Employment Court of New Zealand

Air Nelson Limited v Neill CC 15/08 [2008] NZEmpC 102 (28 October 2008)

Last Updated: 7 November 2008

IN THE EMPLOYMENT COURT

CHRISTCHURCHCC 15/08CRC 35/07

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

BETWEEN AIR NELSON LIMITED
Plaintiff

AND JONATHAN BRUCE NEILL
Defendant

Hearing: 30 April and 1 May 2008

(Heard at Christchurch)

Appearances: Kevin Thompson, Counsel for the Plaintiff
Richard McCabe, Counsel for the Defendant
Duncan Ferrier, Counsel for the Director of Civil Aviation

Judgment: 28 October 2008

JUDGMENT OF JUDGE A A COUCH

[1] Mr Neill is a commercial pilot. He is employed by Air Nelson Limited which operates an airline. The Civil Aviation Act 1990 ("CA Act") imposes an obligation on a wide range of persons, including airline operators, to inform the Director Of Civil Aviation of matters relating to the medical condition of pilots. The key issue in this case is the extent, if any, to which Air Nelson's position as Mr Neill's employer affected its duty to report a possible change in Mr Neill's medical condition to the Director.

[2] On 14 December 2005, the Manager of Flight Operations for Air Nelson informed the Civil Aviation Authority ("the CAA") that he had concerns about Mr Neill's medical condition. The CAA then suspended Mr Neill's medical certificate and he was subsequently disqualified from holding a medical certificate. On 9 January 2006, the CAA lifted those restrictions, enabling Mr Neill to obtain a new medical certificate and to resume flying duties.

[3] Mr Neill believed that Air Nelson ought to have investigated any concerns before making a report to the CAA and that such a report was not warranted in any event. He pursued a personal grievance alleging that he had been disadvantaged in his employment as a result of the report being made. In its determination (CA 86/07), the Employment Relations Authority supported this view. It found that Mr Neill had been disadvantaged by Air Nelson's action in reporting concerns about his medical condition to the CAA and concluded:

I find, after carefully considering the respondent's motives and the statutory framework within which it operates, that its actions were unjustified. This is because the information supplied to the CAA about the applicant was erroneous in fact, and because, had the respondent turned its mind to ensuring that it was factually correct, would have been made aware of its error.

[4] Air Nelson challenged that determination and the matter proceeded before the Court by way of hearing de novo. In the course of the hearing, Mr Neill was granted leave to broaden the scope of his personal grievance to include the consequences for Mr Neill of the CAA acting on the report made by Air Nelson.
[5] It appears that this case is the first in which the mandatory reporting provisions of the CA Act have been the subject of judicial consideration. Because that part of the legislation is of considerable importance to the operation of the CAA, the Director sought and was granted leave to be heard. He did so through counsel, Mr Ferrier. Very properly, Mr Ferrier did not seek to be involved in the evidence and confined his role to submissions on the interpretation and operation of the relevant provisions of the CA Act.

Relevant Legislation

[6] The civil aviation industry in New Zealand is subject to a detailed system of control under the CA Act, as supplemented by regulations and rules made under its authority.
[7] The general scheme of the legislation is that participants in the industry are required to hold specified "aviation documents" according to their role. In the case of commercial pilots, the aviation documents required include an appropriate class of licence. Pilots are also required to maintain a medical certificate consistent with the class of licence they hold.
[8] Part 2A of the CA Act deals with medical certificates. Section 27B empowers the Director of Civil Aviation to issue medical certificates but, pursuant to s27O, this function is delegated to suitably qualified independent medical practitioners, referred to as *"medical examiners"*. Medical certificates are issued in three classes - Class 1, Class 2 and Class 3. Medical examiners are categorised as ME1, ME2 or ME 3 according to the class of medical certificate they are empowered to issue.
[9] Commercial pilots engaged in flying passenger air services, such as that operated by Air Nelson, are required to hold a Class 1 medical certificate. Such certificates must be renewed every 6 or 12 months, depending on the nature of flying operations in which the pilot is involved.
[10] Under the CA Act, Air Nelson is categorised as an *"operator"* and, for the purposes of the Civil Aviation Rules, as an "airline air operator". In order to hold the certificate required for that role, Air Nelson must provide the CAA with an "exposition" stating how it intends to comply with the CA Act and the Rules. This includes the designation of "senior persons" responsible for a range of functions necessary to maintain safety.
[11] Once participants in the civil aviation industry have been issued with the aviation documents necessary for their roles, the primary responsibility for ensuring that they keep those documents current and maintain the standards required to obtain those documents rests with the participants themselves. In the case of medical certificates, this is expressly provided for in s27C of the CA Act, the key parts of which are:

27C Changes in medical condition of licence holder

(1) Subject to any directions that the Director may issue under section 27G(1)(b), if a licence holder is aware of, or has reasonable grounds to suspect, any change in his or her medical condition or the existence of any previously undetected medical condition that may interfere with the safe exercise of the privileges to which his or her medical certificate relates, the licence holder—

(a) must advise the Director of the change as soon as practicable; and

(b) may not exercise the privileges to which the licence holder's medical certificate relates.

(2) Subject to any directions that the Director may issue under section 27G(1)(b), if an aviation examiner or medical examiner or operator is aware of, or has reasonable grounds to suspect, any change in the medical condition of a licence holder or the existence of any previously undetected medical condition in the licence holder that may interfere with the safe exercise of the privileges to which the licence holder's medical certificate relates, the aviation examiner or medical examiner or operator must advise both the licence holder and the Director of the change as soon as practicable.

(3) Subject to any directions that the Director may issue under section 27G(1)(b), if a medical practitioner has reasonable grounds to believe that a person is a licence holder and is aware, or has reasonable grounds to suspect, that the licence holder has a medical condition that may interfere with the safe exercise of the privileges to which the licence holder's medical certificate relates, the medical practitioner must, as soon as practicable,—

(a) inform the licence holder that the Director will be advised of the condition; and

(b) advise the Director of the condition.

