

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 45/08
5110581

BETWEEN FIONA BARTON
 Applicant

AND AIR NEW ZEALAND LTD
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Charlotte Hatlauf-Coles and Blair Edwards for Applicant
 David France for Respondent

Investigation Meeting: 16,17 and 18 January 2008

Submissions received: 23 January from Applicant
 24 January from Respondent

Determination: 14 February 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Air New Zealand's Group Sales Co-ordinator, Fiona Barton, was dismissed on 29 November 2007. The dismissal followed an investigation into allegations that she had taken steps to arrange discounted fares for personal associates outside policy and with a loss of revenue to Air New Zealand ("the airline.")

[2] The airline has a Code of Conduct which was incorporated into Ms Barton's terms and conditions of employment. It sets standards of conduct for staff including a requirement for staff:

- *"to ensure all resources are only used for Company business. This includes money, equipment, material or time. Employees should only use resources that they are authorised to use..."*

[3] In relation to conflicts of interest the Code provides:

“The Company requires all employees to ensure they have no real or perceived conflict of interest between their own personal interests and those of the Company. For example:

...

- *Making decisions, taking actions or use of the Company’s assets or information for personal gain or for the improper benefit of any other party...*

Employees are expected to...

- *Inform their manager as soon as possible should a real or perceived conflict of interest arise...”*

[4] Employees are also warned that:

“Breaches of this Code of Conduct may result in disciplinary action up to and including dismissal.”

[5] Between 10 October and 29 November the airline conducted an investigation into the following actions of Ms Barton:

- *“Your attempts to purchase an AD75 Premium Economy airfare to the USA/London for your partner [P], where Agent Discount (AD) tickets are only available for bona-fide IATA travel agents.*
- *Your apparent intent to mislead Russ Somerville, your Sales Support Supervisor, when he asked for justification for authorising the AD75.*
- *Providing favourable ticketing arrangements to a friend or acquaintance in relation to a trip taken by [A] from Auckland to Sydney NZ 105, 11*

October 2006 and return Sydney to Auckland NZ 704, 14 October 2006, where there was no justification for providing these ticketing arrangements.”

[6] At the end of the investigation Sales Support Manager Jason O’Connell concluded that Ms Barton’s actions constituted serious misconduct in that she “*made decisions and took actions for personal gain and for the improper benefit of another party.*”¹ In submissions Mr France has argued that Ms Barton demonstrated by her conduct that she was prepared to go to extraordinary lengths to obtain benefits that were not available to her and were outside company policy. He submits that the dismissal was the only reasonable option open to the airline in all the circumstances, and says that the applicant is not entitled to remedies.

[7] Ms Barton accepts that she attempted to purchase an AD75 ticket for her partner but says that she did not know what the ticket was or what rules applied to it and denies trying to mislead Mr Somerville about it. She also says that there were compassionate grounds for the favourable ticketing arrangements in 2006. She says that in the circumstances none of her actions amounted to serious misconduct. Mr Edwards argues that the airline failed to act as a fair and reasonable employer when it decided to dismiss her. To remedy her employment relationship problem, Ms Barton seeks permanent reinstatement, compensation for humiliation, loss of dignity and injury to her feelings and reimbursement of lost wages.

Issues

[8] Both the respondent’s investigation and my own were lengthy and detailed. Very little emerged before the Authority that had not already come out of the respondent’s inquiry and there is very little factual dispute between the parties. I have not therefore set out all the evidence in detail. Instead, for the sake of economy, this determination will follow a similar format to the submissions I received from Mr Edwards. Each of the allegations against Ms Barton, and her responses to them, will be addressed in turn to establish whether the respondent’s specific findings were justified. Finally I will consider the overall question of whether the employer’s actions

¹ Letter of dismissal, 4 December 2007.

in dismissing Ms Barton met the test of justification set out in s.103A of the Employment Relations Act 2000.

(i) The attempt to purchase an AD75 ticket.

