what, for ease of reference, I will refer to as the "family" allegations. A was engaged to Ms B who died tragically. Subsequent to that tragedy, Ms B's family made certain allegations about A's behaviour and conveyed those allegations to Pacific Blue. A defended himself and the outcome of

that inquiry was similar to the earlier event. In his letter to A dated 24 April 2009, Captain Lowe, having listed the allegations concerning excess alcohol consumption, illicit drug use and “*self management*”, went on to say:

There is insufficient evidence for me to make a finding on these allegations. As there is not sufficient evidence to enable me to prefer either your or the complainant’s version of events over the other, no further action will be taken in relation to these allegations.”

[21] A, understandably, was not happy with that equivocal response and so he had his counsel write to Pacific Blue by letter dated 29 April 2009. The thrust of that letter was to communicate the fact that A “*wanted his name cleared*” and it sought some further engagement from Pacific Blue to conclude the matter one way or the other. As the Authority noted in its first determination on this matter, “*it would be plain from this communication (which remained unanswered) that (A) regarded his reputation as important and that (Pacific Blue) was on notice that A wished to have the matter dealt with definitively*”.

[22] Pacific Blue took no further steps in the matter and A did not press the point. That leaves the Authority with the question of how to evaluate the reliance Pacific Blue placed on these two earlier incidents in its subsequent disciplinary proceeding, first to issue a final written warning, then to suspend A pending further inquiries, and finally to dismiss him from its service. Pacific Blue’s position is well summarised by this observation in its closing submissions:

However, the Potts Point incident, the Tucker allegations and the 10 June incident (about which more shortly) all occurred so close together, within a matter of months, and Pacific Blue considered that it had to reflect on the events and see the pattern of behaviour. This was particularly given the safety sensitive nature on A’s work.

[23] In *Ashton v. Shoreline Hotel* [1994], 1ERNZ 421 Chief Judge Goddard said at p.429:

It is well established that an employer who discovers misconduct committed by its employee, then overlooks that conduct and continues the employee’s employment, must be taken to have affirmed the employment and cannot subsequently dismiss the employee in reliance on that conduct.

[24] In considering that case and the question of whether it remained good law, His Honour Judge Couch in the challenge to the Authority’s interim determination on the instant matter, referred to more recent authorities and concluded that *Ashton* may no

longer be good law. His Honour's views on the point are contained in paras.[9] and [10] of his judgment.

[25] But of course, as Mr McGinn correctly observes in his submissions on behalf of A, all of the cases referred to by Judge Couch (including *Ashton*) refer to circumstances where there is actual misconduct discovered. A's complaint is that in neither of the Potts Point matter nor the family allegations was there any adverse finding against him.

[26] Of course, Pacific Blue says that although unproven, these episodes suggest a "*pattern of behaviour*" and because they all happened so close together, it is reasonable for these earlier episodes to be taken into account because of the "*safety sensitive*" nature of A's employment. But the difficulty with this argument is surely that there are no allegations that have been found proved "*so close together*" or indeed at any other time and so it is erroneous logic to refer to a pattern of behaviour when no such pattern has been demonstrated. It follows that the Authority will want to carefully scrutinise the weight which Pacific Blue has placed on these earlier incidents in forming the conclusions that it does about A's culpability.

[27] The episode which led eventually to A's dismissal needs to be referred to now. In his letter of 12 June 2009, Captain Lowe refers to the allegation that on Tuesday, 9 June 2009, A invited crew members from a late arriving trans-Tasman flight back to his home in Christchurch and that as a consequence of what happened at A's home in the early hours of 10 June 2009, a flight attendant colleague was subsequently hospitalised "*allegedly exhibiting severe effects of drug and/or alcohol consumption*".

[28] When this matter was brought to the attention of Pacific Blue, it commenced a further employment investigation into A's conduct. The context is relevant. Captain Lowe told the Authority that the female staff member admitted to Christchurch hospital's emergency department had described being given a pill by A in the early hours of the morning and then waking up at 11.45am without being in any way conscious of the period in between. Pacific Blue was told by the female staff member that she had seen A at some point before she lost consciousness. A was in a state of heavy intoxication, either from drugs or alcohol or both, and exhibiting very odd behaviours. As part of the female flight attendant's care at Christchurch hospital, the hospital authorities endeavoured to find out what the pill was that she had been given. The flight attendant did not know and the tests that the hospital conducted were

unhelpful. The female staff member discovered that she had A's cellphone with her; a doctor suggested she listen to the messages to see if there was any evidence about the nature of the substance she took. There were a number of texts and other messages in A's phone referring to various substances. They included messages from friends making comments such as "*how good was that pill*".

[29] The female flight attendant's parents had attended her at Christchurch hospital and, amongst other things, they reported the matter to Police. On behalf of Pacific Blue, Captain Lowe himself spoke with Police to "*offer cooperation*". Although not certain on the point, Captain Lowe thought it likely that he would have told Police that he had had a previous contact with the Customs Department when the so-called family allegations were being investigated, they having alleged, inter alia, that A was planning to import Ecstasy for supply.