(4) An aviation examiner or medical examiner or a ... medical practitioner is not subject to any civil or criminal liability for—

(a) doing an indemnified act in good faith in the course of carrying out his or her functions under this Part; or

(b) doing an indemnified act in good faith in the course of answering any questions put to him or her by the Director that—

(i) concern a licence holder; and

(ii) are relevant to any action the Director may take under this Part.

*(5) In this section, indemnified **act** means any of the following acts:*

(a) advising the Director, whether in writing or otherwise, that a licence holder—

(i) may not meet the medical standards prescribed in the rules; or

(ii) may be unable to exercise safely the privileges to which the licence holder's medical certificate relates:

(b) expressing to the Director, whether in writing or otherwise, an opinion that the licence holder who the aviation examiner or medical examiner or ... medical practitioner has examined or treated may be unable to exercise safely the privileges to which the licence holder's medical certificate relates because of—

(i) illness or any bodily or mental infirmity, defect, incapacity, or risk of incapacity suffered by the licence holder; or

(ii) the effect on the licence holder of treatment for any illness, infirmity, defect, incapacity, or risk of incapacity:

(c) stating to the Director, whether in writing or otherwise,—

(i) the nature of a licence holder's illness, infirmity, defect, incapacity, or risk of incapacity; or

(ii) the effect on a licence holder of treatment for any illness, infirmity, defect, incapacity, or risk of incapacity.

[12] Another key provision of the CA Act relating to medical certificates is s27I, the relevant part of which is:

27I Revocation, suspension, amendment, and surrender of medical certificate

(1) If the Director has reasonable grounds to believe that a licence holder may be unable to exercise safely the privileges to which the licence holder's medical certificate relates, the Director may, by written notice to the licence holder,—

(a) suspend any medical certificate issued to the licence holder; or

(b) impose or amend any conditions, restrictions, or endorsements on any medical certificate issued to the licence holder.

[13] At issue in this case is Mr Neill's personal grievance that his employment has been affected to his disadvantage by the unjustifiable actions of Air Nelson. The statutory test which must be applied to decide whether Air Nelson's actions were unjustifiable is in s103A of the Employment Relations Act 2000 ("the ER Act") which provides:

Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred

Facts

[14] Mr Neill has been employed as a pilot by Air Nelson since 1994 and usually works as a first officer on passenger flights operated by the company. To perform his duties, he must hold a Class 1 medical certificate issued by the Director of Civil Aviation. Mr Neill has always had such a certificate.
[15] In 2005, Air Nelson was in the process of changing the type of aircraft used for most of its operations from the Saab 340 to the Bombardier Q300. This entailed retraining its pilots and their certification on the new aircraft.
[16] Since about 2000, Bob Guard has been the Manager, Flight Operations for Air Nelson. This is a "senior person" role for the purposes of the Civil Aviation Rules. In addition to his responsibility to Air Nelson as an employee, therefore, Mr Guard is also accountable to the Director of Civil Aviation for many of his responsibilities.
[17] Mr Guard has responsibility for the operation of the company's aircraft both in the air and on the ground. He also has overall responsibility for management of the pilots employed by Air Nelson. This requires him to oversee and address issues of pilot performance including fitness to fly. As Mr Guard put it in his evidence:

"In summary, anything which may affect pilot performance, whether occurring on the job or off the job, which may result in the pilot taking his mind off his work as a pilot in Air Nelson's operations, is my responsibility to address."

[18] In July 2005, Mr Neill began his conversion to the Q300 aircraft. The first part of this comprised approximately 5 weeks of intensive training in Canada. Mr Neill found this very demanding and was abnormally tired for much of the time. After a week of leave, Mr Neill then began line training in New Zealand during the period 16 August to 10 October 2005. Mr Neill described this as another intense period of training which he believed was made particularly difficult by a variety of factors. At the conclusion of that training, Mr Neill went to Australia for a simulator check but was unable to complete it because of fatigue. He subsequently completed the check on 23 October and that ended his training.
[19] Mr Neill described this as *"easily the most challenging course I have ever done"*.
[20] On 27 October 2005, Mr Neill started work flying the Q300. The transition from one aircraft type to the other was done progressively and, while two different types were in use, changes to normal duty rosters had to be made. Mr Neill said that, during November 2005, the rosters were provided late or changed at short notice.
[21] On 12 November 2005, an incident occurred at Hawkes Bay airport involving Mr Neill. He had stayed overnight in Napier and his sleep had been disturbed during the night by other patrons of the hotel. Mr Neill was scheduled to have breakfast at the airport café prior to working on an early flight but the staff at the café were initially unable to provide Mr Neill with the breakfast he wanted. An argument ensued. When the breakfast Mr Neill ordered was subsequently provided, he refused to eat it. He put the tray with the uneaten food on it back on a counter where it fell to the floor.
[22] Mr Neill's behaviour on this occasion was the subject of a complaint by the café manager to Air Nelson. She said that Mr Neill had deliberately pushed the tray onto the floor and that, although he said "sorry", the apology had been sarcastic. The complaint was received and subsequently investigated by David Kenny, Air Nelson's Line Operations Manager. Mr Kenny initially discussed this complaint with Mr Neill by telephone. He said that what had happened was an accident and that his apology had been genuine. Mr Kenny also spoke with Roy West, the captain of the aircraft on 12 November 2005. Mr West had made his own complaint about café staff but had left the café by the time the events concerning Mr Neill occurred.
[23] Mr Kenny felt the café incident needed to be discussed further with Mr Neill and arranged a meeting with him on 30 November 2005.
[24] On 26 November 2005, Mr Kenny received a report from Taut Glover, a member of Air Nelson's crew control team, which is responsible for rostering. He told Mr Kenny about events which suggested Mr Neill may have inappropraitely taken sick leave. Mr Kenny decided to raise this issue also with Mr Neill on 30 November 2005.
[25] Mr Kenny's evidence was that, when they discussed the café incident at their meeting on 30 November 2005, he suggested to Mr Neill that he should have walked away from the situation rather than get into a confrontation and that, in response, Mr Neill was *"contrite and apologetic"* and offered to apologise to the café owner. Mr Neill did not contradict this evidence. When the sick leave issue was raised, Mr Neill gave an account of events which was different to that provided by Mr Glover. The discussion ended on the basis that Mr Neill would provide a medical certificate to support his position. Mr Kenny said that Mr Neill left his office unhappy about the issue.
[26] Shortly after he left Mr Kenny's office, Mr Neill telephoned to say that he had just had an altercation with Mr Glover. Mr Neill said that he had challenged Mr Glover about the information Mr Glover had provided to Mr Kenny and that Mr Glover had responded with abuse. According to Mr Kenny, Mr Neill reported that this exchange had been quite heated.
[27] On 1 December 2005, Alan Pumphrey went to see Mr Kenny to discuss his concerns about Mr Neill. Mr Pumphrey was another pilot employed by Air Nelson and an official of the Airline Pilots Association, the union to which Mr Neill belonged. They talked for some time about Mr Neill and the concerns Mr Pumphrey had. Immediately after that meeting with Mr Pumphrey, Mr Kenny reported what he knew to Mr Guard. Specifically, he made Mr Guard aware of the café incident and the altercation with Mr Glover. Mr Kenny also relayed the concerns expressed by Mr Pumphrey. Mr Pumphrey then had a discussion directly with Mr Guard about Mr Neill.
[28] Mr Guard, Mr Kenny and Mr Pumphrey all gave evidence about these discussions but their accounts varied in several significant respects.
[29] Mr Kenny's evidence was this. Mr Pumphrey told him that, following almost daily contact with Mr Neill over a period of several weeks, he was concerned about Mr Neill's condition. Mr Pumphrey said that Mr Neill had been suffering the effects of stress since returning from his Q300 training in Canada and that he had been receiving treatment for this. Mr Pumphrey also told Mr Kenny that Mr Neill had recently attended Dr McEwan, a doctor in Auckland recommended by the Airline Pilot's Association. Mr Pumphrey expressed particular concern about the stress he perceived Mr Neill was experiencing as a result of the café incident, Mr Kenny's investigation of it and the altercation with Mr Glover the previous day. The discussion finished with Mr Pumphrey urging Mr Kenny to try to get some formal help for Mr Neill from Air Nelson to alleviate the stress he was under. Mr Kenny summarised Mr Pumphrey's attitude by saying *"Overall, Alan was expressing quite some concern in relation to Jon and the 'space' Jon was in at the moment."*
[30] Mr Guard's evidence was that Mr Pumphrey said very similar things to him. This included telling Mr Guard that Mr Neill had been receiving treatment from a provider in Nelson since returning from Q300 training in Canada. According to Mr Guard, Mr Pumphrey also told him that Mr Neill *"was receiving counselling for depression or a stress related condition."*
[31] Mr Pumphrey's evidence in chief about these meetings gave quite a different impression. He said that the

