



Employment Court of New Zealand

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Air New Zealand Limited v Wulff [2010] NZEmpC 158 (6 December 2010)

Last Updated: 14 December 2010

IN THE EMPLOYMENT COURT AUCKLAND

[\[2010\] NZEMPC 158](#)

ARC 101/09

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN AIR NEW ZEALAND LIMITED Plaintiff

AND RANDALL WULFF Defendant

Hearing: 22-25 March 2010 (4 days) (Heard at Auckland)

Appearances: Kevin Thompson, counsel for the plaintiff

Paul Wicks and Lisa Keys, counsel for the defendant

Judgment: 6 December 2010

JUDGMENT OF JUDGE A A COUCH

[1] Mr Wulff was employed by Air New Zealand as an international flight attendant. In relation to two flights on 24 March and 4 April 2008, Air New Zealand had a series of concerns about Mr Wulff's conduct. Following a lengthy investigation, Mr Wulff was dismissed on 7 November 2008. The essential issue in this case is whether that is what a fair and reasonable employer would have done in all the circumstances.

[2] Mr Wulff believed his dismissal was unjustifiable and took that claim to the Employment Relations Authority. The Authority determined^[1] that the dismissal was unjustifiable but that Mr Wulff had contributed significantly to the situation giving

rise to his dismissal. The Authority ordered his reinstatement but, reflecting his

contribution, declined to award reimbursement of lost remuneration or compensation.

[3] Air New Zealand challenged the whole of the Authority's determination and the matter proceeded before the Court by way of a hearing de novo.

[4] During the hearing of this matter, a great deal of oral evidence was given. Eight witnesses were called by Air New Zealand; two by Mr Wulff. A bundle of documents running to nearly five hundred pages was provided. This included more than three hundred pages of transcripts and correspondence generated during the investigation process conducted by Air New Zealand. While I have considered and reconsidered all of that evidence, it is unnecessary and impractical to refer to most of it.

Background

[5] Safety has a very high priority in the airline industry. This is particularly so in operations involving actual flight. The [Civil Aviation Act 1990](#) requires all airline operators to establish and maintain management systems and operating procedures directed at ensuring safe operation at all times. Air New Zealand has extensive documentation of this nature, including standard operating procedures (SOPs) and safety and emergency procedures (SEPs). Flight crew are required to be familiar

with these procedures and to follow them at all times.

[6] An important aspect of safety in flight is that the crew work as a team. This includes both flight crew and cabin crew. By statute, the pilot-in-command of an aircraft has responsibility for the aircraft and for the safety of all on board^[2]. As a matter of policy and practice, other crew are part of a hierarchical structure, or chain of command, headed by the pilot-in-command.

[7] One of Air New Zealand's safety and emergency procedures is a turbulence management policy. This includes charts showing the differing duties and responsibilities of crew according to whether the turbulence experienced is light, moderate or severe. Those three conditions are described by reference to the

reaction of the aircraft to the turbulence and the reaction of people and objects in the cabin. Of significance in this case is that, while the policy requires passengers to be seated with seat belts fastened during all turbulence, flight attendants are required to continue service with caution during light turbulence.

[8] Notwithstanding that policy, Air New Zealand accepts that cabin staff may sit and fasten seat belts during any period of turbulence if they feel unsafe or uncomfortable. This is reflected in Air New Zealand training manuals and in health and safety directions.

[9] Mr Wulff was an experienced flight attendant. When the events in issue in this matter occurred, he had been employed by Air New Zealand in that role for more than 13 years.

[10] Many flight attendants are members of the Flight Attendants and Related Services Association (FARSA), a union which has a collective agreement with Air New Zealand. In 2008, Mr Wulff was Vice President and acting President of FARSA.

Overview of events

[11] On 11 December 2007, Air New Zealand issued a notice to international cabin crew setting out revised rules for rostering staff and, in particular, for handling staff requests for particular work or for particular days off. These rules introduced what were called "productivity requests" which gave advantages to staff who had few absences for illness or injury, regardless of cause.

[12] FARSA took issue with this notice. On 8 January 2008, a letter was sent to the Chief Executive Officer of Air New Zealand raising numerous concerns and seeking a meeting to discuss them. The letter was written in the first person and signed by Mr Wulff as Vice President of the union. One of the propositions advanced in the letter was that the new policy penalised staff who suffered work related accidents and one of the examples given was "turbulence injury". The letter

suggested that this would encourage certain responses from cabin crew, one of which was:

Whilst in flight remaining seated on all occasions where the seatbelt sign is illuminated

[13] The letter went on to say of this and two other suggested responses:

These outcomes are not in the best interests of the airline, crew or our customers.

[14] On 22 January 2008, Air New Zealand modified its earlier notice to an extent by allowing for exemptions from the productivity request policy in "exceptional circumstances". Otherwise the policy remained in effect.

[15] During the following months, management of Air New Zealand took issue with the contents of the 8 January 2008 letter at various meetings with FARSA representatives. This included meetings on 20 February and 13 March 2008.

[16] On 11 March 2008, FARSA issued a notice headed "ALERT" to its members. Mr Wulff was involved in preparing the notice which contained the following sentence:

The safety of our members is of paramount concern and for that reason FARSA is **recommending** that on all occasions that the seatbelt sign is illuminated, to refrain from all activities unless assisting in a life threatening situation and secure your harness immediately to minimise the chances of injury to yourself and others.

[17] Air New Zealand responded promptly to this notice. On 13 March 2008, it sent a letter to FARSA pointing out that its notice purported to alter the established turbulence management policy. Safety issues and regulatory issues were identified and the union was required to withdraw its recommendation. The letter contained the following paragraph:

Therefore to maintain proper order Cabin crew must continue to comply with the promulgated procedures as detailed in their operating manuals. Failure to do so will expose those members to investigation and potential disciplinary action up to and including dismissal. It is also a potential individual breach of the [Civil Aviation Act](#) and rules.

[18] The letter was addressed to the secretary of FARSA but a personal copy was also sent to Mr Wulff as acting President of the union.

[19] The following day, 14 March 2008, FARSA issued a notice to its members which stated:

FARSA wishes to notify all members that the Alert Update relating to the recommendation around turbulence and seating of cabin crew issued on the

11th March 2008 was issued without sufficient consideration of CAA

regulations and compliance.

All members **must** continue to comply with the Standard Operating Procedures and CAA regulations as set out in SEP manuals. These are all approved by CAA and must be complied with.

[20] On 20 March 2008, Air New Zealand's General Manager Airline Operations and Safety issued a memorandum to staff including international cabin crew. This reinforced the need for staff to comply at all times with the established turbulence management policy.

[21] On 24 March 2008, Mr Wulff was a crew member on a flight from Auckland to Melbourne and return. During the flight to Melbourne, Mr Wulff went to the flight deck where he spoke with the pilot-in-command, Captain Pattie about how he would behave during turbulence. During the return flight from Melbourne, Mr Wulff again went to the flight deck where he had a further discussion with Captain Pattie. As a result of those discussions, Captain Pattie questioned whether Mr Wulff could be relied on to follow SEPs at all times and, as a result, whether he could fly with Mr Wulff again. These two discussions on the flight deck became the first concern subsequently investigated by Air New Zealand.

[22] Prior to the flight to Melbourne, there was a crew briefing in Auckland at which Mr Wulff chose to speak. He made a statement about what actions he would take if there was turbulence during the flight. This was to become the second concern about Mr Wulff's conduct.

[23] The events which occurred in relation to these Melbourne flights were the subject of a detailed report by Captain Pattie on 11 April 2008.

[24] In the meantime, further events of concern occurred in relation to a flight from Auckland to Vancouver on 4 April 2008. Mr Wulff was a crew member on that flight. At a briefing prior to the flight, Mr Wulff again made a statement about how he would behave if there was turbulence during the flight. This added to and became part of the second concern about Mr Wulff's conduct.

[25] A short time into the flight, Mr Wulff and two other flight attendants were seated with their harnesses fastened when other cabin crew were continuing to provide the meal service. This became the third concern about Mr Wulff's conduct.

[26] Also at an early stage of the flight, the pilot-in-command went to the crew rest compartment where he was to have a meal. While he was there, a catering cart controlled by Mr Wulff collided with the compartment. This became the fourth concern about Mr Wulff's conduct.

[27] In relation to the Vancouver flight, several other issues arose involving many of the crew but, as they were either unrelated to Mr Wulff or were ultimately not pursued by Air New Zealand, there is no need to detail them.

[28] Initial reports about events on the Vancouver flight were made to Air New Zealand management on 9 and 10 April 2008. These were from the first officer, one of the second officers and from Holly Alderton, who was the Flight Service Manager. As previously noted, Captain Pattie's report about events on the Melbourne flight was provided to management on 11 April 2008.