[30] As part of its response to the developing situation, Pacific Blue decided that in order for it to conduct a full disciplinary inquiry, it needed to consider suspending A from duty and accordingly a letter was written to A dated 12 June 2009 in which that prospect (of suspension) was raised. A subsequent meeting was held with A wherein he was represented by a legal officer from the New Zealand Airline Pilots' Association (ALPA) to consider his response to the proposed suspension. Despite A's protests, Pacific Blue decided to suspend him from duty and that decision was conveyed by letter dated 19 June 2009. Interestingly, that letter also picks up the theme that I have already commented on extensively, namely Pacific Blue's apparent reliance on the earlier issues, namely the Potts Point incident and the family allegations. This is because in the fourth to last paragraph of Captain Lowe's letter, and in the context of referring to the submissions made by A in opposition to the need for him to be suspended from duty, Captain Lowe says, amongst other things:

... given both the nature of the investigation and the fact that we have needed to address drug/alcohol issues with you in the past we have determined that suspension was appropriate ...

[31] As well as undertaking the suspension, Pacific Blue decided that it was obligated under the Civil Aviation Act to notify the CAA of any matters relating to a pilot's fitness to fly.

[32] As part of the investigation into the events of 10 June 2009, Pacific Blue obtained A's consent to the latter being seen by a specialist aviation medicine

practitioner. Prior to that consultation, Pacific Blue provided to the practitioner concerned, Dr Souter, an informal brief without mentioning names but indicating the nature of the allegations and the previous incidents. Captain Lowe was adamant that making that information available to Dr Souter was proper in all the circumstances and was “*to give context to our concerns about the June 2009 episode*”. In his affidavit in opposition to the granting of interim reinstatement, Captain Lowe expressed the matter in this way:

It was precisely because there were now three different allegations relating to A’s use of alcohol and/or drugs that (Pacific Blue) had such serious safety concerns. The nature of our industry is such that I could not ignore them.

[33] Dr Souter advised Pacific Blue on 22 June 2009 that she had suspended A’s medical certificate, the effect of which was to preclude him from flying duties until its reinstatement.

[34] A protests that Pacific Blue, despite Captain Lowe’s active involvement and the regular meetings between the principal protagonists, failed to conduct a proper investigation into the events of 10 June 2009. In particular, A complains that Pacific Blue “*made no effort*” to test any of the affected employees for drug or alcohol use. It is true that Pacific Blue did not do this promptly, apparently for logistical reasons. A related criticism is the allegation that Pacific Blue failed to test the *Red Alert* pill which A admitted giving to the adversely affected female flight attendant and to others at the party at his house. Captain Lowe’s evidence on that point indicted that he doubted A’s veracity in respect of the nature of the pill, that is, his tentative conclusion was that the pill was not of the kind that A claimed it was. Certainly, Captain Lowe said at the investigation meeting on this very point:

I did not think A was entirely honest with me and may have made up the Red Alert story.

[35] One of the reasons that Captain Lowe concluded provisionally that A was not telling the truth about the nature of the pill was that, as *Red Alert* was a herbal caffeine pill, it was difficult to understand why everyone would go to sleep so soon after taking the pill when it was supposed to keep them awake.

[36] Furthermore, Captain Lowe said that the evidence obtained from talking to the other participants at the event indicated that they did not know what it was at first, but that a consensus developed later on, that the pill was a *Red Alert* pill.

[37] Even on the footing that the pill administered by A was a *Red Alert* pill, Captain Lowe made the observation during the investigation meeting that he doubted a responsible host would give a *Red Alert* pill to partygoers who were drinking alcohol when the information supplied with *Red Alert* pills suggested you should not take them with alcohol. Captain Lowe's conviction, expressed in giving evidence at the Authority's investigation meeting, was that the pill given to the flight attendant by A was what caused her to be hospitalised and that it followed that the pill given to her was not a *Red Alert* pill as A alleged.

[38] A also protests that Pacific Blue failed to inquire appropriately into the inconsistencies between the various statements of the partygoers. Captain Lowe agreed at the investigation meeting that he should have spent more time teasing out those inconsistencies, although he pointed out that he did go back to one of the partygoers, Mr McKenzie, and asked him about inconsistencies in his statement. Captain Lowe also pointed out that the most consistent of all the partygoers in the statements made was the young woman who was admitted to the hospital, and that gave him confidence that her evidence could be relied upon. That last conclusion is challenged by A who maintained that Pacific Blue had "assisted" the female flight attendant victim of the party to maintain consistency in her evidence. Evidence of that alleged collusion is drawn to the Authority's attention. But the question really is whether Pacific Blue's actions had a sinister motive or not. The essence of the argument between the parties on the point relates to the transfer of roughly handwritten notes to a typed transcript. The transcript actually refers to the making of amendments, but "*to ensure it was an accurate record of events*". The Authority is not persuaded on the evidence before it that the steps Pacific Blue took in this regard are in any way improper; certainly there was no attempt by Pacific Blue to cover up the changes made, otherwise it would not have included the explicit statement in the transcript that there had been adjustments made. On balance, the Authority is not persuaded Pacific Blue behaved improperly in its collection of the evidence of the female flight attendant.

[39] But the essence of A's challenge to the credibility of the Pacific Blue investigation really revolves around a criticism of Pacific Blue's conclusion about how the young female flight attendant came to be unwell. In essence, as was sketched above, Captain Lowe's provisional conclusion was that her illness was caused by her taking the pill given to her by A and that that pill cannot have been the pill that he

claimed it was. But the difficulty with that thesis is that Captain Lowe was confronted with not just A's evidence about the nature of the pill, but also the evidence of three other employees who also confirmed the nature of the pill that A had given out. Captain Lowe is accused of concluding that those other three employees were colluding with A in order to have Pacific Blue reach the wrong conclusion about the nature of the pill. Furthermore, A alleges that, having decided that collusion was in play, Captain Lowe did not put that allegation to A at any stage.