reason for speaking to Mr Kenny was to arrange in advance for Mr Neill to be released from duty to enable him to travel to Auckland to meet with Dr McEwan. Mr Pumphrey denied saying to Mr Guard that Mr Neill was receiving counselling of any sort and denied in particular saying that he mentioned counselling for depression.

[32] On these issues I largely prefer the evidence of Mr Kenny and Mr Guard. These meetings took place on 1 December 2005. Mr Neill attended Dr McEwan on 28 November 2005. It follows that, in saying that the purpose of his visit to Mr Kenny was to arrange in advance for Mr Neill to have time off to see Dr McEwan, Mr Kenny was clearly mistaken. It was also significant that, in answer to questions in cross examination, Mr Pumphrey largely agreed with what Mr Guard and Mr Kenny said he had told them on 1 December 2005. I find that Mr Pumphrey did tell Mr Kenny and Mr Guard that Mr Neill had been receiving ongoing counselling and had recently been to see Dr McEwan. That was in fact what was happening. I find also that Mr Pumphrey expressed his very real concern that Mr Neill was experiencing high levels of stress and was not coping well. The one issue which is equivocal is whether Mr Pumphrey suggested Mr Neill was receiving counselling for depression. Mr Kenny did not say this in his evidence and Mr Guard was unclear whether Mr Pumphrey referred to depression or stress as the reason for the counselling Mr Neill was receiving. On balance, I find that Mr Pumphrey reported the reason for Mr Neill receiving counselling as stress rather than depression.

[33] Following those meetings with Mr Kenny and Mr Pumphrey, Mr Guard had real concern for Mr Neill's personal welfare. He also began to have concern about Mr Neill's fitness to fly. I accept Mr Guard's evidence that, from this point on, these were his only concerns and that he had no thoughts of disciplinary action. To progress matters, Mr Guard arranged to meet with Mr Neill on 5 December 2005. Mr Neill had no flying duties in the meantime.

[34] When Mr Guard and Mr Neill met on 5 December 2005, they talked at length. Mr Neill estimated the meeting took about an hour. The two men's evidence about what was said was similar. They agreed at the outset that the meeting was to be "off the record". Mr Neill told Mr Guard in some detail about his experience during the Q300 training and how he had been feeling subsequently. Mr Neill told Mr Guard that he had been affected by a lack of sleep and that he had been experiencing stress for which he was receiving counselling. Mr Neill also told Mr Guard that he was having problems with his blood pressure which was unusually high. Another topic of discussion was the café incident at Hawkes Bay airport. Mr Guard expressed his concern about Mr Neill's reaction to what appeared to have been a minor issue and Mr Neill explained the incident from his perspective.

[35] In his evidence, Mr Guard summarised the impression he had of Mr Neill following this discussion:

"From what Jon had told me, things were not right and he had also mentioned himself that he was receiving counselling. Regardless of whatever Jon's actual diagnosis may have been, Jon had presented to me in a distressed state to the point where I was quite concerned for his health and his ability to safely fulfil his duties as a pilot. The only thing that mattered to me was that for whatever reason, Jon did not appear to me to be in a good mental state."

"At the end of our discussion, I had formed a quite clear view that Jon's health, and in particular his 'head space', were not in good health. Jon seemed quite unhappy, did not give me confidence that he was coping adequately with day to day matters and was under stress. He did not appear to me to be in a particularly good way. My own description of Jon was that he was morose, withdrawn, not particularly communicative and generally not a 'happy chap' at all."