[29] Acting on these reports, an initial meeting was held with Mr Wulff on 15

April 2008. Air New Zealand's principal representative at the meeting was Philip Callaghan who was then Acting Cabin Crew Manager. Mr Wulff was told that a disciplinary investigation was to be held and, following discussion, he was suspended from duty.

[30] On 22 April 2008, Mr Callaghan wrote to Mr Wulff setting out in some detail the four concerns which he proposed to investigate further. They were the four matters I have identified earlier.

[31] There followed a lengthy and detailed investigation into those concerns about Mr Wulff's conduct. That process was principally conducted by Mr Callaghan who eventually became the decision maker on behalf of Air New Zealand. Several reports were called for and received. Many staff were interviewed. In most cases, these interviews were lengthy and very detailed. They included a long and meticulous interview of Mr Wulff on 23 June 2008. Throughout the investigation process, both Mr Wulff and Mr Callaghan were assisted and, at times, represented by experienced counsel. Transcripts were prepared of all interviews. Copies of these and other relevant documents were provided to Mr Wulff or to his counsel, Mr Wicks.

[32] On 25 July 2008, Mr Callaghan wrote to Mr Wicks, broadening the investigation. Linking the original specific incidents, and referring also to the letter of 8 January 2008 and the ALERT notice of 13 March 2008, Mr Callaghan expressed concern

that Mr Wulff's actions as a representative of FARSA might have made him unsuitable to continue as a flight attendant and might also warrant disciplinary action. These issues were discussed at a further interview with Mr Wulff on 30 July 2008.

[33] On 3 September 2008, Mr Wicks provided Mr Callaghan with extensive and detailed written submissions on behalf of Mr Wulff.

[34] On 10 October 2008, Mr Callaghan wrote to Mr Wulff recording the findings he had made regarding the matters of concern. This was a lengthy and detailed letter. Mr Callaghan concluded that Mr Wulff's conduct in relation to the first concern (discussions with Captain Pattie) and the third concern (being seated on the Vancouver flight) constituted serious misconduct and that, in relation to the fourth concern (the meal trolley), there had been misconduct. Regarding the second concern (statements at pre-flight briefings), Mr Callaghan found that Mr Wulff had engaged in serious misconduct in relation to the Melbourne flight but no misconduct in relation to the Vancouver flight. In relation to what he described as the "overarching consideration", Mr Callaghan concluded that Mr Wulff's conduct as a representative of FARSA was inconsistent with his role as a flight attendant.

[35] That letter prompted a further detailed written response from Mr Wicks which, in turn, led to Mr Callaghan issuing a revised version of his letter on 28

October 2008. That updated letter formed the basis for a final meeting with Mr Wulff which took place on 29 October 2008. The purpose of that meeting was to discuss with Mr Wulff and Mr Wicks the final outcome of the disciplinary process. They spoke at length and provided Mr Callaghan with a written summary of their submissions.

[36] Arising out of that meeting, Mr Callaghan interviewed two further staff. One was Captain Pattie. The other was a senior member of the flight crew on the Melbourne flight. That led to yet another meeting with Mr Wulff on 7 November

2008 to discuss what they had said. In the course of that meeting, Mr Wulff sought an opportunity to directly address Alan Gaskin, the General Manager Cabin Crew. Mr Gaskin joined the meeting and listened to what Mr Wulff said. After an adjournment, Mr Callaghan dismissed Mr Wulff. That was confirmed in a letter dated 10 November 2008 in which Mr Callaghan said that the reasons were those set out in his letter of 28 October 2008.

Issues

[37] Whether the dismissal of Mr Wulff was justifiable must be decided in accordance with the test in [s103A](#) of the [Employment Relations Act 2000](#):

103A 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.

[38] It is important to bear in mind that this test is to be applied at the time the dismissal occurred. In deciding whether the dismissal was substantively justifiable, therefore, the material to be considered is that which was available to Mr Callaghan at the time he made the decision to dismiss Mr Wulff rather than what the many witnesses said about events in their evidence to the Court. The evidence of witnesses is relevant, however, to establishing what the circumstances were at the

time the decision was made and the process by which it was made. It is also relevant to remedies.

[39] The ultimate issue to be decided in this case is whether the dismissal of Mr Wulff was justifiable. As that dismissal was based on conclusions reached by Mr Callaghan in respect of five specific concerns, however, it is convenient to consider whether a fair and reasonable employer would have followed the process adopted by Mr Callaghan and reached each of those conclusions on the material available to him. Some overall factors then need to be taken into account, such as Mr Wulff's employment history, the assurances he gave in the course of the disciplinary process and the extent to which it was appropriate to regard Mr Wulff as personally responsible for actions taken on behalf of his union.

Pre-flight briefings

[40] Prior to the flight to Melbourne, the Flight Service Director, John Baldwin conducted a pre-flight briefing. This was a routine event. Mr Baldwin spoke first and was followed by Trudi Parlane, the Inflight Service Co-ordinator for the flight. When other cabin crew were then asked if they had anything to say, Mr Wulff spoke. Mr Callaghan was given differing accounts of exactly what he said.

[41] In answer to a question from Mr Callaghan about what Mr Wulff said to the briefing, Mr Baldwin said:

When I asked for any input from crew, Randall said he would like to mention (not exact quote) that he was a part of the Farsa union and he would answer any questions from crew on Farsa issues.

And then he said, just to let you know, re the communications going around about seatbelts, he said ‘I will be sitting down when the seatbelt sign is on’, that is exactly what he said. At that point, he ceased his comments, it was obvious he had said what he wanted to say.

[42] Captain Pattie was not present at that crew briefing but, in his report dated 11

April 2008, he recorded what Mr Baldwin told him when he arrived at the aircraft:

He told me I should know that one of his crew was a FARSA executive member and after his briefing to the crew he invited anyone else to contribute and that Randall had informed the crew that if it became turbulent he would be sitting down in accordance with FARSA’s advice.

[43] When he was interviewed about this issue, Mr Wulff largely agreed with Mr Baldwin’s report but said that his statement about sitting down was that he would do so if he felt unsafe. Mr Wulff explained that, as a union representative, he felt it appropriate to stress safety to staff and that he had a form of words he had used frequently on such occasions. He said that this stressed the need for safety when turbulence was experienced.

[44] Initially, Mr Callaghan took no further steps to investigate this issue. He did not interview other members of the crew or check with Mr Baldwin whether Mr Wulff may have qualified his statement by referring to safety concerns. This was his position even though Mr Baldwin’s account of what Mr Wulff said differed from what Captain Pattie said Mr Baldwin had told him at the time. In Mr Wulff’s response to Mr Callaghan’s letter of 28 October 2008, Mr Wicks criticised this lack of further inquiry and provided a brief statement made by Ms Parlane. This prompted Mr Callaghan to interview Ms Parlane on 31 October 2008. She was clear that safety was an integral part of what Mr Wulff had said prior to the Melbourne flight. In this respect, her recollection differed significantly from what Mr Baldwin had said, although it is fair to say she did not agree entirely with Mr Wulff’s account either. Ms Parlane also said that Mr Wulff had made a similar statement prior to another flight on which they had both crewed.

[45] Mr Callaghan did not change his view or make any effort to investigate matters further after speaking with Ms Parlane. In his letter of 10 November 2008 confirming his dismissal of Mr Wulff, Mr Callaghan referred to Ms Parlane by name but did not mention what she had said or that it had any effect on his views. Rather, he confirmed the conclusion he had reached prior to speaking with Ms Parlane which was that he preferred Mr Baldwin’s account of matters to that given by Mr Wulff.

[46] In relation to the Vancouver flight, Mr Callaghan interviewed eight members of the cabin crew. All recalled Mr Wulff saying at the pre-flight briefing that he was a FARSA representative and mentioning action which might be taken during turbulence. Most reported that Mr Wulff linked his remarks about turbulence with safety. One recalled that Mr Wulff had specifically said staff should follow Air New Zealand SEPs regarding turbulence. Another reported that what Mr Wulff said on

that occasion was the same as statements he had made prior to several other flights on which they had both crewed.

[47] Having received this information from staff, Mr Callaghan said in his letter of

28 October 2008 that he found the position in relation to the Vancouver flight “less clear” than it was in relation to the Melbourne flight and that he was unable to reach a “definitive conclusion”.

[48] Mr Callaghan concluded that what Mr Wulff said at the pre-flight briefing for the Melbourne flight amounted to serious misconduct. In doing so, he made detailed reference to Mr Wulff’s position as a union representative. I return to this issue later. Mr Callaghan made “no findings of misconduct” in relation to what Mr Wulff said prior to the Vancouver flight.