[40] Next, A says that Pacific Blue deliberately overlooked the obvious explanation for the flight attendant's unwellness, namely that she was very drunk and had been in the spa pool for far too long and so was dehydrated as well. A goes so far as to allege that Captain Lowe not only mishandled the investigation but that he deliberately set about to predetermine the outcome by not approaching the matter with clean hands and an open mind. This aspect in particular refers back to the question of whether Pacific Blue was entitled to continue to rely upon material dating from previous events like the Potts Point incident and the Tucker allegations.

[41] A's personal grievance does not raise any complaint about the final written warning. It is not part of his personal grievance. It is plain from the evidence before the Authority that the final written warning was accepted by A. A now says that he only accepted it because the alternative was dismissal, but if that were the position, he could have raised a personal grievance concerning the allegedly unjustified final written warning within 90 days of its issue because, within that timeframe, there were further matters of concern to A which he does complain about in his personal grievance. Having said that, the issues that have been traversed in this section of the determination are considered in the detail they are because the themes that resonate in this part of the factual matrix continue to influence the views of the principal protagonists in the subsequent and concluding parts of the story. Of particular importance in drawing these themes together is A's conviction that Pacific Blue was inappropriately influenced by earlier incidents involving alcohol and/or drugs which he thought were closed. For Pacific Blue on the other hand, its strong submission is that the effect of the final written warning was to, in effect, give A another chance and that had matters ended there, there would presumably have been no personal grievance. Furthermore, by virtue of giving A another chance, Pacific Blue emphasises that it was not motivated by consideration of the earlier Potts Point and

family allegations. Had it been, presumably, no such second chance would have been available.

[42] But more fundamental than that is the question of whether the earlier incidents and now the final written warning itself (and the circumstances giving rise to it), can continue to inform Pacific Blue's consideration of A's professional behaviour going forward. Pacific Blue says that it can, partly because it specifically reserved the right to do that in especially the final written warning but also arguably both in the Potts Point and the Tucker allegations, but also because this is a "*course of conduct*" case and as such, it is available to the employer to look at a pattern of behaviour because, in the words of the Court of Appeal in *Telecom New Zealand Ltd v. Nutter* [2004] 1 ERNZ at 315:

... it was plainly unreasonable and illogical to exclude from consideration any relevant facet of that pattern.

[43] Indeed, in giving the judgment of the Court, Justice William Young refers to that case as a "*course of conduct*" case at para.[51] and it is Pacific Blue's contention that the present case is also a course of conduct case and thus the earlier incidents are relevant, if only contextually.

[44] Furthermore, Pacific Blue points up the safety sensitive nature of the airline industry and particularly its obligations to the travelling public pursuant to the Civil Aviation Act amongst other things. Risk-taking behaviour is said to be incompatible with the "*steadfast*" nature of an airline pilot's calling.

[45] Of course, the Authority must balance the understandable concern that Pacific Blue has for safety matters against A's right to fair and reasonable treatment. For reasons already advanced in this section of the determination, the Authority's conclusion is that Pacific Blue has unreasonably relied on earlier allegations of improper behaviour in adding weight to the conclusions that might be available to it in respect of the 10 June 2009 matter. The Authority does not accept that this is "*a course of conduct*" case as that sort of case is exemplified by the Court of Appeal decision in *Nutter*. That case, as with other cases on similar facts, concerned previous similar fact behaviour that was established. The present case concerns unsubstantiated historical allegations which have been married to the June 2009 issue to allegedly disclose a pattern of behaviour which is of concern to the employer.

[46] But as the Authority has already indicated, there is no pattern of behaviour because the earlier allegations were unproven. They were no more than allegations and one of them in particular, because of its context, must be seen as having emanated from a source that could only be described as partial. None of this seems to have been taken into proper account by Pacific Blue which, on its own admission, has consistently sought to rely on the earlier historical incidents as relevant context in which to place the employer's consideration of the June 2009 episode. The Authority rejects that nexus and considers that insofar as Pacific Blue has allowed its consideration of the June 2009 issue to be coloured by the earlier episodes where there was no finding of fault, it has erred in its treatment of its employee, A.

[47] But that is not an end of it because, in addition, A makes trenchant criticisms of Pacific Blue's investigation of the June 2009 incident itself. Those criticisms have also been referred to earlier in this section of the determination. First, the Authority has already observed that Pacific Blue notified the specialist aviation medicine practitioner who decided that A was unfit to fly, of the earlier incidents. If these incidents were, as the Authority has already established, not the subject of a conclusive finding of fault against A, then they cannot and should not be relevant to A's fitness to fly and so ought not to have been made available to Dr Souter, the specialist aviation medicine practitioner. Their provision to Dr Souter by Pacific Blue was prejudicial to A's ability to be appropriately evaluated in relation to his medical fitness to fly. It is not for a medical practitioner to make judgments about whether to take into account or not historical incidents relating to the patient. The Authority concludes that Pacific Blue erred in providing that information to Dr Souter.