[36] Mr Guard's immediate reaction to this situation was to suggest to Mr Neill that he take time out from flying duties and see his doctor to *"try and sort matters out."* He suggested that Mr Neill take two weeks off for this purpose. Mr Neill agreed and said he would see Dr Brooke, who was an ME2 who had attended Mr Neill previously. Mr Guard also offered to defuse the situation which had developed with the owners of the café at Hawkes Bay airport who, by then, had said they would refuse to serve Mr Neill in future.

[37] The following day, 6 December 2005, Mr Guard telephoned Dr Tim Rumball, who was then employed by Air New Zealand in its aviation medicine unit. Dr Rumball is a specialist in occupational medicine and has extensive experience in aviation medicine in particular. He has also been an ME1 examiner for some years.

[38] Mr Guard telephoned Dr Rumball to seek informal advice about Mr Neill. After giving Dr Rumball some background about Mr Neill, he related the matters of concern to him. This included reference to the café incident and to the altercation between Mr Neill and Mr Glover. Mr Guard also told Dr Rumball of the difficulties Mr Neill had experienced during his Q300 training and since, that he was receiving counselling for a stress related condition and that he had raised blood pressure. Mr Pumphrey's concerns were also relayed to Dr Rumball. Dr Rumball agreed that there was good reason for concern about Mr Neill's medical condition which warranted, in the first instance, investigation by Mr Neill's ME.

[39] Where Dr Rumball differed from Mr Guard's initial assessment was that Dr Rumball was firmly of the view that a longer period of stand down was indicated and suggested that the period should be not less than four weeks. In Dr Rumball's view, it was inappropriate for Mr Neill to be flying while his medical condition was being investigated and that it would take four weeks to confidently exclude or treat any *"conditions of aeromedical significance"* which might be affecting Mr Neill. He based this view on what Mr Guard had told him about Mr Neill and his extensive experience of previous similar cases.

[40] Mr Guard took Dr Rumball's advice. He told Mr Neill that the period of stand down was to be four weeks.

[41] On 7 December 2005, Mr Neill saw Dr Brooke who apparently found that Mr Neill's blood pressure had returned to normal. Mr Neill then telephoned Mr Guard and said that he was fit to fly. Mr Guard was surprised by this and doubted whether Mr Neill had raised any issues with Dr Brooke other than his blood pressure.
[42] Mr Guard then spoke again with Dr Rumball and explained what had happened. Dr Rumball agreed that it was most unlikely that the issues Mr Neill had discussed with Mr Guard on 5 December 2005 would have been resolved within two days. Dr Rumball said that he wished to think about the matter and to discuss it with Dr Powell, Air New Zealand's chief medical officer.
[43] The following day, 8 December 2005, Dr Rumball spoke again with Mr Guard. He confirmed his initial view that it was not possible for the issues which had been affecting Mr Neill to have been resolved in such a short time and made arrangements for Mr Guard to speak directly with Dr Brooke.
[44] The discussion between Dr Brooke and Mr Guard took place on 12 December 2005. Mr Guard relayed to Dr Brooke essentially the same information he had given to Dr Rumball. In his evidence, Mr Guard said that Dr Brooke did not appear to know any of what Mr Guard told him. That evidence must, however, be treated with caution as Dr Brooke's ability to contribute to the conversation was necessarily limited by his professional obligations to Mr Neill.
[45] This conversation was the subject of a note made in Mr Neill's medical records by Dr Brooke. This largely coincided with Mr Guard's evidence of what was said but also included the sentence *"An ALPA person has told Bob Guard that Jonathan has had recent counselling for depression."* Unfortunately, Dr Brooke was not called as a witness and this part of his note was therefore not explained or put into context by him. In his evidence, Mr Guard did not accept that the note accurately recorded what he said to Dr Brooke. His recollection was that he said he had been told that Mr Neill was receiving psychological counselling for a stress related condition and that, if he used the word "depression" at all in the conversation, it was as a medical lay person's description of Mr Neill's mood rather than a reference to clinical depression.
[46] Two days later, on 14 December 2005, Dr Brooke spoke with Dr Scrivener who was Mr Neill's ME1 examiner. Dr Brooke made a note of this conversation in which, after referring to having told Dr Scrivener what Mr Guard had told him, Dr Brooke recorded *"He said he would inform CAA about these issues, in particular the counselling for depression and will ask CAA to suspend licence."*
[47] In Dr Brooke's notes, he also recorded Mr Neill having asked him specifically some days later whether Mr Guard had mentioned counselling for depression. Dr Brooke noted *"I am sure from my 7 day memory and notes made at the time that this is the case."*.
[48] On balance, I find that Mr Guard did relay to Dr Brooke what he understood Mr Pumphrey to have said to him on 1 December 2005 to the effect that Mr Neill had been receiving counselling for depression. As it turned out, however, that was of little consequence. Although Dr Brooke repeated this statement to Dr Scrivener on 14 December 2005 and Dr Scrivener apparently said he would inform the Director under s27C of the CA Act, Dr Scrivener never did so.
[49] On 14 December 2005, Mr Guard telephoned Dr Preitner, the senior medical officer for the CAA. Mr Guard's evidence was that he relayed to Dr Preitner the same information he had previously discussed with Dr Rumball. It was suggested to Mr Guard that he had told Dr Preitner that Mr Neill was believed to have been receiving counselling for depression. Mr Guard denied this and, to the extent there was doubt about the matter, this was dispelled by the note of the conversation made by Dr Preitner:

"Mr Guard rang me to indicate that he had suspended J Neill from duty for a month.

He has concerned regarding Mr. Neill current well being and stress level. He related several incidents of outbursts, one in the cafeteria during witch Mr Neill became very angry because he was served the wrong dish, so much so that he broke some plates and was banned from the cafeteria.

There was also an altercation in the car park. He said that Jonathan seems to have problem when lacking sleep during overnights.

He said he discussed the issue with Jonathan who revealed he was currently undergoing counselling.

I thanked Mr Guard for informing us in compliance with his obligation with the Civil Aviation Act.