[49] How Mr Callaghan conducted this aspect of the investigation and the conclusion he reached in relation to the Melbourne flight were not what a fair and reasonable employer would have done in all the circumstances. Mr Wulff’s account of the event was supported by what Ms Parlane said. An important part of that account was that Mr Wulff said very much the same thing at each flight briefing in which he participated. That was supported by Ms Parlane and by what cabin crew on the Vancouver flight said. The fact that Mr Baldwin apparently gave Captain Pattie a different account of what Mr Wulff had said to the Melbourne briefing to that he gave to Mr Callaghan must also have cast some doubt on Mr Baldwin’s report that Mr Wulff made the unqualified statement that he would sit down when the seat belt sign was on.

[50] In the circumstances of this case, a fair and reasonable employer would have made further enquiries. There were 14 cabin crew on the flight to Melbourne. They were readily available to Mr Callaghan. There would also have been no difficulty in Mr Callaghan speaking again with Mr Baldwin. In the initial interview with Mr Baldwin, the question whether Mr Wulff may have linked his comments about sitting down with safety was not asked. When it emerged that this was an essential part of Mr Wulff’s account of events and that this was supported by what other staff

said, it was neither fair nor reasonable to rely entirely on what Mr Baldwin had said without putting that proposition to him for comment.

[51] In all the circumstances, Mr Callaghan also went too far in characterising what he believed Mr Wulff to have said at the Melbourne pre-flight briefing as serious misconduct. Mr Callaghan relied on what Mr Baldwin said. According to Mr Baldwin, Mr Wulff spoke only of his own intentions and did not urge other crew members to do likewise. Mr Baldwin also reported that, immediately after Mr Wulff spoke, he spoke again, reminding staff specifically that SOPs were mandatory and drawing their attention to the turbulence chart which gave guidance about when to sit and when not to sit. During the flight, Mr Wulff did not sit at a time anyone else considered inappropriate. It is also of some significance that neither Mr Baldwin nor Captain Pattie considered that what Mr Wulff had said warranted his removal from the flight or his being stood down from duty during the flight. Both options were available as the flight had one more crew member on board than was required for safety.

[52] It is also clear that Mr Callaghan elevated what could otherwise only be regarded as misconduct to the level of serious misconduct because of Mr Wulff's role as a union representative. That was inappropriate. I discuss this issue in detail later.

Discussions with Captain Pattie

[53] I deal next with the concern about the discussions Mr Wulff had with Captain Pattie during the flights to and from Melbourne.

[54] On the outward flight, Mr Wulff went to the flight deck where he initiated a discussion with Captain Pattie about the FARSA action regarding crew behaviour during turbulence. Captain Pattie's report of the conversation was as follows. Mr Wulff asked Captain Pattie whether he was aware of the FARSA advice to its members. Captain Pattie said he was but understood it had been withdrawn by the subsequent notice. Mr Wulff replied that this was not the case and that the second notice was simply informing members that they should comply with Air New Zealand SOPs and Civil Aviation requirements at all times; something he said had

always been FARSA's intention. Captain Pattie asked Mr Wulff if he held office in FARSA and Mr Wulff replied that he was a member of the executive. Captain Pattie then asked Mr Wulff what he would do if the seat belt sign came on and Mr Wulff replied that he would sit down immediately. He agreed, however, that he would still comply with SOPs by preparing the cabin for landing after the seat belt sign went on. When Captain Pattie asked why there was a change in procedures after many years, Mr Wulff replied that cabin crew have to be responsible for their own well being and that concerns about safety had increased recently. Captain Pattie suggested to Mr Wulff that the approach he was advocating would require flight crew to make an announcement about what cabin crew were to do every time they put the seat belt sign on. Mr Wulff replied that he would sit if he felt unsafe regardless of such an announcement. During their conversation, Mr Wulff repeatedly said that his views reflected his concerns about his personal safety and well being.

[55] Mr Wulff went to the flight deck again during the return flight from Melbourne. Captain Pattie reported the conversation on that occasion as follows. Mr Wulff said "I know what this all about, you feel threatened!" Captain Pattie assured him that was not so and that the issue was one of trust. Captain Pattie said that cabin crew had always trusted his judgment in the past but that it appeared all trust had suddenly gone. He also suggested that, if cabin crew adopted the turbulence procedure Mr Wulff had described, this would destroy the flight crew's trust in the cabin crew. Mr Wulff disagreed.

[56] In his email of 11 April 2008 reporting these events, Captain Pattie then went on to say how he felt after reflecting on the situation for some time. He said that he had doubts whether Mr Wulff would follow standard operating procedures in future and expressed concern that he might influence other crew to do the same. Captain Pattie also said that "if we were rostered on any flight where turbulence was forecast, I would be talking to him again and unless I got agreement from him that he would not sit down as soon as I put on the seat belt sign and would wait until I did a PA if I felt it was going to get too rough for the [cabin crew] then I would not take him as part of my crew."

[57] In his response to Captain Pattie's report, Mr Wulff said that he had initiated the conversation because Captain Pattie was a fleet manager, that he had never flown with such a senior pilot before and he was interested to know his views. Mr Wulff did not dispute what Captain Pattie had reported was said in the conversation but stressed that his responses to Captain Pattie's questions were all expressly based on whether he felt safe or unsafe. Mr Wulff said he thought Captain Pattie had misunderstood what he said in the conversation and that this could be cleared up by a direct discussion between them. He said that it was never his intention to question Captain Pattie's authority or judgment and offered an apology to him if what he had said had been interpreted that way.

[58] In the written statement which formed part of Mr Wulff's response to this concern he gave the following assurances:

I wish to reiterate in the strongest possible terms that the company can rest assured that I will maintain all codes, principles, protocols, rules, regulations, SOPs and SEPs on all flights I am on. As I have done in all my previous flights. I note that Captain Pattie in his email asked a specific question as to whether I would follow SOPs if turbulence was forecast (or at anytime). The answer to his question is yes I would.

I give my absolute undertaking to the company that I will always follow the direction of the PIC, FSM and the SOPs. I am

ready, willing and able to take any appropriate steps to quell and overcome the concerns expressed by Captain Pattie.

[59] In the interview which followed the presentation of that written response on

23 June 2008, Mr Wulff gave several similar assurances of his absolute commitment to following operating procedures and to respect the chain of command. In particular, he said that he accepted that sitting down whenever the seat belt sign was illuminated was not standard procedure and that he would never do that. The only qualification Mr Wulff placed on these commitments was that he would sit if he felt unsafe.

[60] In his letter of 28 October 2008, Mr Callaghan concluded that what Mr Wulff said in these conversations with Captain Pattie constituted serious misconduct. This conclusion was based very much on the concerns expressed by Captain Pattie that procedures may not be followed and his reservations about flying with Mr Wulff again in certain circumstances.

[61] Prior to reaching those conclusions, Mr Callaghan had not spoken with

Captain Pattie and relied solely on his email of 11 April 2008. It was only on 6

November 2008 that an interview with Captain Pattie was finally conducted. In that interview, Captain Pattie disputed Mr Wulff's statement that all references to sitting down when the seat belt sign came on were qualified by safety concerns. He confirmed, however, that much of the discussion was about safety and the view expressed by Mr Wulff that, as well as relying on the flight crew to look after their safety during turbulence, cabin crew also needed to look after themselves.

[62] In the course of this interview, Captain Pattie was asked whether he would accept Mr Wulff as part of his crew in future. He replied:

I'm sure I could sit down and discuss this flight in particular with [Mr Wulff] and provided I had his assurance that he would be operating in accordance with SOP and SEP manual in regard to seating of cabin crew I could fly with him.

[63] Later in the interview, Mr Callaghan read to Captain Pattie part of what Mr

Wulff had said in his response on this issue. Captain Pattie's response was:

I'm happy to meet with him but it's not only my flight that was involved. From my point of view if he's willing and able to acknowledge that there's SOPs and SEPs to be followed and it's business as usual from hereon in I'd be happy to fly with him.

[64] The following day, 7 November 2008, there was a final meeting at which Mr

Wulff said to Mr Callaghan:

I really feel that SOPs and SEPs are paramount. I have always followed them. I will continue to follow them in the future – obviously there was confusion and by all means I never wanted to create confusion or anything like that and in the future there will be no confusion created by anyone or anything – SOPs/SEPs are paramount. I understand my requirements as a [flight attendant] – fully. And those are to follow SOPs, follow SEPs follow the [pilot-in-command]. I've never not. Pilot is the ultimate authority on the aircraft. SOPs/SEPs reinforce that – I have never questioned those and I will not question those in the future.

[65] Despite those statements by Captain Pattie and Mr Wulff's further unqualified assurance, Mr Callaghan did not modify the conclusion he had reached previously. That was not what a fair and reasonable employer would have done in all the circumstances. Mr Callaghan's conclusion was based very much on Captain

Pattie's concerns. Following the final interviews with Captain Pattie and Mr Wulff, those concerns had effectively been assuaged. Captain Pattie said he would be happy to fly with Mr Wulff if he had an assurance about following SOPs and SEPs. Mr Wulff gave an unqualified assurance to that effect.