[48] Next, A protests that Pacific Blue's investigation of the 10 June 2009 event was substandard. None of the participants were tested promptly for drug or alcohol use allegedly for logistical reasons. Nor was the Red Alert pill tested, notwithstanding A's ready acknowledgment that he had given such a pill to the affected female flight attendant and to the other participants at the party. None of this is good enough from the point of view of a proper investigation. Given the nature of the very serious allegations made against A and the conclusions which Captain Lowe reached on behalf of Pacific Blue, it should have been self-evident to the employer that drug and alcohol testing of the participants ought to have been undertaken (whether or not it was logistically difficult, as claimed), and similarly, it ought to have been apparent that the Red Alert pill should have been tested as well. It may be that

neither of those tests produced anything of value, but we can never know and the Authority is satisfied that a good and fair employer, in the conducting of a proper and full investigation into a most serious allegation, would have undertaken such tests in order to inform its provisional conclusion.

[49] This becomes particularly apparent when Captain Lowe's explicit testimony to the Authority on the nature of the pill administered, is considered. Captain Lowe told the Authority that he did not believe that A was honest about the nature of the pill and thought in effect that the pill that A had administered was of a different kind. This conclusion, on its face, appears to the Authority to be against the weight of the evidence. Captain Lowe appeared to reason that because it was the pill that caused the female flight attendant to be hospitalised, and a Red Alert pill would not cause such damage, it followed that the pill that was administered by A was not a Red Alert pill. But that thesis seems to overlook the possibility that the female flight attendant suffered her collapse not as a consequence of taking the pill (whatever it was), but for other reasons. In this regard, Captain Lowe appears to have discounted the evidence that the female flight attendant was drinking heavily and had been in the spa pool at A's house for long enough to be seriously dehydrated. Further, evidence to suggest that the female flight attendant may have predisposed herself to the kind of illness that she suffered by virtue of her own medical history, was itself not, in the Authority's view, given proper weight by Pacific Blue.

[50] Next, on the nature of the pill itself, again as the Authority has noted earlier in this section of the determination, Pacific Blue is confronted with uniform testimony from three other participants at the party who supported A's evidence that the pill that was administered to all of them by A was a Red Alert pill. Captain Lowe's conclusion appears to have been that those three other participants were colluding with A to encourage Pacific Blue to reach a conclusion that was favourable to A. If that was so, Captain Lowe himself confirmed that he never put to A the suggestion that there was collusion from others to support A's version of events; nor did Captain Lowe tease out the inconsistencies (where there were such) in further questioning of the other participants. Captain Lowe himself quite properly acknowledged during the course of the investigation meeting before the Authority that he might have spent more time investigating the inconsistencies of the other partygoers.

[51] So the Authority's conclusion is that this was, in truth, a substandard investigation informed by an improper reliance on historical matters which ought not to have been part of the consideration of culpability at all. But, given that A did not protest the final written warning which resulted from this consideration, is it available to the Authority to take matters any further? Not only did A not raise a personal grievance at the time the final written warning was issued, but he also took no steps subsequent to the final written warning issuing, as he might have done given the unfolding of events, within the 90 days after the issue of the final written warning. Certainly, the Authority can make no finding about the justifiability of the final written warning. There has been no protest about that within time by A and accordingly Pacific Blue's submission in that regard must be supported; that is, that given the final written warning is not part of the personal grievance claim brought by A, it is not available to the Authority to consider that aspect.

The events leading to the second suspension

[52] It is A's conviction that at the end of the investigation into the 10 June 2009 incident, Pacific Blue issued him with a final written warning and closed its investigation yet the effect of what happened after the issuance of the final written warning was, A says, to reopen a closed investigation, allegedly because new information had come to hand, and then re-suspend A so that further inquiries could be undertaken.

[53] There was a meeting between the parties on 29 September 2009 at which Pacific Blue says that it made it abundantly clear to A that the effect of its investigations into his behaviour would, in the normal course, have led to his dismissal but that in the circumstances of this case, including A's recent loss of his fiancée and his various undertakings to cease drinking alcohol, undergo drug testing and the like, Pacific Blue was minded to give A one last chance.

[54] That position of the employer's was reiterated by it in its letter of 1 October 2009. That letter carefully sets out the results of the investigatory process after providing a summary of that process. The letter evidences six concerns that Pacific Blue had and which were the subject of detailed discussion at the 29 September meeting. The letter sets out Pacific Blue's conclusions in relation to each of those concerns and concludes that "*Pacific Blue's trust and confidence in you is significantly diminished*".

[55] Despite the evidence that there were still some “*loose ends*”, Pacific Blue decided to continue with the disciplinary process and to conclude it by the issue of the final written warning to A. Those loose ends included the absence of the toxicology report on the flight attendant from the party together with the fact that the Police were still making their inquiries as a consequence of the complaint made to them by the parents of the affected flight attendant. Pacific Blue says it had no expectation that the toxicology report would ever be available to it and there was no reason to think that the Police investigation into A’s alleged behaviour would reach a conclusion promptly or indeed at all.

[56] Five days after the written warning, Pacific Blue was told that A had reobtained his medical certificate from the CAA enabling him to recommence flying duties. Then, Captain Lowe was summoned to a meeting with Police on 19 October 2009. That meeting included a representative of the New Zealand Customs Service. Captain Lowe told those officials that A had been the subject of a disciplinary inquiry and was about to recommence flying duties. Captain Lowe’s evidence is that he formed the view from the exchanges between Police and Customs representatives at that meeting that their concerns were not narrowly focused on the 10 June 2009 incident but were of wider application and related to allegations that A was supplying illegal drugs. Police asked Pacific Blue for notes of the employer’s investigation into A, which were provided after legal advice, and Police also asked Captain Lowe not to convey to A the fact of the 19 October meeting or its contents which Captain Lowe felt obliged to honour.