I suggested that he informed Mr Neill of his action and that we would act as appropriate on our side."

[50] If Mr Guard had suggested to Dr Preitner that Mr Neill was receiving counselling for depression, that would have been of such great significance that it would be inconceivable that Dr Preitner would not have recorded it in his note of the conversation. I find as a fact that Mr Guard did not report to Dr Preitner that Mr Neill was suffering from depression or receiving counselling for depression. I accept his evidence that what he told Dr Preitner was that he had concerns for Mr Neill's well being and he reported Mr Neill's own statement that he was receiving counselling.
[51] After summarising what had been said in the conversation, Dr Preitner's note then had a heading *"Actions & Conclusions"* under which it was noted *"Suspend Medical Certificate and seek information."*

[52] Later on 14 December 2005, Dr Preitner wrote to Mr Neill formally suspending his medical certificate. The reason for the suspension was simply stated as *"Concerns regarding mental wellbeing."* Dr Preitner concluded his letter by saying *"To help us come to a decision on your case we require you to forward copies of your GP notes for the last 12 months and detailed reports from your psychologist or counsellor."*
[53] The CAA then conducted an investigation into Mr Neill's medical condition. This included reviewing medical notes relating to Mr Neill made by Dr Brooke and Dr Scrivener and obtaining reports from the two psychologists who had recently seen Mr Neill. While that was in progress, Dr Preitner wrote to Mr Neill again on 23 December 2005, formally disqualifying him from holding a medical certificate. On 9 January 2006, that disqualification was lifted. Mr Neill then obtained a new medical certificate and returned to work.

Case for Mr Neill

[54] The foundation of Mr Neill's case was that Mr Guard had an obligation to investigate his concerns about Mr Neill's medical condition and verify the facts before making a report to the CAA under s27C of the CA Act.
[55] Mr McCabe submitted that this obligation arose both out of s27C(2) of the CA Act itself and out of Air Nelson's obligations to Mr Neill as his employer. In terms of s103A of the ER Act, it was suggested that a fair and reasonable employer in the airline industry, understanding the work pressures on pilots and knowing the seriousness of mental health issues for pilots, would have fully investigated all issues of concern before mentioning them to Dr Brooke or the CAA.
[56] Based on that proposition, it was submitted that Mr Guard had failed to make proper investigation and that his discussions with Dr Brooke and Dr Preitner were therefore unjustifiable actions. That was essentially a claim that Mr Guard's actions were unjustifiable because the process was deficient.
[57] It was also submitted that, regardless of process, the information available to Mr Guard was not sufficient to warrant making a report under s27C of the CA Act. As Mr McCabe put it, the "trigger point" had not been reached. For that reason also, it was said that Mr Guard's discussion with Dr Preitner was unjustifiable.
[58] Mr McCabe also developed a third argument that, in any event, Mr Guard had not notified the CAA of his concerns *"as soon as practicable"* as required by s27C of the CA Act. It was suggested that this cast doubt on the reasonableness of Mr Guard's concerns and whether he was truly concerned to discharge his obligations under the CA Act.
[59] Mr McCabe made detailed submissions in support of these propositions. This included a careful consideration of the relevant parts of s27C of the CA Act. In particular, detailed submissions were directed to the meaning and significance in s27C(2) of the expressions *"any change in the medical condition of a licence holder"* and *"as soon as practicable"*.
[60] It was submitted that notification under s27C(2) was not warranted unless the reasonable suspicion or awareness of the person reporting was based on *"sound data"*. In support of that conclusion in relation to operators, such as Air Nelson, Mr McCabe referred to the fact that s27C gives an indemnity from criminal prosecution or civil claim only to medical practitioners and not to operators. He submitted that this should be construed as placing a higher burden on operators to ensure that any report they make is soundly based in fact.
[61] In analysing the expression *"as soon as practicable"*, Mr McCabe referred me to several authorities discussing the meaning of word "practicable" and "reasonably practicable" He urged on me the conclusion that *"as soon as practicable"* must import into s27C(2) a strong duty to report promptly.
[62] A further submission made by Mr McCabe, but not pursued strongly, was that Mr Guard ought not to have acted on anything said by Mr Neill in the discussion they had on 5 December 2005 because it was agreed to be "off the record". Mr McCabe submitted that, in doing so, Mr Guard's conduct was misleading or deceptive and a breach of the good faith obligations imposed by s4 of the ER Act.

Case for Air Nelson

[63] The key submission for Air Nelson was that s27C of the CA Act imposes a statutory obligation on Mr Guard to report his concerns to the CAA which was not subject to any obligation the company had as Mr Neill's employer. As Mr Thomson put it in his final submissions:

"Air Nelson was required to discharge its reporting obligation under the Civil Aviation Act once the trigger threshold had been met. It was not required, and indeed ought to be prohibited from, conducting its own investigation into the substance or detail of those medical concerns with Mr Neill. In fact to do so, would usurp the role of the CAA and would have the very real potential to compromise aviation safety. Ongoing medical compliance has very little, if anything, to do with Air Nelson. It is a matter overseen and controlled by CAA."

[64] Mr Thomson's second submission was that s27C(2) of the CA Act imposes a low threshold for the obligation to report and that, as a matter of fact, the information provided to Mr Guard reached that threshold.
[65] The third broad submission for Air Nelson was that the suspension of Mr Neill's medical certificate and his subsequent disqualification from holding a medical certificate were actions taken by the CAA, not Air Nelson. It was submitted that neither was an automatic outcome of the report made by Mr Guard and that responsibility for

any impact on Mr Neill of those decisions lay with the CAA rather than Air Nelson.
[66] The fourth and final submission was that, as a matter of fact, Mr Neill's employment had been unaffected by the events complained of and certainly not to his disadvantage.

Issues

[67] Arising out of the facts and the submissions made by the parties, the issues are:

a) Whether Air Nelson was obliged to investigate the concerns held by Mr Guard and verify their validity either by s27C(2) of the CA Act or by its obligations to Mr Neill as an employer.
b) Whether the information available to Mr Guard was sufficient to warrant the report he made to Dr Preitner.
c) Whether Mr Guard made that report *"as soon as practicable"*.
d) Whether Mr Neill's employment was affected to his disadvantage by any of the actions of Air Nelson which were unjustifiable.