[66] Another significant aspect of this issue was that the basis on which Captain Pattie expressed his concerns in his email of 11 April 2008 took no account of the accepted policy that cabin crew should sit during any turbulence if they felt unsafe or uncomfortable. Rather, Captain Pattie seemed to expect that cabin crew would not sit during light turbulence unless directed to do so by flight crew. This anomaly was not raised with Captain Pattie or acknowledged by Mr Callaghan when reaching his conclusions.

[67] An important piece of evidence relating to the seriousness of this issue was that Captain Pattie accepted that a member of the cabin crew sitting down during light turbulence would not give rise to a safety issue.

[68] In all these circumstances, a fair and reasonable employer would not have characterised what Mr Wulff said to Captain Pattie on the Melbourne flights as serious misconduct.

Sitting down on the Vancouver flight

[69] On the flight to Vancouver on 4 April 2008, Mr Wulff was working in the forward cabin. The two other cabin crew working with him in that area were Jane Sullivan and Roseanne Madsen. The Flight Service Manager was Holly Alderton.

[70] On 9 April 2008, Ms Alderton made a detailed report about many aspects of the tour of duty which included the flight to Vancouver on 4 April 2008 and the return flight on 6 April 2008. This included several issues on board the aircraft, events on the crew bus, events at the crew hotel, comments on the pilots and extended comments on the crew. The first issue on board the aircraft was described by Ms Alderton as follows:

When the first meal service had started on board I was required to go to the front cabin. At that time I noticed both Randall Wulff and Jane Sullivan

were seated and belted into their seats. I had not noticed the seat belt sign illuminate nor had I noticed much turbulence. I had not been informed that these crew were seated or that the service in the front cabins was being conducted by one flight attendant. I immediately phoned the Captain and informed him of the situation. Subsequently the seatbelt sign was turned off and the service resumed as normal.

[71] When she was interviewed by Mr Callaghan on 28 April 2008, Ms Alderton added only a little to this report. She said that she did not speak to Mr Wulff or Ms Sullivan at the time, the reason being that she “knew the reason why”. This appeared to be a reference to FARSA notices and what Mr Wulff had said at the pre-flight briefing. Ms Alderton said that flying conditions were “very smooth” with “zero” turbulence but that the seatbelt sign was on. She spoke to the pilot who switched off the sign. Mr Wulff and Ms Sullivan then resumed their duties. Ms Alderton reported that Ms Madsen made no comment.

[72] Mr Callaghan first spoke to Ms Madsen on 11 April 2008. The notes he made of what she told him about the early part of the flight were :

During the first meal service there was mild turbulence “nothing to worry about” and she continued with service except for one bout of approx five minutes of moderate turbulence where she and Jane Sullivan decided to return the cart to the galley and take their seats. It then “calmed down” and remained sufficiently calm to continue service

[73] Mr Callaghan formally interviewed Ms Madsen on 8 May 2008. She reported that, about half an hour into the meal service, “it got a bit rough so we brought the carts back in and sat down.” She confirmed that all three crew in the cabin, including her, sat down and that they did so because they felt unsafe. When asked to elaborate on the degree of turbulence, Ms Madsen said “Mildly turbulent – enough to bring the carts in – there was visual jiggling of the bottles but nothing fell off. We secured them against a wall in the galley.” Ms Madsen went on to say that it was about five to ten minutes before she felt comfortable about getting up. Ms Madsen was not asked whether she had carried out safety checks before taking her seat.

[74] Ms Sullivan was interviewed on 6 June 2008. She confirmed she had been working closely with Mr Wulff and Ms Madsen on the flight but said there had been no discussion about turbulence and seat belt signs. Ms Sullivan agreed that she and

Mr Wulff had taken their seats during the first meal service. She said she sat down “because the signs came on and it was rough.” She said they resumed service again when the seat belt sign went off. Ms Sullivan estimated they were seated for about ten minutes. She also said that she did not check whether any passengers were in the toilets before taking her seat.

[75] A flight attendant working in the rear cabin, Belinda Dunne, was interviewed on 11 June 2008. She reported having seen Mr Wulff and Ms Sullivan seated in the front cabin at an early stage in the flight when she went to the forward cabin. She described the turbulence at that stage as being “light” and that the seat belt sign was on. When she was returning to the rear cabin, she sat down for a brief period estimated at 20 to 30 seconds because of turbulence. She said that the turbulence at this point “wasn’t totally light but definitely wasn’t heavy – really niggly turbulence with occasional decent jolt sort of thing.”

[76] Other cabin crew interviewed by Mr Callaghan described the flying conditions at the time in question as follows: “occasional light chop at the beginning”, “initial stages there was mild turbulence” and “whole flight was pretty niggly”.

[77] When he was interviewed, Mr Wulff said that he and Ms Sullivan were seated at differing times but that they were both seated for 10 to 15 minutes early in the flight. Mr Wulff described the turbulence at that point as “at least moderate in my opinion – just felt unsafe – took my seat”. When asked to elaborate, Mr Wulff said that bottles were clanking and he was unsure of his footing. He said that, before taking his seat, he advised passengers to fasten their seat belts but did not check whether the toilets were occupied.

[78] All three flight crew were interviewed by Mr Callaghan. The first officer and second officer described the turbulence during the early part of the flight as light and occasional. They also said it was clear air turbulence which was unpredictable. When asked about when the seat belt signs were first put on, both said it was well into the flight. This was at odds with the reports of most of the cabin crew who

spoke of the seat belt signs being on during the period early in the flight when it was said Mr Wulff inappropriately sat down.

[79] The other information available to Mr Callaghan was a technical report produced because some of the crew had reported

moderate or severe turbulence later in the flight to Vancouver. It is standard practice to investigate such reports. The aircraft was a Boeing 777 which has a sophisticated data monitoring and recording system. The data recorded on that flight was analysed and the following report made:

Flight data:

- Flight data is removed from the B777 fleet as part of the onboard monitoring programme. The disk from OKH was removed and assessed as part of the normal process and the data did not show any lateral or vertical G deviations that would indicate moderate or severe turbulence.

Based on the data, the level of turbulence encountered by the crew prior to the climb up to FL310 and the hour immediately after the climb, is within the bounds of light turbulence

[80] The conclusions reached by Mr Callaghan regarding this issue were that, during the early part of the flight to Vancouver, there was insufficient turbulence to warrant Mr Wulff taking his seat. He recorded that Mr Wulff had admitted that he failed to complete the required cabin and passenger safety checks and then said:

I find that the actions you took during this phase of the flight were in accordance with your earlier stated intentions, both generally from the FARSA ALERT and in particular your discussions and statements in relation to NZ123 [the Melbourne flight]. In other words, you did act as you said you would and you failed to follow SEPs/SOPs.

I do not consider that there was a genuine basis, at this phase of the flight, for you to have had a concern, or a sufficient concern, for your safety so as to warrant the actions you took. Rather than relating to any concern you had in relation to your personal safety or the safety of your fellow crew or passengers under your care, I have concluded that your actions were far more likely to be in keeping with your earlier stated intentions. Again, given the importance of consistent adherence to procedure, the safety aspects involved in a Flight Attendant's role and the potential for disrepute I find your actions to have been serious misconduct.

[81] There are fundamental problems with these conclusions. On one hand, Mr

Callaghan relied on the proposition that Mr Wulff had advocated deliberate

disobedience with SEPs and SOPs during pre-flight briefings. For the reasons I have given earlier, that was not what a fair and reasonable employer would have concluded in all the circumstances. It was therefore not open to Mr Callaghan to attribute motives to Mr Wulff on that basis.

[82] As an alternative, Mr Callaghan concluded that the degree of turbulence at the time in question was so slight that Mr Wulff could not have had sufficient concern for his safety to warrant sitting down when he did. It was common ground amongst the witnesses who gave evidence on the issue, including Mr Callaghan, that perceptions of turbulence vary between individuals and that assessment of risk or discomfort is inevitably subjective. To reject Mr Wulff's explanation that his conduct was based on a genuine concern for his own wellbeing, therefore, Mr Callaghan would have had to be satisfied that there was no turbulence or only a very low level of turbulence throughout the period in question. Having regard to all of the information available to Mr Callaghan, no fair and reasonable employer would have reached that conclusion. It was also contrary to the express statements by Ms Sullivan and Ms Madsen that they too sat down because the turbulence made them feel uncomfortable.