[57] Captain Lowe sought from Police a written statement of the nature of their inquiries. Pacific Blue has been criticised for taking that step on the footing that it was simply setting A up to suspend him again and using Police’s letter as the necessary ammunition to do that. Captain Lowe, for Pacific Blue, says simply that he wanted a detailed explanation of precisely what Police’s concerns were in order that he could evaluate the various competing obligations that he had to Police on the one hand, to his employee A, and of course to the travelling public.

[58] By letter dated 10 November 2009, Police advised Captain Lowe that A was a suspect in the supply of a Class C controlled drug, a crime under the Misuse of Drugs Act 1975 punishable by a sentence of up to eight years’ imprisonment. The letter makes no reference at all to the 10 June 2009 incident but does contain two very

strong statements about the possible risk to the travelling public of A continuing to work. In the penultimate paragraph, Police say that they are concerned that A's "... *employment as a pilot may place your customers and the general public at risk*" and in the final phrase of the letter they request that Pacific Blue "... *consider the safety issues relevant to your industry*".

[59] On 19 November 2009, Captain Lowe wrote to A indicating that Pacific Blue was contemplating suspending A again as a consequence of the Police investigation and until the outcome of the Police investigation was known. Once the Police had completed their inquiries, Pacific Blue indicated to A that the employer would then decide if further disciplinary proceedings against A would or should be undertaken.

[60] A meeting between the parties took place on 30 November 2009 at which the proposed suspension was debated but Captain Lowe's conclusion was that he "*was not willing to take a risk*" and accordingly he wrote to A on 1 December 2009 confirming the suspension and advising that the suspension would remain in force until Police had completed their inquiries.

[61] While the suspension was on foot, Pacific Blue sought, without success, to obtain Police's file but did elicit from Police the suggestion that the CAA be advised of the position. In fact, Police had themselves referred the matter to the CAA contemporaneously with making the suggestion to Pacific Blue that it do so.

[62] On 19 January 2010, Police advised Captain Lowe informally that there was insufficient evidence to proceed with criminal charges and that the investigation against A was likely to be complete within the week. Also on that date, Captain Lowe received a formal request from the CAA to name the pilot who had been the subject of Police investigation, that information having previously been provided to CAA by both Police and Pacific Blue on a "*no names*" basis. Captain Lowe responded to that second request from CAA and included in it a statement to the effect that the Police investigation was still continuing. A protests that by this stage, Captain Lowe was aware that the Police inquiry was coming to an end (because of the telephone discussion he had had that very day with Police) and that no charges were likely to issue. Captain Lowe denies that he deliberately misled CAA in order to make things more difficult for A. His evidence is that he told CAA the unvarnished truth which was that the investigation had yet to conclude. CAA, based on the information that it had received from Police and Pacific Blue, decided to conduct its own investigation.

[63] Also in late January, Captain Lowe saw for the first time the toxicology report on the flight attendant adversely affected after the 10 June 2009 party at A's home. That report identified that the flight attendant had BZP in her system. Much was made in the evidence before the Authority of the fact that Captain Lowe failed to notice that the copy of the report given to him by the flight attendant was missing page two and it was suggested that Captain Lowe had deliberately suppressed this page because it was of assistance to A in his argument. In particular, the so-called missing page referred to the subject individual having abnormally high levels of acetone which was associated with, amongst other things, prolonged periods of fasting. One of A's arguments was that the subject individual had been taking diet pills which may be consistent with this information, but A's complaint is that the issue was not pursued by Pacific Blue. But, Pacific Blue did not see the second page of the toxicology report until the statement of problem was filed in the present proceedings. Captain Lowe's evidence is that, had he seen it at the time, "*we would have taken further steps, in particular asking [the affected individual] some more questions*".

[64] On 16 February 2010, Pacific Blue received an email from the New Zealand Airline Pilots Association (ALPA) which it in turn had received from Police, indicating that the investigation into A was complete and that there were no proceedings to issue. This meant that although A's second suspension was on the footing that the suspension would remain in place until Police had concluded their investigations, while that process by Police had been completed, in the meantime, the CAA had commenced its investigation and Pacific Blue had received the toxicology report on the affected flight attendant. From Pacific Blue's standpoint, the toxicology report suggested that A had not been honest in his previous dealings with his employer because it suggested that illegal drugs had been present at the event on 10 June 2009 and that in principle then, A may have been guilty of supplying illegal drugs rather than the harmless herbal pills which A claimed had been supplied.

[65] A claims that this second suspension caused him disadvantage because of unjustified actions of Pacific Blue. The disadvantage evident is plain to see; A was precluded from continuing his flying duties because of the further suspension. Were it not for the second suspension, A would have been flying again after a month on ground duties. The real question is whether there was any unjustified action by Pacific Blue. If there was not, then the evident disadvantage to A cannot ground a personal grievance.

[66] A says that Pacific Blue had concluded its investigation into the 10 June 2009 issue, issued a final written warning and it was not available to Pacific Blue to reopen the investigation just because the Police now seemed interested in the matter, particularly when Pacific Blue knew of the Police involvement immediately after the 10 June incident.