Discussion

[68] The issue which lies at the heart of this matter, and which is of wider importance, is the interaction between the obligations imposed on Air Nelson by the CA Act and its obligations to Mr Neill as an employer.
[69] The general obligations on Air Nelson as an employer may be expressed in various ways. It has an obligation to be a good employer. It has an obligation to support and maintain the relationship of trust and confidence between itself and its employees. It must act in good faith in its dealings with its employees.
[70] This case, however, is a personal grievance alleging that the actions of Mr Guard in providing the information he did to Dr Brooke and the CAA were unjustifiable and affected Mr Neill's employment to his disadvantage. Whether any particular actions were justifiable for the purposes of a personal grievance must be decided in accordance with s103A of the ER Act.
[71] Counsel made detailed submissions to me about the construction and application of s103A and referred me to several of the decisions of the Court so far in which those issues have been discussed but I need not traverse those submissions in detail.
[72] It is axiomatic that a fair and reasonable employer will comply with statutes binding on it. It follows that, where the action alleged to be unjustifiable is taken pursuant to a statute, whether it is justifiable will be inextricably linked to whether there was compliance with that statute. That requires analysis of the obligation imposed on Air Nelson as an operator by s27C(2) of the CA Act.
[73] The structure and meaning of s27C(2) is straightforward. It applies to every aviation examiner, medical examiner and operator. For the purposes of this case, the trigger for its operation involves 3 components, which are that the operator:

a) *"is aware of, or has reasonable grounds to suspect"* that there has been
b) *"any change in the medical condition of a licence holder"* that
c) *"may interfere with the safe exercise of the privileges to which the licence holder's medical certificate relates"*

[74] The words used create a low threshold. The operator need not know or be certain. All that is required is *"reasonable grounds to suspect"*. What is suspected need not be any particular condition or disability. It is sufficient if the suspicion relates to *"any change in the medical condition"* of the licence holder. The operator need not establish that the suspected change will affect safety but only that it *"may"* do so.
[75] I accept Mr Ferrier's submission that a low threshold is consistent with the overriding emphasis of the CA Act on safety. As he put it *"The threshold for reporting is low because safety is the paramount consideration."* I also accept his submission that *"The reason for that emphasis is clear. The aviation environment is inherently unforgiving and the margin for error is extremely low."*
[76] In terms of the degree of certainty required to meet the threshold, Mr McCabe submitted that any report must be based on *"sound data"* and that it must relate to *"a real, credible and significant change to the pilot's medical condition"*. That overstates the requirement of the statute. The primary meaning of the word *"suspect"* provided in the Concise Oxford English Dictionary, 11th edn (2006), is *"believe (something) to be probable or possible"*. That clearly allows for a substantial degree of uncertainty. By its very nature, suspicion is subjective and may occur as a result of many different processes. It will often be formed without conscious analysis. It certainly need not be the result of inquiry or investigation.
[77] I therefore accept Mr Ferrier's submission that *"To require an operator to establish, with any real degree of certainty, a change in the licence holder's medical condition would strain the meaning of the words 'reasonable grounds to suspect'."*
[78] This conclusion is consistent with the construction placed on the very similar expression *"reasonable cause to suspect"* as it appears in other statutes. Mr Thompson referred me to a number of decided cases in that regard, the essence of which are conveniently summarised in the decision of Judge Joyce QC in *Dulcie Holdings Ltd v New*

Zealand Customs Service [1997] DCR 1077. I adopt the analysis and conclusions in that case. The range of information taken into account may include personal observation, hearsay and other material which later turns out to be incapable of verification.

[79] Mr Ferrier also advanced the proposition that the proper body to conduct any investigation of suspected changes in medical condition is the Director, through the medical officers retained by the CAA. I agree. This is consistent with the scheme of the CA Act that the Director has control of medical certificates. Only the Director, either directly or through his delegate, can grant, suspend or revoke a medical certificate or disqualify a person from holding a certificate. It is therefore appropriate that the Director should have charge of the process by which it is determined whether the grounds necessary for any of those actions are established.

[80] The requirement that any report under s27C(2) be made *"as soon as practicable"* further supports this construction. It reflects a legislative intention that the Director should know without delay of the possibility of change in a pilot's medical condition. If it was intended that an operator should investigate any concerns and verify the accuracy of them before reporting to the Director, that intention would be seriously compromised.

[81] I noted earlier Mr McCabe's submission based on the exclusion of operators from the indemnity in s27C(4). I do not accept the rationale of that submission. Whether or not a particular person has an indemnity for his or her actions under s27C does not alter the scope of that person's duty. At most, it might constitute an incentive to discharge that duty diligently.

[82] I turn then to whether the threshold requiring Mr Guard to make a report to the Director was reached in this case. That must be assessed not on the basis of what Mr Guard was told by various people but on the basis of what Mr Guard told Dr Preitner. That may be summarised as comprising reference to the café incident and the altercation with Mr Glover, his concern about Mr Neill's stress levels, his concern that Mr Neill was having difficulty when lacking sleep and the fact that Mr Neill had been receiving counselling. Much of this information had come from Mr Neill himself. Some was the result of Mr Guard's personal observation of Mr Neill and interaction with him. The balance was from Mr Pumphrey and Mr Kenny, sources Mr Guard could properly regard as reliable. Overall, I find that this information was clearly sufficient to constitute reasonable grounds to suspect that there had been a change in Mr Neill's medical condition. I also accept the evidence of Mr Guard that he actually had such a suspicion.

[83] Mr Guard gave evidence that stress and fatigue can cause a pilot to lose concentration and thereby create a safety hazard. In answer to questions in cross examination, Mr Neill effectively agreed with that view. I accept that evidence which satisfies the third component of the threshold under s27C(2) that the suspected change in the medical condition may affect flight safety.

[84] The next issue relating to compliance with s27C is whether Mr Guard reported his concerns to the CAA *"as soon as practicable"*. As discussed earlier, the purpose of this requirement is to ensure that the Director is informed without delay of any possible change in the medical condition of a pilot which may affect safety. The obligation to report arises as soon as the threshold under s27C(2) is reached.