[83] This conclusion also raised disparity issues. Mr Wulff, Ms Sullivan and Ms Madsen had all taken their seats in the same part of the aircraft at a similar time in the flight. They were all experienced flight attendants fully familiar with the SOPs and SEPs. Ms Sullivan also confirmed that she did not check the toilets for passengers when she sat down. Mr Callaghan's conclusion that there was insufficient turbulence to warrant sitting down at the time in question applied equally to them all but disciplinary action was only taken against Mr Wulff. Mr Callaghan described Ms Sullivan's action as "at worst ... a lack of good judgment", the implication being that he did not regard it as misconduct of any sort. Mr Callaghan attempted to justify this obvious disparity by referring to factors which he suggested distinguished Ms Sullivan's position from that of Mr Wulff. I found that evidence unconvincing. Mr Callaghan also said that he thought it would have been unfair to take disciplinary action against Ms Sullivan because she had not been warned that this might be an outcome of the interview with her. No explanation at all was

offered in relation to Ms Madsen. Applying the applicable principles³, I find that the explanation for disparity was far from adequate and that Mr Wulff's dismissal was not otherwise justifiable on this ground.

Catering cart incident

[84] On Air New Zealand flights to and from Vancouver, the flight crew take it in turns to rest during the flight. They do so in a module which is located over the passenger cabin near the front of the aircraft. Access to the rest area is by stairs which go up from the forward galley. In this area, there is a security camera whose display is on the flight deck.

[85] On the flight to Vancouver on 4 April 2008, the pilot-in-command of the flight was Captain Campbell-Cree. The other members of the flight crew were first officer Warren Dwight and second officers Mark Woodhouse and Darrin Cook.

[86] After the aircraft had reached cruising altitude, Captain Campbell-Cree and Mr Cook went to the crew rest module. This was about half an hour into the flight. Cabin crew were conducting the meal service in the front cabin. It was arranged that meals would be prepared for the two flight crew in the rest area and Captain Campbell-Cree asked Ms Madsen to knock on the door when the meals were ready.

[87] Around this time, there were issues between the cabin crew and the flight crew who remained on the flight deck about turbulence and whether the seat belt sign should be put on. Initially Ms Dunne telephoned the flight deck and spoke to Mr Woodhouse. She reported that it was “bumpy” at the rear of the aircraft and suggested the seat belt sign be put on. Mr Woodhouse told her that the flight crew did not think this was warranted. A little time later, Mr Wulff spoke to Mr Woodhouse from the front of the aircraft. He expressed concern about turbulence and suggested the service be stopped. Mr Woodhouse replied that Mr Wulff should make that decision. This was contrary to Air New Zealand practice which is that decisions about cabin service are to be made by the Flight Service Director who, on that flight, was Ms Alderton.

[88] Very shortly after that conversation between Mr Wulff and Mr Woodhouse, a catering cart was positioned against a bulkhead which is connected to the crew rest module. This occurred between an hour and an hour and a half into the flight. In the course of his investigation, Mr Callaghan received conflicting information about how the cart was positioned and what happened immediately afterwards.

[89] The first mention of the matter was in written reports from Mr Dwight and Mr Woodhouse dealing with numerous issues which had been raised about the tour of duty to and from Vancouver. Those reports were not dated but it appears they were made on or about 10 April 2008.

[90] Mr Dwight said:

I observed through the flight deck security video monitor camera FAPS Wulff ram a galley cart into the pilots crew rest bulkhead. At this time, there were a number of crew standing around the front galley including FA Dunne and ISC Voykovich talking to FAPS Wulff. Wulff stood with his hands on his hips throughout this gathering.

A few moments after FAPS Wulff had rammed the galley cart into the side of the pilots crew rest bulkhead Capt. Campbell-Cree was observed coming out of the crew rest compartment. I observed Capt. Campbell-Cree in conversation with this group, he then returned to the pilots crew rest compartment.

[91] Mr Woodhouse said:

Wulff appeared frustrated at my response and I witnessed, through the flightdeck security camera, him ram a catering trolley into the overhead crew rest bulkhead. While I could not hear, I was not surprised to see the Captain emerge a very short time later.

[92] Both of these men were subsequently interviewed in early May 2008. Mr Woodhouse’s description of events was similar to his initial report. Mr Dwight’s description changed significantly. Whereas he had initially reported that Mr Wulff “rammed” the cart into the bulkhead, his interchange with Mr Callaghan in the interview was:

Mr Callaghan: You say you witnessed RW ram a cart into the FD crew rest module wall – can you describe please?

Mr Dwight: I witnessed RW move the galley cart into the bulkhead – immediately after the phone call.

Mr Callaghan: When you say move – how did he move it? Was it repositioned or was there anything more noticeable?

Mr Dwight: I can’t say – how do you detect forcefulness? The only things I noted afterwards were MCC appear straight afterwards from crew rest module and have dialogue with the crew. MCC later said he wondered what the bang was and the crew claimed it was turbulence that moved the cart there. It was obvious that it had been pushed in there. This occurred very shortly after RW’s conversation with MW.

[93] A few days later, Mr Callaghan interviewed Captain Campbell-Cree. He said that the crew rest module “thumped” and that it made him think someone had kicked the door. He came down expecting to collect meals but there was no-one there so he came out into the galley area. There were several cabin crew there which he thought unusual. He said that, when he came out, Mr Wulff immediately said that the cart had banged against the crew rest door because of turbulence. In answer to further questions from Mr Callaghan, Captain Campbell-Cree said that there was little turbulence at this time. He also said that it would require considerable force to produce the noise he heard.

[94] When he was interviewed, Mr Wulff consistently denied pushing the cart deliberately into the crew rest module. He said that he positioned the cart next to the crew rest module door while he spoke to Mr Woodhouse on the telephone and that

turbulence caused it to bang against the door. Mr Wulff said that when Captain Campbell-Cree came down to see what the noise was, the cart was still in front of the door, blocking his exit and that he then put the cart up against the bulkhead.

[95] Mr Wulff's account of events was put to Mr Dwight and Captain Campbell-Cree on 18 July 2008. They were both adamant that the door to the Crew rest module had not been blocked when Captain Campbell-Cree came down and that he was able to immediately exit freely.

[96] Ms Madsen and Ms Sullivan were also asked about this incident. Ms Madsen said that she did not see Mr Wulff position the cart against the crew rest module bulkhead. She did, however, recall Captain Campbell-Cree coming down expecting to get meals. She also said that the cart was banging against the bulkhead subsequently because of turbulence. Ms Sullivan said she did not see Mr Wulff move a cart into position against the crew rest module wall but assumed he must

have done so. She recalled Captain Campbell-Cree coming out of the module door but said that his concern was solely for his meal rather than being about any noise. She described bottles on the catering carts banging against the crew rest module wall. Both women agreed with Mr Wulff's view that there was considerable turbulence at this time.

[97] Aspects of these accounts were clearly inconsistent. In particular, Mr Wulff's statement that the catering cart was initially blocking the door to the crew rest module when Captain Campbell-Cree came down was inconsistent with what both Captain Campbell-Cree and Mr Dwight said. It was certainly open to Mr Callaghan to discount Mr Wulff's account of this aspect of events and I find that a fair and reasonable employer would have done so.

[98] What was more problematic was the suggestion that Mr Wulff had "rammed" the cart into the bulkhead. This suggested both deliberation and a great deal of force. A consistent theme of all accounts of the event was that no bottles fell off the cart, nor was anything else spilled. There was also no suggestion that either the cart or the bulkhead had been damaged. This strongly suggested that the initial accounts given by Mr Woodhouse and Mr Dwight were mistaken or exaggerated. Mr Dwight himself seemed to recognise that by moderating his description of events considerably when he was interviewed.

[99] On this issue, Mr Callaghan concluded that Mr Wulff's positioning of the cart was a "forceful manoeuvre, possibly out of frustration" at the response he received from Mr Woodhouse to his call. Mr Callaghan regarded this as misconduct. I find that, in all the circumstances, this was what a fair and reasonable person in Mr Callaghan's position would have concluded. This must be qualified, however, by saying that a fair and reasonable employer would have regarded this as relatively minor misconduct.

Union involvement

[100] Mr Callaghan's investigation was initially into the five specific incidents in which it was alleged Mr Wulff had engaged in misconduct. In a letter to counsel dated 25 July 2008, however, Mr Callaghan expanded the investigation to include

Mr Wulff's role in FARSA. This became what Mr Callaghan described in his letter of 28 October 2008, setting out his conclusions, as an "overarching consideration". In that letter he said:

49.1 I am unable to ignore the fact that you have a senior leadership role in FARSA and that other Flight Attendants, particularly FARSA members, will look to you for leadership. I find that you were significantly involved in the letter to the company dated 8 January

2008 and in the issue of the FARSA ALERT. You also confirmed with the Captain, and cabin crew, on both the Melbourne flight and

the Vancouver flight your role as a FARSA representative and, in your discussions with Capt Pattie, introduced FARSA's position into

a discussion occurring during the flight.