[9] In her role as Group Sales Co-ordinator Ms Barton's primary responsibility was to provide group pricing and sales support to the airline's industry distribution partners. This involved arranging for sales and bookings for groups on behalf of travel agents and required her to have full knowledge of the airline's booking system, airfare structures, booking classes and policies. It also gave her full access to the airline's booking system.

[10] Like other staff, if she wanted to access benefits under the Staff Travel policy, Ms Barton had to get the bookings done by the Staff Travel unit or use the exclusive staff online booking system "I Fly". She was however permitted to use the regular booking system herself to arrange travel for family or friends *outside* the Staff Travel policy. With the approval of her manager she could arrange such travel at a 4-10% saving through access to "Industry Fares" or the waiver of commission. These arrangements were subject to availability and had to comply with airline policies. Both Ms Barton and respondent witnesses confirmed that this option was not used frequently.

[11] In late 2007 Ms Barton's partner was planning to travel to the UK and US. As her nominee he was entitled under the Staff Travel policy to the same benefits as her except that he was not eligible to be upgraded unless travelling with her. When travelling without her (as he would be on this occasion) he was entitled to a discounted "N" class economy ticket only. As an alternative to arranging travel for him under the Staff Travel policy Ms Barton had the option of an Industry Fare which was strictly capacity controlled and (like normal Staff Travel) had to be booked in economy "N" class.

[12] Neither a Staff Travel booking nor an Industry Fare suited Ms Barton because she did not want her partner to have to travel economy class. She later explained this by saying that she wanted him to have a comfortable flight as he had recently been under a lot of stress caring for his mother who was ill. She also said that while part of

his trip would be spent visiting friends in the US, he would also be going to London to discuss his mother's health issues with his brother there.

[13] For these reasons Ms Barton opted not to get Staff Travel to make bookings for her partner. Instead, during August and September she reserved seats for him in a number of different fare and class categories, and gave him priority status for waitlisted seats, something she was not entitled to do. Then on 28 September she booked him a Pacific Premium Economy (PPE) fare to London with the notation "*awaiting auth for AD75 for O class.*"

[14] Several things were amiss about this booking. The AD75 (which involved a 75% discount) was available only to licensed travel agents. It was also unavailable in PPE. Finally an AD75 fare meant \$4,500.00 revenue loss to the airline.

[15] Later that day Ms Barton went to see Groups and Incentives Sales Executive [C]. After telling him the background relating to her partner's travel plans (and emphasising his mother's recent illness) she asked if he could authorise the PPE AD75 ticket. [C] proceeded to authorise the travel. He later told Mr O'Connell that he did so as a favour to Ms Barton. He also said that at the time he believed he had the authority to do so, but has since accepted that this was not the case.

[16] On 8 October, just before the date of travel, Ms Barton approached ticketing clerk Mary Lowe to pay for the ticket. Ms Lowe advised that she was not prepared to complete the ticketing arrangements as the travel appeared to be outside policy.

[17] At no time since Ms Barton had made the first bookings back in August had she spoken to her manager about any of this. After what Ms Lowe told her she went to see him for the first time. I will return later to the topic of exactly what Ms Barton told Mr Somerville when she saw him.

[18] The airline asserts that by pursuing a discounted fare (the AD75) that was not legitimately available to her partner, Ms Barton knowingly engaged in actions for personal gain and/or the improper benefit of her partner. It says that:

- she failed to inform her manager about the proposed travel arrangements;

- instead she sought to have it approved by someone [C] who did not have the requisite authority and to whom she was not in a reporting relationship;
- she knew, or should have known, the policy relating to Agent Discounts and that the fare could only be made available within the terms of that policy;
- she knew that if the ticket had been issued, it would have resulted in significant loss of revenue to the airline.

[19] In response, Ms Barton asserted that:

- at the time she made the attempts to purchase the AD75 ticket for her partner she did not know what it was or what rules applied to it. She says she thought it was the same as the Industry Fare which staff were permitted to purchase;
- It was [C] who came up with the idea of using this fare, not her, after she asked him what he could suggest to assist her with travel arrangements for her partner;
- The reason she did not approach Mr Somerville for authorisation was that he had been her manager for only two weeks. Although [C] had never been her manager, he was someone she knew well having worked closely with him in the past, and
- [C] approved the arrangements in the belief that he had the necessary authority and in the full knowledge that they were for her partner who was not an agent.