[85] When Mr Guard formed the suspicion he reported to Dr Preitner was the subject of sustained cross examination by Mr McCabe. Mr Guard's initial response was that he began to form that suspicion on 5 December 2005 after his meeting with Mr Neill but that he felt he needed to talk to Dr Rumball before taking the matter further. Later, he agreed with the proposition that he contacted Dr Rumball because he had formed a reasonable suspicion. Another key piece of evidence in this regard is that, by the end of his discussion with Mr Neill on 5 December, Mr Guard suggested that Mr Neill that he take time out from flying duties. The following day, after speaking with Dr Rumball, Mr Guard extended Mr Neill's period of stand down from flying and required him to obtain a new ME1 medical certificate. I do not believe Mr Guard would have taken those actions unless he felt they were appropriate. I infer from this evidence that the threshold under s27C(2) was probably reached on 5 December 2005 and that it was certainly reached by 6 December 2005. That being so, Mr Guard's obligation to inform the CAA of his concerns arose no later than 6 December 2005.

[86] Why then did Mr Guard delay until 14 December before speaking to Dr Preitner? He was unable to adequately explain this in answer to questions in cross examination. Having regard to all the evidence, however, the reason seems clear. Mr Guard was conscious that making a report under s27C was a serious step with potentially significant consequences for Mr Neill. He therefore tried to find a way to have the issues resolved without a report being made. This is why he took the initial step of getting Mr Neill to discuss the issues with his doctor and standing him down from flying in the meantime. When Mr Neill told him a couple of days later that he had seen his doctor and was fit to fly, Mr Guard accepted Dr Rumball's suggestion to provide the information to Dr Brooke he suspected Mr Neill had not provided. It was only when nothing had happened for a further two days that Mr Guard took the matter into his own hands and spoke with Dr Preitner.

[87] While Mr Guard's conduct was entirely understandable in terms of human nature, the result was that he failed to discharge his duty under s27C for 8 or 9 days. I return later to the significance of this failure.

[88] Mr McCabe raised one further issue regarding compliance with s27C(2) which was whether Mr Guard advised Mr Neill of the concerns he conveyed to Dr Preitner. The section itself is clear. Once the threshold is reached, the obligation created is to advise both the Director and the licence holder as soon as practicable. Mr Guard's evidence was that he advised Mr Neill *"at about the same time"* as he spoke to Dr Preitner and referred to an email to verify this. The email, however, records that it was sent at 10.04 am on 15 December 2005 whereas Dr Preitner's note of

his telephone conversation with Mr Guard says it occurred at 10.40 am on 14 December 2005, almost 24 hours previously. In the absence of any explanation for the delay, I can only conclude that Mr Guard did not advise Mr Neill *"as soon as practicable"* and this constituted another breach of s27C(2).

[89] In addition to his submission that s27C(2) itself required the concerns Mr Guard had about Mr Neill to be investigated and verified before a report was made to the CAA, Mr McCabe submitted that a similar duty also arose out of the employment relationship. In terms of s103A of the ER Act, Mr McCabe's submission was that a fair and reasonable employer would have conducted such an investigation before making a report to the CAA.

[90] I do not accept this submission. The obligation to report under s27C(2) arises immediately the necessary suspicion is formed. For the reasons given earlier, the formation of a suspicion on reasonable grounds does not require investigation and delaying a report for the time necessary to conduct an investigation would be inconsistent with the requirement to report the suspicion *"as soon as practicable"*.

[91] To find that an obligation to investigate suspicions before making a report arose out of the employment relationship would, therefore, require the operator to act in a manner inconsistent with s27C(2) of the CA Act. That is not what a fair and reasonable employer would do.

[92] It is also significant that s27C(2) imposes the same duty to report not only on operators but also on aviation examiners and medical examiners. In most cases, persons in the latter categories will not have an employment relationship with a pilot who may be the subject of a report but an operator will. To find that the employment relationship imposed a duty to investigate on an operator who was the employer of a pilot would therefore mean that the obligation to report imposed by s27C(2) differed according to a factor not mentioned in the section or contemplated by it. That cannot be correct.

[93] On this issue, Mr Thompson submitted that no investigation was required because making a report under s27C(2) did not, of itself, have any consequences for Mr Neill. As Mr Thompson put it:

"The act of suspending Mr Neill's medical certificate was an action of CAA, not of Air Nelson. It was not an automatic outcome of the supply of any information to CAA and only occurred after CAA's own inquiries."

[94] Mr Thompson went on to make a similar submission with respect to Mr Neill's disqualification from holding a medical certificate. While it is correct that only the Director or his delegate could suspend Mr Neill's medical certificate, it is clear that the suspension occurred prior to any investigation by the CAA. Mr Preitner's file note of his conversation with Mr Guard on 14 December 2005 records his decision to *"Suspend Medical Certificate and seek information"*. It was a case of suspend first and investigate later. Having been informed of a suspicion that a pilot's medical condition had changed in a manner which may affect safety, Dr Preitner could hardly have done otherwise. Given his experience in the aviation industry, I am sure Mr Guard was aware that this would happen when he made his report to Dr Preitner. I find, therefore, that the suspension of Mr Neil's medical certificate was a likely and foreseeable consequence of Mr Guard's report to Dr Preitner. In that sense, it was the result of his actions.

[95] Mr McCabe's final submission was based on evidence that the discussion between Mr Guard and Mr Neill on 5 December 2005 was described as *"off the record"*. Mr McCabe submitted that a fair and reasonable employer would not have conveyed to either Dr Brooke or Dr Preitner what was said in a conversation held on that basis. I do not accept that submission as it relates to Dr Preitner. To do so would potentially undermine the whole purpose and effect of s27C which is to ensure that the CAA is informed of any potential risk to aviation safety arising out of the medical condition of a pilot. The section contains no exceptions for confidentiality, even though it binds medical practitioners to whom much information is disclosed in confidence. That being so, there can be no basis to imply into the section an exception for employers who have discussions in confidence with employees. In order to comply with s27C(2), Mr Guard was obliged to convey to Dr Preitner the information Mr Neill had provided to him, regardless of the circumstances in which it was provided. I find that, in telling Dr Preitner of his concerns about Mr Neill, Mr Guard did what a fair and reasonable employer would do.