49.2 While I accept that you have described the letter to the company dated 8 January, and also the ALERT, as mistakes, given that you are an experienced Flight Attendant aware of the significance of following procedures, I cannot accept that the mistake made was a reasonable mistake.

49.3 In fact, I find that your involvement in the FARSA communications and discussions with Capt Pattie and others, while asserted to have been undertaken wearing your FARSA "hat" I can nonetheless not ignore the fact that you are also a senior Flight Attendant for the company who ought to be fully versed in all aspects of adherence to procedures. It would be one thing if it was a non-flight attendant employee who had acted as the FARSA representative. However, it is another, when that FARSA representative is also an experienced Flight Attendant as you are. The actions promoted by FARSA, and yourself, have demonstrated to me that there is a basis for the concerns outlined in paragraphs 2(a) – (d) of my letter to Paul Wicks dated 25 July.

[101] The concerns referred to in the last paragraph of this passage were expressed in Mr Callaghan's letter of 25 July 2008 as

being:

2. Whether Randall's involvement in sending the letter to Rob Fyfe dated 8 January and in the issue of the Alert, and also Randall's interactions generally with Captain Pattie and then with the cabin crew of NZ84, all to the extent that this may have involved Randall acting in the capacity of a FARSA office bearer may mean

(a) Randall has shown a disregard for the requirement to comply with SEPs/SOPs so as to call into question Randall's suitability to operate as a flight attendant for Air New Zealand and/or to appreciate the seriousness of non-compliance with SEPs/SOPs.

(b) Randall has shown an inability to be able to separate his activities as a FARSA office bearer from his responsibilities as a flight attendant, again so as to call into question

Randall's suitability to operate as a flight attendant for Air

New Zealand.

(c) Randall has failed to appreciate that his actions as an office bearer for FARSA may impact on his own actions and the actions of others as flight attendants for Air New Zealand, in circumstances where those actions, in the capacity of flight attendants may be improper, inappropriate and/or unlawful.

(d) Randall's actions as a FARSA office bearer had the potential to bring Air New Zealand's name into disrepute, both with Air New Zealand's customers and with the CAA in that if the directives issued by FARSA were carried out, passengers could well think less of Air New Zealand and/or the CAA may have had cause to question or investigate Air New Zealand's compliance with its Air Operators Certificate and exposition, with particular reference to SEPs/SOPs.

[102] There were two effects of these conclusions by Mr Callaghan. Firstly, Mr Wulff was held responsible as an employee for his actions as a union representative. Secondly, Mr Wulff's conduct as an employee was considered more serious because he was a union representative. Neither of these consequences was appropriate or justifiable.

[103] Unions are a legitimate and integral part of employment relations in this country. Unions can only act through their representatives. Generally, when a union's representatives are acting on behalf of the union, their actions must be attributed to the union, not to the representatives personally. Union representatives are often employees of an employer with whom the union has a relationship. Delegates are the obvious example but, in the case of most unions, office bearers will also be employees of the employer. When acting on behalf of their union, those persons therefore have two relationships with their employer; that of employer and employee and that of employer and union. In such circumstances, all parties have an obligation to recognise and respect the two roles of the employee and to attribute responsibility for the employee's conduct according to the role in which he or she is acting at any time.

[104] It is clear that, in his involvement with the letter of 8 January 2008 and the ALERT notices issued on 11 and 14 March 2008, Mr Wulff was acting as a representative of FARSA. That being so, responsibility for those actions lay with the

union, not with Mr Wulff as an employee. Mr Callaghan erred significantly in failing to recognise that distinction and give effect to it.

[105] When acting in his capacity as an employee, Mr Wulff was entitled to be judged by the same standards as other employees in his position. It was wrong for Mr Callaghan to hold him to a higher standard by reason of his position in the union.

[106] Mr Callaghan's reliance on this "overarching consideration" was not what a fair and reasonable employer would have done.

Assurances

[107] The essential question Mr Callaghan had to consider was whether Mr Wulff could be relied on in future to comply with SOPs and SEPs. On numerous occasions during the investigation process, Mr Wulff offered formal unqualified assurances that he would comply without exception. I have dealt with some of these in my analysis of the discussions with Captain Pattie. Other similar assurances were given from the very first meeting on 15 April 2008 to the last meeting on 7 November 2008.

[108] Mr Callaghan placed little weight on those assurances, saying in his evidence that he "determined them not to be sufficient and hollow". When asked why he formed that view, Mr Callaghan said that he believed he had received similar assurances from Mr Wulff prior to the Melbourne and Vancouver flights and that, by his conduct in relation to those flights, Mr Wulff had not lived up to them. Mr Callaghan agreed that his belief that those assurances had been given was "a very important part" of his decision making process.

[109] Mr Callaghan said he “believed” he had received these assurances from Mr Wulff during meetings between Air New Zealand management and FARSA representatives on 20 February and 13 March 2008. Mr Wulff denied that he had given any assurances about his future conduct at those meetings.

[110] As to the meeting on 20 February 2008, Mr Callaghan said that he raised with

FARSA representatives, including Mr Wulff, the company’s concern about the

content of the union’s letter of 8 January 2008. According to Mr Callaghan, Mr Wulff gave an assurance that the action suggested in that letter would not occur. Mr Callaghan said he interpreted that as an assurance on behalf of the union and as an assurance from Mr Wulff personally. This demonstrates Mr Callaghan’s failure to distinguish between Mr Wulff’s two roles. It is clear that Mr Wulff attended the meeting on 20 February 2008 on behalf of the union. That being so, it was inappropriate for Mr Callaghan to have regarded what he said as a personal statement. In any event, it is apparent from Mr Callaghan’s own evidence that what Mr Wulff said related only to the specific matters of concern in the earlier FARSA letter. For these reasons, it could not be relied on by Mr Callaghan as a general assurance by Mr Wulff personally that he would comply with all SEPs and SOPs in future.

[111] In relation to the meeting on 13 March 2008, another witness, Ms McManus, was called on behalf of the plaintiff. She said that SEPs were discussed at the meeting but, in answer to questions in cross examination, she agreed that Mr Wulff had not given any assurances at that meeting, nor had he been asked to do so.

[112] A further issue regarding Mr Callaghan’s handling of this issue is that he never mentioned during the course of the investigation process that he doubted the value of Mr Wulff’s assurances because he believed Mr Wulff had not honoured earlier assurances. This was so even when Mr Wulff gave categorical and unqualified assurances to Mr Callaghan in person. A fair and reasonable employer having the doubts Mr Callaghan said he had would have voiced those doubts in the course of the investigation. Mr Callaghan’s failure to do so made his reliance on those doubts fundamentally unfair.

Other factors

[113] Three other aspects of the investigation require brief comment: Mr Wulff’s employment record, his performance prior to being suspended and allegations of predetermination.

[114] Mr Wulff had more than 13 years of unblemished service. During that time, he had achieved a level of seniority which presumably reflected Air New Zealand’s

confidence in his ability and integrity. Although this employment history was specifically mentioned on several occasions in interviews with Mr Callaghan and in submissions made to him, it was not mentioned at all in either Mr Callaghan’s detailed letter of 28 October 2008 in which he set out his conclusions or in his letter of 10 November 2008 confirming the reasons for Mr Wulff’s dismissal. This is surprising. Mr Wulff’s employment history ought to have been an important factor in Mr Callaghan’s assessment of whether he could be relied on to perform appropriately in future. The fact that it was not mentioned suggests Mr Callaghan did not give it the weight it deserved.

[115] Between the time the FARSA letter of 8 January 2008 was sent and the Melbourne flights, Mr Wulff completed 19 tours of duty without any reported incident or concern. Between the Melbourne and Vancouver flights, Mr Wulff completed a tour of duty to and from San Francisco, again without concern being expressed. The significance of this is that Mr Callaghan concluded that Mr Wulff’s actions were part of a pattern of conduct based on the FARSA communications. The fact that Mr Wulff had completed 20 tours of duty without concern since the FARSA letter of 8 January 2008 militated strongly against the conclusion Mr Callaghan reached yet there is no indication that he took that fact into account.

[116] There was an allegation that Mr Callaghan predetermined the outcome of his investigation. Having reviewed all the evidence, I find that there are several aspects of what Mr Callaghan said and did in the course of the investigation which suggest that he reached conclusions on important issues at an early stage or closed his mind to what was said by Mr Wulff or on his behalf. I do not, however, make a finding of fact that Mr Callaghan predetermined the outcome of the investigation as a whole. Rather, he conducted it in a manner which was inappropriate in many respects but which was nonetheless honest and genuine on his part.

Decision

[117] Mr Wulff’s dismissal was unjustifiable. That is because Air New Zealand’s actions, and how it acted, were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. I reach that conclusion both on the basis of the specific factors I have discussed above and on consideration of the matter as a whole.