[67] It will be remembered that the Police were involved in the 10 June 2009 matter, not as a consequence of anything Pacific Blue did, but because the parents of the affected flight attendant complained to Police. Notwithstanding the fact that Pacific Blue did not initiate the Police's inquiries, it is clear from the evidence that Pacific Blue knew the Police were making those inquiries. A protests that if Pacific Blue had wanted to reserve its position pending the issuance of the Police decision on the matter, then it ought to have made that clear when it issued the final written warning and it did not.

[68] Pacific Blue says in response that it did not understand the Police to be inquiring into the 10 June incident but rather inquiring into a wider allegation that A was guilty of supplying illegal drugs. That position is consistent with Captain Lowe's evidence of the meeting he had with Police on 19 October 2009 and more particularly absolutely consistent with the letter that he received from Police dated 10 November 2009 in which there is no reference at all to the events of 10 June 2009. Of course, Captain Lowe would have been aware that the genesis of Police inquiries was the complaint from the family of the affected flight attendant which was about the party at A's home on 10 June 2009. But Pacific Blue says that the Police inquiries may well have had their genesis in that event, but that their concerns appeared to be broader based than that. That view of the evidence is rather supported by the presence of the Customs official at the 19 October 2009 meeting. The presence of that official at the meeting does tend to confirm the view that a wider issue was in play. Customs are interested in matters of border protection and the transport of illegal substances across national borders rather than the commission of criminal offending within the jurisdiction.

[69] In response to Captain Lowe's claims in that regard, A retorts that Captain Lowe's email of 4 November 2009 soliciting the 10 November response from Police, refers specifically and only to the incident of 10 June. The first sentence of the relevant email simply says "*are you able to send me something that states the New*

Zealand Police are formally investigating the incident on 10 June?”. That may well be the question that Captain Lowe asked, but it is not, in the Authority’s view, the answer that Police provided. Their answer, as the Authority has already made clear, is of wider compass. It would have been available to Police to simply send a response referring exclusively and only to the 10 June matter but they chose not to do that and gave a broader response which the Authority is entitled to take notice of. That broader response suggest a wider compass to the inquiries and in those circumstances it seems axiomatic that in a safety-sensitive industry such as commercial aviation, a good and fair employer would exercise some considerable degree of caution.

[70] At the time that the suspension was enacted, Pacific Blue, on the evidence before the Authority, expected that the suspension would run its course until Police had finished their inquiries and on the basis that there was no case to answer (the view that A had consistently maintained, including in the discussions between the parties prior to the decision to suspend), then A would have been available to commence his normal duties again, were that all that was then in play.

[71] But other factors became relevant during the course of the second suspension, in particular the independent investigation of the CAA and the emergence of the toxicology report. The Authority deals with the toxicology report in the next section of this determination, but so far as the CAA’s investigation was concerned, A seeks to paint that involvement as being the responsibility of Pacific Blue, maliciously doing everything it could to ensure that A did not fly again. The Authority does not accept that the evidence supports any such conclusion. Pacific Blue cannot be, and is not, responsible for the activities of independent statutory agencies. Pacific Blue can no more control the activities of Police than it can the activities of the CAA. Pacific Blue did its level best, the Authority is satisfied, to protect A’s reputation with CAA and to ensure that the information provided to CAA by Pacific Blue was no more and no less than that which the law required. Pacific Blue deliberately did not provide CAA with material about A on a named basis until it was satisfied it was required to do so by law. Whatever Pacific Blue did in respect of the provision of information to the CAA, it is apparent from the evidence that Police also provided CAA with information about their activities in respect of A and plainly, Pacific Blue can have no control over what Police disclose to other agencies. The attempt by A to paint some sort of conspiracy where Captain Lowe in particular is cast as the architect of A’s misfortunes, simply does not stand up to scrutiny. Captain Lowe is and was responsible for many of the

significant decisions made by Pacific Blue in relation to A's employment, but Pacific Blue and/or Captain Lowe cannot be responsible for the activities of statutory agencies whose influence, work and process, they have no control over whatever.

[72] As the Authority has already noted, even if Pacific Blue had failed to provide any information to CAA naming A, CAA would have obtained that information from Police at about the same time. Furthermore, it is evident from CAA's response that their concern was not just whether Police were going to bring charges against A but rather the wider question of whether the very fact of A having come to the notice of Police was itself something that impacted on A's fitness to fly a commercial aeroplane.

[73] In all the circumstances then, the Authority is not persuaded that the second suspension of A by Pacific Blue was improper and on that footing, A's grievance in this regard must fail.

The alleged unjustified dismissal

[74] Pacific Blue says that the arrival of the toxicology report provided it with viable evidence that illegal substances had been taken at A's party on 10 June 2009 contrary to the advice that A had given earlier and which formed the basis of Pacific Blue's decision not to dismiss A for serious misconduct. Consistent with his earlier submissions, A alleges that in reopening the 10 June 2009 matter, Pacific Blue is not behaving as a fair and just employer would. He says that Pacific Blue ought to have "*reserved its position*" if it was intent upon leaving open the prospect that the matter could be looked at afresh. But that begs the question of whether Pacific Blue knew or ought to have known that the toxicology report might become available at some point in the future. The evidence is clear that Pacific Blue had no idea that it would ever get access to the toxicology report and its arrival in January 2010 seems to have literally come "*out of the blue*". In any event, Pacific Blue maintains that it is available to it as a fair and reasonable employer to review material relevant to an inquiry, as it becomes available, and that there cannot be a hard and fast rule which precludes the consideration of material discovered subsequently.