[96] To the extent that Mr McCabe's submission relates to Mr Guard's telephone conversation with Dr Brooke, I need not consider it as it is outside the scope of the personal grievance before me. In any event, the evidence was clear that, although Dr Brooke relayed to Dr Scrivener what Mr Guard had told him, the information went no further. Thus, what Mr Guard told Dr Brooke played no part in the subsequent suspension of Mr Neill's medical certificate. Nor was there any evidence that Mr Neill was otherwise disadvantaged in his employment by what Mr Guard told Dr Brooke.

[97] An essential aspect of Mr Neill's personal grievance is that his employment was affected to his disadvantage by the actions of Mr Guard he complained about. Mr Thompson addressed a significant part of his submissions to the proposition that Mr Neill had not suffered any such disadvantage and that, as a result, his grievance could not be sustained regardless of the findings I might make about the justifiability of Mr Guard's actions. Mr Thompson referred me to the decision in *Victoria University of Wellington v Haddon* [1996] NZCA 706; [1996] 1 ERNZ 139 in which the Court of Appeal took the approach that *"disadvantage"* in this context must relate either to the current employment relationship or to *"the on the job situation"* and did not include adverse impact on future employment alternatives.

[98] That decision is binding on the Employment Court and I accept that its effect is to render some of Mr Neill's

evidence irrelevant. In particular, I have put to one side Mr Neill's evidence regarding the possible effect on his future career of having had his medical certificate suspended. Mr Neill did, however, give evidence about a number of ways in which his suspension did impact on his day to day work and other entitlements he had under his employment agreement. The most obvious aspect of this was that Mr Neill was prevented from flying, the very thing he was employed to do. Because Air Nelson regarded him as being on sick leave during the period of suspension, Mr Neill also lost other benefits including staff travel privileges. There was originally an issue of loss of sick leave but this seemed to have been resolved by Air Nelson crediting Mr Neill with all of the sick leave debited to his account while he was prevented by the CAA from flying.

[99] In terms of the personal grievance before me, I find that the only respects in which Air Nelson's actions were not what a fair and reasonable employer would have done were that Mr Guard failed to advise either the Director or Mr Neill *"as soon as practicable"* of his concerns about Mr Neill's medical condition. To that extent, I find that the actions of Air Nelson were unjustifiable.

[100] That raises the question whether those actions affected Mr Neill's employment or any condition of his employment to his disadvantage. All of the disadvantage to Mr Neill's employment which was established by evidence arose out of the suspension of Mr Neill's medical certificate and his subsequent disqualification from holding a medical certificate. I find that Mr Guard's delay in discharging the obligations of Air Nelson under s27C(2) neither caused nor contributed to that disadvantage. It follows that Mr Neill's personal grievance is not sustained.

Conclusions

[101] In summary, my conclusions are:

a) Section 27C(2) of the CA Act does not require or contemplate that suspicions about the medical condition of a pilot be investigated prior to the Director being advised.

b) The employment relationship between Air Nelson and Mr Neill did not oblige Air Nelson to investigate Mr Guard's concerns about Mr Neill's medical condition prior to his making a report to the Director pursuant to s27C(2) of the CA Act.

c) Mr Guard had reasonable grounds on which to suspect that there had been a change in Mr Neill's medical condition which might have interfered with the safe exercise by him of his duties a pilot.

d) Mr Guard was therefore required by s27C(2) of the CA Act to advise the Director of his suspicion.

e) Mr Guard did not advise either the Director or Mr Neill as soon as practicable of his suspicion, as required by s27C(2) of the CA Act.

f) Mr Guard's failure to advise the Director and Mr Neill of his concerns as soon as practicable was an unjustifiable action on behalf of Air Nelson.

g) Mr Neill was disadvantaged in his employment by the suspension of his medical certificate and subsequent disqualification from holding a medical certificate.

h) None of that disadvantage was the result of the unjustifiable actions of Air Nelson.

i) The challenge is successful.

j) The determination of the Authority is set aside and this judgment stands in its place.

Comments

[102] The conclusion I have reached is different to that of the Authority. That is partly because the evidence provided to the Court was more extensive and different in some critical respects to that provided to the Authority. In particular, it appears that the Authority did not have the benefit of Dr Preitner's file note of his conversation with Mr Guard on 14 December 2005.

[103] The result in this case is that Mr Neill has suffered disadvantage in his employment as a result of the actions of his employer but is not entitled to any remedy. That should not be seen as anomalous. Rather it is an unavoidable consequence of the promotion of high standards of public safety under the CA Act which render the actions of Air Nelson in this case justifiable, notwithstanding the adverse effect on Mr Neill. Mr Ferrier referred me the a decision of Gendall J in *Oceania Aviation Limited v The Director of Civil Aviation* High Court, Wellington, CP162/98, 9 August 2000 in which he discussed the scheme of the CA Act and observed:

It is however abundantly clear that public interest in aviation safety is intended to override in some instances interests of individual document holders.

[104] This is one of those instances. The public interest in aviation safety must override Mr Neill's interests as an employee and Air Nelson's general duties to him as his employer.

[105] It should not be inferred from this decision that every report made by an operator under s27C(2) of the CA Act will be justifiable in the context of the employment relationship the operator may have with the subject of the report. If the suspicion reported to the CAA is not based on reasonable grounds, or the threshold under s27C(2) is not reached for some other reason, then making the report may not be what a fair and reasonable employer would do in all the circumstances and may therefore be unjustifiable.

[106] I wish to acknowledge the assistance I have received in this matter from the submissions of all counsel.

Costs

[107] Both parties recognise that this case raised issues which are novel and which affect many other participants in aviation. Accordingly, and in my view appropriately, costs were not sought regardless of the outcome. There will be no order as to costs.

A A Couch
Judge

Judgment signed at 4.00pm on 28 October 2008