[118] In my view, the only conclusion adverse to Mr Wulff which could properly have come out of the investigation conducted in this case was that his actions in relation to the catering cart on the Vancouver flight constituted misconduct. The appropriate response to that conclusion would have been no more than a warning.

Remedies

[119] The statement of defence did not deal with the remedies sought on behalf of Mr Wulff. In his submissions, however, Mr Wicks made it clear that Mr Wulff sought reinstatement, reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to his feelings. I deal with each of those in turn but note that my initial conclusions are subject to what I later say about contribution by Mr Wulff to the situation.

Reinstatement

[120] Reinstatement is expressed by [s 125](#) of the [Employment Relations Act 2000](#) to be a “primary remedy”. Where it is sought as a remedy for a proven grievance, the Court must provide it “wherever practicable”. The interpretation and application of this section was recently considered by the Court of Appeal in *Lewis v Howick College Board of Trustees* [\[4\]](#) where the Court endorsed the statement of principle affirmed in an earlier case concerning a similarly worded provision of the [Labour Relations Act 1987](#)[\[5\]](#):

Whether ... it would not be practicable to reinstate Mr Bell involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

[121] I adopt that approach.

[122] In this case, reinstatement was strongly opposed by Air New Zealand. That opposition was the subject of extensive submissions by Mr Thompson which traversed three broad grounds:

- a) The evidence of witnesses for the plaintiff in senior positions that they still lacked trust and confidence in Mr Wulff to carry out the duties of a flight attendant.
- b) The special nature of the airline industry in which the employer has extensive statutory and regulatory obligations which co-exist with its obligations to its employees.
- c) The need for safety to be paramount in flying operations, leaving no room for doubt about compliance with safety obligations.

[123] The concerns expressed in evidence were largely those of Mr Callaghan. To a large extent, they were based on the conclusions he reached during his investigation of Mr Wulff's conduct and which he has strenuously defended since. I have found that it was inappropriate for Mr Callaghan to have reached all but one of those conclusions. That being so, it would be equally inappropriate for me to place weight on the subjective views of Mr Callaghan based on those conclusions.

[124] Evidence about the practicability of reinstatement was also given by five other witnesses for the plaintiff. They included Captain Morgan, Air New Zealand's Chief Pilot. He emphasised the safety and regulatory issues which were accepted by all parties. In that context, he said that any conclusion by Air New Zealand or the captain of an aircraft that a crew member could not be relied on to follow SEPs “makes employment of such a person in our airline very problematic.” In this and other aspects of his evidence, Captain Morgan was scrupulously careful not to express any views about Mr Wulff personally. Rather, his evidence was based on the consequences for operation of the airline of certain conclusions, being the conclusions I have found it was inappropriate for Mr Callaghan to have reached.

[125] On 6 November 2008, Captain Pattie told Mr Callaghan that he could accept Mr Wulff as a member of his crew if he received an assurance from Mr Wulff “that he would be operating in accordance with SOP and SEP manuals in regard to seating of cabin crew”. In his evidence to the Court, Captain Pattie sought to qualify that statement by saying that he now has reservations about the reliability of Mr Wulff's assurances. In cross examination, Captain Pattie confirmed that any such reservations were based on Mr Callaghan's belief that Mr Wulff had given assurances in February and March 2008 which he had not honoured. My finding that there was no basis for Mr Callaghan to have such a belief should enable Captain Pattie to accept Mr Wulff's assurance unreservedly.

[126] In his brief of evidence, Captain Campbell-Cree did not comment on this issue but, in answer to a supplementary oral question, he said that he would not have Mr Wulff as a crew member on one of his flights in future. No reason for that view was offered and none was sought in cross examination. I therefore raised the matter with Captain Campbell-Cree. He said that there were two factors. The first was that he believed Mr Wulff had failed to honour assurances he had given to follow SEPs. He based this on having seen Mr Wulff seated at one point during the flight to Vancouver when he perceived there to be only very light turbulence. The second was that he believed Mr Wulff had encouraged cabin crew on the Vancouver flight to make operations occurrence reports implicitly critical of the flight crew, including himself. He concluded by saying “I think

him orchestrating that level of animosity against us - in my opinion a complete fabrication - I would have a significant problem with flying with him again.”

[127] I can place little weight on this evidence from Captain Campbell-Cree. One of the specific issues investigated by Mr Callaghan was whether cabin crew on the Vancouver flight had conspired to present false information. Mr Callaghan concluded, after interviewing all of the staff involved, that he was unable to make such a finding. As to the issue of Mr Wulff's assurances, Captain Campbell-Cree appeared to rely on a brief observation which had never been discussed with Mr Wulff.

[128] Mr Baldwin was also asked in a supplementary question how he would feel about having Mr Wulff as a member of his crew. He replied “I would have to say that, as a minimum, I would be uncomfortable.” Again, the witness was not asked by counsel what the reasons for that view were. I asked him why he held that view now, given that he had said in evidence that he was happy to fly with Mr Wulff on the flight to Melbourne. He replied that he had since been given more information about communications with Mr Wulff prior to the Melbourne flight and that he assumed that information to be correct. From the context of this answer, I understood Mr Baldwin to be referring to the meetings with Mr Wulff as a FARSA representative in February and March 2008 relied on by Mr Callaghan. I have already dealt with those. I note also that Mr Baldwin retired in November 2008 and that his evidence in this regard could only be hypothetical.

[129] The other witness who gave evidence about the practicability of reinstatement was Ms Alderton. Yet again, the issue was raised with her as a supplementary oral question. She was asked “Do you think you could ever work with Mr Wulff again as a crew member under your authority?” She replied “Definitely not after the Vancouver incident.” Unfortunately, Ms Alderton was not asked to say what she meant by “the Vancouver incident”. It is significant that Ms Alderton gave a good deal of evidence about events which were not the subject of the disciplinary investigation. These included a lengthy conversation she had with Mr Wulff over lunch during the layover in Vancouver. Ms Alderton gave evidence that she offered Mr Wulff advice and it was clear that she was offended by the manner in which he rejected it. Her feelings about this event were heightened by the fact that she had a longstanding friendship with Mr Wulff's wife. In the absence of any other evidence, it seems to me that this was the “Vancouver incident” Ms Alderton was referring to. It is the sort of personal difference which can occur in any workplace and which responsible employees must put aside when working. I place no weight on Ms Alderton's views on this issue.

[130] In his submissions, Mr Thompson attempted to widen the scope of this ground of opposition. He suggested that “Pilots will not want to have Mr Wulff as a crew member or, at the very least, Air New Zealand would need to make extra arrangements satisfactory to the pilots, and possibly CAA.” He also suggested that

“There is the very real potential for hostility which could affect safety considerations, not only as between ground management and Mr Wulff but between Mr Wulff and pilots/flight crew.” Other than what I have discussed above, there was no evidence to support either of these contentions and I reject them accordingly.

[131] The second and third themes of Mr Thompson's submissions can be considered together. They were summarised in the following paragraph of his synopsis:

If the Court was to order reinstatement, it would, in effect, be overriding the specialist judgment of Air New Zealand that for the reasons given, Mr Wulff's presence in the business compromised Air New Zealand's ability to operate as safely as it could and in discharge of its various responsibilities to a range of third parties.

[132] I do not accept that submission in the context of this case. It relies on the conclusions reached by Mr Callaghan. In particular, it relies on the proposition that Mr Wulff actually breached an SEP in the course of his duty. For the reasons I have given, that conclusion was inappropriate except as to the admission by Mr Wulff that he failed to check the toilets for passengers on one occasion. Such an omission cannot sensibly be said to undermine Air New Zealand's overall ability to meet its safety and regulatory obligations.

[133] Air New Zealand continues to employ without difficulty the other flight attendants whose behaviour on the Vancouver flight was similar to Mr Wulff, namely Ms Sullivan and Ms Madsen.

[134] Even putting the evidence for the plaintiff at its highest, there was never any issue that Mr Wulff would not comply with SOPs or SEPs generally. The focus was on part of one SEP relating to crew behaviour during light turbulence. The repeated suggestion by witnesses for the plaintiff and by Mr Thompson in his submissions that there was any wider issue of disobedience by Mr Wulff was simply unsupported by the evidence.

[135] On the evidence, I cannot accept that the issue of when a flight attendant should or should not sit during light turbulence is of sufficient significance to affect either flight safety or Air New Zealand's regulatory obligations. As to the latter,

Captain Morgan agreed that the issues involved in this case were not ones requiring any reporting under the Civil Aviation regulations. As to safety, both Captain Pattie and Captain Campbell-Cree agreed that the only consequence of sitting down during light turbulence may be a delay in cabin service and that it did not compromise safety.