[75] On 18 February 2010, Pacific Blue wrote again to A with a copy of the toxicology report and invited him to comment on how the contents of that report could be squared away against his previous statements. A complains that, on its own

admission, Pacific Blue had had the toxicology report (which it actually received in two bits, p.2 being separate from the balance of the report) for fully a month and had not disclosed it to him. That is true, but nothing turns on the delay; Pacific Blue is entitled to take the time to reflect on its position and decide what to do next. During the course of the month, A remained suspended on pay so suffered no material disadvantage.

[76] Much of the debate between the parties in relation to the toxicology report revolved around technical issues to do with the rate at which BZP metabolised and arguments about where the BZP had come from in the first place.

[77] After considering submissions made on A's behalf, Pacific Blue wrote to A on 21 April 2010 setting out its continuing concerns. This letter clearly expresses Pacific Blue's provisional conclusion that the new evidence (the toxicology report) materially changed the facts on which the final written warning was issued in that the anxieties that Pacific Blue had about A's honesty at the time the final written warning was issued were magnified now by this new evidence, thus increasing Pacific Blue's anxiety about whether it could have trust and confidence in A as a commercial pilot.

[78] There was then a lengthy engagement between the parties' representatives in which Pacific Blue endeavoured to extract from A and his representatives the Police file in relation to A's allegedly improper activities. In the result, A would only release a portion of the Police file but it was enough to excite the anxiety of Pacific Blue which noted that the Police report indicated that A was suspected not just of supplying Class C drugs but also Class A drugs. Further, Pacific Blue points out that the Police report amply demonstrates its earlier conclusion that Police were not so much interested in the events of 10 June 2009 but rather in the wider issue of whether A was responsible for a range of criminal offending under the Misuse of Drugs Act 1975. Pacific Blue understandably argues that if A had nothing to hide, it was difficult to explain why he had vociferously opposed Pacific Blue having access to the full Police file. It is suggested by Pacific Blue that these are not the actions of an employee with nothing to hide.

[79] It is clear from the evidence before the Authority that A made a deliberate decision not to allow Pacific Blue access to the full Police file prior to the dismissal, notwithstanding Pacific Blue's specific request for the full file and its identification of particular matters from the summary file which would be elaborated upon helpfully in

the full file. On being advised that A was refusing further access to the Police file, Pacific Blue indicated it would make its decision on the outcome of the investigation on 25 May 2010. It is clear from Captain Lowe's evidence to the Authority that the very fact that A had failed to provide the complete Police file was itself a relevant factor which Pacific Blue had to take into account in respect of the decision it had to make on the outcome of its inquiries. That fact, coupled with A's refusal to respond to the final questions asked by Pacific Blue based on its consideration of the information before it (including the Police summary file) were matters which weighed in Pacific Blue's consideration of the issue.

[80] In seeking to challenge the employer's decision to dismiss, A first of all attacks the alleged "*reopening*" of the earlier investigation relating to the events of 10 June 2009 on the footing that, that matter having been disposed of by the final written warning, it was not available to Pacific Blue to re-litigate it. This is the "*double jeopardy*" argument which underpins much of A's attack on the way that Pacific Blue has approached the disciplinary investigation and its outcomes.

[81] But whereas the Authority was prepared to accept there was a viable challenge to reliance on material which had not been definitively concluded with negative findings against the employee, the position is otherwise in respect of Pacific Blue's introduction of the toxicology report. This is genuinely new information. It was not available to the employer at the time that the final written warning was issued. Indeed, it is plain to the Authority on the evidence that it was the employer's conviction at the time that the final written warning issued that it would never be available. When it suddenly became available literally "*out of the blue*", the Authority is satisfied that an employer in a safety-sensitive industry such as commercial aviation would have been negligent in terms of its statutory duties under the Civil Aviation Act as well as its obligation under the Health and Safety in Employment Act 1992 if it had failed to take matters further.

[82] After all, what were the options available to Pacific Blue? It could have simply ignored the toxicology report on the footing that it had already dealt with A and that was an end of the matter. But if it did that and there was subsequently an accident involving A in which others were hurt (including potentially other employees of Pacific Blue), then Pacific Blue would have failed to meet the standard set by the Health and Safety in Employment Act and by the Civil Aviation Act as well. Clearly,

Pacific Blue has obligations of fairness and equity to its employees. But arguably, it would have failed in that duty as well if it had not disclosed to A the fact of the toxicology report and sought his observations on it.

[83] The toxicology report is not of itself definitive proof that A lied to his employer or indeed that the BZP that appeared in the system of the affected flight attendant had been put there by A. Natural justice required Pacific Blue to put the toxicology report to A and seek his response. The fact that A's response was, in Pacific Blue's view, implausible requires it to consider whether it should take further steps.

[84] Plainly, having become even less satisfied with A's responses than it was previously, Pacific Blue would have been failing in its duties if it had not taken steps to address the issue.

[85] That view of matters is supported by the supplementary evidence coming from the Police summary report and A's continuing refusal to release the whole report despite having previously indicated an intention to make that available to Pacific Blue. Captain Lowe described the Police summary report as "*incredibly concerning*" and for obvious reasons. Even in the summary report, there was material which supported Pacific Blue's doubts about the veracity of A, suggested that the drug that he was handing out was not a herbal pill at all, and indicating more broadly an involvement in the drug scene which would have been anathema to Pacific Blue's vision of the "*steadfast*" nature of a pilot's calling.

[86] Finally, Pacific Blue reflected on A's continuing refusal to allow the release of the full Police report and/or to respond to particular questions asked by Pacific Blue at the eleventh hour. Pacific Blue rightly draws the Authority's attention to the requirement that parties must be "*active and constructive*" and "*responsive and communicative*" in their dealings with each other. That represents the statutory obligation of good faith which each party has to the other. There can be no claim by A that he was withholding the Police file with a view to not incriminating himself as the Police had, by this time, already determined that they would not lay charges so there was no prospect that, in releasing access to the file, A would be in danger of incriminating himself. All he was doing in fact was making it more difficult for Pacific Blue to reach a fair and measured conclusion about the matters in contention.

[87] In all the circumstances of the present case, the Authority is not persuaded that A has made out his claim to have been unjustifiably dismissed from his employment. The legal test set out in s.103A of the Act (at the time this dismissal took place), requires the Authority to consider whether a fair and just employer would conclude that dismissal was the appropriate response to the serious misconduct found after the conducting of a proper and full inquiry.

[88] First, there is no substantive criticism of Pacific Blue's process save for an eleventh hour claim that Captain Lowe was somehow biased because of some specious claim about an episode of such little consequence that Captain Lowe was initially unaware of it. Save for that last ditch attempt to challenge process, there is no claim that the process was unfair or unjust and that is right and proper. Pacific Blue adopted a fair, measured and reflective process to reach the conclusion that it did.

[89] The criticisms that A makes and which are well founded relate to the over-enthusiastic reliance on the earlier episodes in A's career where there was no finding of fault. It cannot be fair and just for an employer to take account of those matters when no conclusion is reached. If an employer wishes to rely on earlier events, the law requires that those earlier events have an outcome where a finding of fault is made against the employee. In such cases, it is reasonable for an employer to say there is "*a course of conduct*" which it is entitled to take into account. This is not such a case. This is a case where there were two earlier incidents, one anyway of which was generated from a source which, with the best will in the world, was hardly impartial and Pacific Blue ought to have rejected any reliance on those matters out of hand.

[90] Furthermore, A is right to complain about some of the infelicities in the investigation of the events leading up to the final written warning. Certainly, as the Authority indicated earlier in this determination, there are some matters where Pacific Blue could have more diligently inquired into the participants at the subject party, more assertively had drug testing done of all participants in a timely fashion, and had the pill that A alleges was distributed, analysed. But none of those matters go to the heart of the decision to dismiss A for misconduct; in fact, all they do is inform the decision to issue A with a final written warning, which he accepted. Given that acceptance, it is not available to A to subsequently complain that in fact these matters

were part of his overall complaint of personal grievance. If that is or was the position, A should have made the raising of a grievance a priority within the 90 days provided by law, or have sought to raise it out of time which he has not chosen to do. The only relevance that those matters can have is in respect of the final decision to dismiss and/or to the grievance claimed in respect of disadvantage, which the Authority has already rejected earlier in this determination.

[91] As to the influence those failings A relies upon have in relation to the decision to dismiss, the Authority is satisfied that the decision to dismiss rests fairly and squarely on the assessments Pacific Blue made in relation to the toxicology report and the difference between it and the responses provided previously and contemporaneously by A, and information derived either from the summary Police file antithetical to A's interests and inferences drawn from A's continuing refusal to provide the full Police file and/or respond to particular questions.

[92] The Authority is satisfied that Pacific Blue's action in dismissing A was what a fair and reasonable employer would have done in the particular circumstances of that case, having followed a fair and reasonable process of investigation. The Authority is satisfied that the particular circumstances of the case include a consideration of the safety-sensitive nature of the airline industry and, in consequence, Pacific Blue's obligations both under the Health and Safety in Employment Act and the Civil Aviation Act.

Were there breaches of good faith?

[93] A alleges that Pacific Blue breached good faith in its dealings with him. The Authority has carefully reflected on that submission and in traversing the evidence, is unable to find any suggestion that good faith has been breached by Pacific Blue. To the contrary, the only evidence of breaches of good faith come from A himself in his failure to engage openly and constructively with his employer in the course of the various investigations undertaken by Pacific Blue during the latter stages of A's employment.

Determination

[94] The Authority has not been persuaded by A that he has any viable personal grievance, either in respect of unjustified dismissal or in respect of a disadvantage

caused by unjustified actions of the employer nor has he satisfied the Authority that Pacific Blue has been guilty of breaches of good faith.

[95] The only matter on which A has been successful is in satisfying the Authority that there were infelicities in the initial handling of the investigation of the 10 June 2009 event and the unreasonable reliance that Pacific Blue placed on earlier unproven episodes, but the Authority is not satisfied that any of those matters impact on Pacific Blue's decision to dismiss, save to the extent that the toxicology report, the summary Police report and A's conduct in preventing Pacific Blue's access to the full Police report, cast grave doubt on responses already given by A. The Authority accepts Pacific Blue's submission that, because A has neither raised a grievance in relation to the initial final written warning nor sought to have such a grievance considered out of time, the only relevance that those matters pertaining to this earlier period can have is insofar as they inform the employer's behaviour in respect of the factual matrix for grievances that have been raised by A.

Costs

[96] Costs are reserved.

James Crichton
Member of the Employment Relations Authority