[136] In his submissions, Mr Thompson suggested that the events in question raised wider issues of respect for authority. The evidence to support that contention was minimal and related almost entirely to the discussions Mr Wulff had with Captain Pattie on the Melbourne flights. Any concerns raised by those exchanges could only be minor and should have been resolved by Mr Wulff's unqualified assurances that he understood and accepted the chain of command.

[137] The other submission Mr Thompson made was that Mr Wulff's financial position was such that he did not need to work and be paid. He suggested that this was a factor to be taken into account against granting reinstatement. I do not accept that submission. Whether or not an employee needs income from work has nothing at all to do with whether reinstatement is practicable. I note also that most people perform their chosen work for reasons other than simply being paid. In this case, Mr Wulff said that he was passionate about his job and wished to continue working as a flight attendant for many years to come. I have no reason to doubt that evidence.

[138] Overall, I conclude that it is realistic for Mr Wulff to return to duty as a flight attendant for Air New Zealand and that a constructive employment relationship can be successfully restored. In reaching this conclusion, I take into account that Air New Zealand is a large employer. Ms Alderton said that the airline employs approximately 1000 international flight attendants and agreed that this gives the company considerable flexibility in rostering, including the ability to avoid particular staff working together. To the extent that any particular employee may initially have reservations about resuming work with Mr Wulff, therefore, Air New Zealand can avoid that happening until any such concerns have been resolved.

Reimbursement of lost earnings

[139] An employee who has been unjustifiably dismissed may seek reimbursement of "remuneration lost as a result of the personal grievance". In this case, Mr Wulff says that he lost a total of \$56,375 between the date of his dismissal on 7 November

2008 and 15 October 2009 when he began work as a real estate agent. Mr Thompson submitted that Mr Wulff was not entitled to reimbursement of that sum or any part of it because the loss was due to his failure to seek alternative employment rather than his dismissal.

[140] Mr Wulff agreed that he did not seek alternative employment but offered an explanation for that. Firstly, he said that at the time he was dismissed, he had two blocks of leave scheduled, one of three weeks in January 2009 and another of five weeks beginning in late March 2009. He said that family arrangements had been made for both periods which could not be changed.

[141] When he was dismissed, Mr Wulff initially sought interim reinstatement, the implication being that he needed to be available to take up work with Air New Zealand again if that was granted. That application was not pursued when, on 2

December 2008, the Authority scheduled a substantive investigation meeting beginning on 23 February 2009. The meeting had not concluded after two days and the commitments of those involved were such that it could not resume until 4 May

2009. By that time, Mr Wulff had already begun studying for his real estate qualification.

[142] Had Mr Wulff remained in employment by Air New Zealand, he would have been paid for the eight weeks leave scheduled between January and May 2009. He therefore lost the holiday pay he would have received for that period as a result of his dismissal. Otherwise I find that only one month's remuneration can fairly be said to have been lost as a result of Mr Wulff's dismissal. That is accounted for by the one month's salary he was paid on dismissal. Therefore, he is only entitled to reimbursement of eight weeks' holiday pay at the rate applicable in January and April 2009.

[143] The Authority ordered that Mr Wulff be reimbursed for remuneration lost between the date of its determination, being 4 December 2009 and the date of his reinstatement. I see no reason to disturb that award and confirm it.

Compensation

[144] Mr Wulff gave evidence about the personal effects on him of his dismissal. He emphasised that the conclusions reached by Mr Callaghan on which his dismissal was based brought his honesty and integrity into question and that he found this both hurtful and humiliating. He also said that he was embarrassed by neighbourhood discussion of his dismissal and that he found it particularly difficult to explain to his children why he had lost his job. Other effects mentioned included loss of sleep and loss of patience as a result. One consequence of dismissal which is often a major factor for people who are dismissed is financial hardship. This was not a factor in Mr Wulff's case.

[145] Having regard to other broadly comparable cases, I find that a just award of compensation for the distress experienced by Mr Wulff as a result of his dismissal would be \$10,000.

Contribution

[146] [Section 124](#) of the [Employment Relations Act 2000](#) provides:

124 Remedy reduced if contributing behaviour by employee

Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—

(a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and

(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[147] Although I have found in this case that Mr Callaghan was not justified in concluding that Mr Wulff had crossed the line between acceptable conduct and misconduct, except in respect of the catering cart incident, that is not to say that Mr Wulff was blameless.

[148] In making his statements to pre-flight briefings, Mr Wulff failed to make himself entirely clear. As a result, some of those around him got the impression he was advocating unjustified breach of an SEP.

[149] Similarly, it is apparent that Mr Wulff pushed the policy about sitting when he felt unsafe to its limit and into an area of uncertainty in which others felt he had acted improperly.

[150] On the Melbourne flights, the approach Mr Wulff made to Captain Pattie was imprudent and provocative. In particular, Mr Wulff's suggestion that Captain Pattie felt threatened was simply foolish and it was entirely foreseeable that this would cause friction. As a member of the crew, it was wrong for Mr Wulff to engage in such conduct with any other member of the crew and, in particular, the pilot-in-command.

[151] Mr Wulff was wholly responsible for the incident involving the catering cart.

[152] On the issue of contribution, I am in agreement with the Authority that it may properly be reflected by limiting Mr Wulff's remedies to reinstatement and a brief period of reimbursement of lost remuneration. In reaching this conclusion, I am mindful that [s 124](#) refers to both the nature and extent of remedies. In this case, I do not find the extent of Mr Wulff's contribution requires that he be denied the remedy of reinstatement.

Comments

[153] A major factor giving rise to the issues in this case was the promulgation by Air New Zealand of two inconsistent policies, one prescriptive and the other entirely subjective. On one hand, the SEP on turbulence positively required cabin crew to continue service during light turbulence. On the other hand, there was an acknowledged policy, reinforced by the training manual and health and safety bulletins, that cabin crew may sit at any time during turbulence if they feel unsafe or uncomfortable. The SEP also required cabin crew to complete specified safety checks prior to being seated during turbulence. The general policy did not. No guidance was provided to staff on reconciling these two policies. I found it

surprising and disturbing that three senior captains, one of them the airline's chief pilot, had differing views about the relationship between these policies. Captain Morgan said he would not regard it as a breach of the SEP if a cabin attendant sat down during light turbulence because he or she felt unsafe. Captain Pattie incorrectly thought that the SEP manual contained a direction that cabin crew could sit during light turbulence if they felt unsafe. Captain Campbell-Cree said that sitting down during light turbulence would be a breach of the SEP in any circumstances. I suggest this is a training issue Air New Zealand needs to address.

[154] In reaching my decision, I have borne in mind the particular nature of the airline industry which was acknowledged by all parties and some of whose features I have mentioned under the heading "Background" at the beginning of this judgment.

[155] Although I have made only limited reference to counsel's submissions in this judgment, I have considered them fully. In both cases, they were thoughtful and contained helpful analysis of the issues and evidence. I derived considerable benefit from them.

[156] I wish to complement counsel on the manner in which they presented a complex case. Cross examination was focussed and the hearing completed within the time estimated.

[157] I regret that it has taken longer than I would have wished to complete this judgment and acknowledge the resulting inconvenience to the parties. The delay has been largely due to the pressure of other matters before me and the consequent difficulty in setting aside sufficient time to properly review the large volume of evidence involved in this case.

Summary

[158] In summary, my judgment is:

a) Mr Wulff was unjustifiably dismissed.

b) The order for reinstatement made by the Authority is confirmed. If any issues arise about implementing reinstatement, leave is reserved to apply to the Court on notice for directions.

c) The Authority's order that Mr Wulff be reimbursed for remuneration lost between 4 December 2009 and the date of his reinstatement is confirmed.

d) Mr Wulff contributed to the situation giving rise to his personal grievance to an extent which requires that he be awarded no remedies under [s 123](#) of the [Employment Relations Act 2000](#) other than those confirmed above.

e) The challenge is unsuccessful.

f) By operation of [s 183\(2\)](#) of the [Employment Relations Act 2000](#), the determination of the Authority is set aside and this decision stands in

its place.

Costs

[159] As he has successfully resisted the plaintiff's challenge, Mr Wulff is entitled to a reasonable contribution to his costs. Counsel should confer with a view to agreement about costs but, if that is not possible, Mr Wicks is to file and serve a memorandum within 30 working days after the date of this judgment. Mr Thompson

is then to have 20 working days to respond.

Signed at 12.30pm on 6 December 2010.

A A Couch
Judge

[1] AA 433/09, 4 December 2009

[2] [Section 13 Civil Aviation Act 1990](#)

[3] See *Chief Executive of Department of Inland Revenue v Buchanan (No 2)* [2005] NZCA 428; [2005] ERNZ 767 (CA)

[4] [2010] NZCA 320

[5] *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*

[1994] NZCA 509; [1994] 2 ERNZ 414 (CA)