[20] The airline strongly refutes the suggestion that Ms Barton did not know what an AD75 was or could have confused it with an Industry Fare, to which different criteria apply. Several respondent witnesses attested to the fact that Ms Barton was

highly skilled with many years of experience in the industry. They told me she knew or should have known, all about Agent Discount fares and Industry Fares.

[21] As already noted, Industry Fares can only be booked in economy “N” class, not the “O” class in which Ms Barton had made the AD75 booking.² Ms Barton acknowledged in her evidence to me that she knew that Industry Fares were not available in “O” class.

[22] It is not in dispute that Ms Barton had been provided with the all relevant policies (the Code of Conduct, the Agent Discount policy, and information relating to Industry Fares) although Ms Barton told me she never had occasion to apply the Agent Discount policy and had not read it. That policy provides:

“AGENT DISCOUNT TRAVEL POLICY

...Effective July 2007-

1. Eligibility

“A person who is the sole proprietor, partner, director and/or full-time travel consultant working for an IATA or accredited Agency for at least 12 months and is directly involved in the selling and promotion of Air New Zealand for a minimum of 75% of their day. Full eligibility details are published as resolution 880 in the IATA travel agents handbook....”

[23] Mr O’Connell also told me that he was reinforced in his view that Ms Barton knew what the AD75 was when she admitted, during his investigation into her conduct, that when she had been an agent herself she had utilised it twice for personal travel. At my meeting with the parties, Ms Barton stated that her admission had been a mistake as she was confused even then about what the different types of discounted fare were called.

[24] I have checked the meeting notes (which are not themselves disputed) and consider the respondent entitled to treat Ms Barton’s very unequivocal admission at

² I note that original AD75 booking in “O” was later changed by Ms Barton to ‘U’ class, a full revenue fare with greater flexibility in terms of itinerary changes.

face value. Her subsequent evidence that she was confused is not credible nor is her evidence that after years of working in the industry and having been eligible for it herself, she was ignorant about the Agent Discount.

[25] I accept the respondent's assertion that Ms Barton knew or at least should have known of the Agent Discount policy.

[26] When interviewed during the respondent's investigation into Ms Barton's conduct [C] denied that it was his idea for her to use an "AD75." He said she had suggested it. Scrutiny of the booking history and of the email exchange between her and [C] (which were provided to Ms Barton during the disciplinary process) has confirmed (consistent with [C]'s evidence) that she entered the booking for the "AD75" before even talking to him about it.

[27] I am satisfied that it was indeed her suggestion and that she misled the respondent's investigation on this point. I also note that the fact that she entered the booking in this way is further confirmation (contrary to what she told the investigation and what she told me) that she knew something about the AD75.

[28] Mr O'Connell told me that the fact that Ms Barton went to [C] at all was a cause of concern to him. He said established practice, the Code of Conduct, and commonsense all made it clear that staff members making private bookings should approach their manager for approval. To make sure that staff were in no doubt about this, he had personally reminded them of their obligations when he took over as their manager. He was emphatic that Ms Barton had been told that she should go to Mr Somerville about matters of this type. In the event that Mr Somerville had been unavailable (although there was no suggestion of this) she should have approached him. Instead she went to someone who was not a team leader, was not at an equivalent level of seniority to Mr Somerville and was not even in the same department as her.

[29] It is argued in submissions that the inference to be drawn from Ms Barton's actions is that she knew that the AD75 was outside the applicable policy and that Mr Somerville would not authorise it. I find that this was a reasonable inference to draw. Ms Barton has failed to offer a satisfactory explanation for the fact that she

approached [C] rather than Mr Somerville to gain approval for the travel arrangements.

[30] In submissions Mr Edwards has argued that the applicant's behaviour cannot be described as serious misconduct because what she did was approved by [C] with full knowledge of the circumstances. He says that the applicant cannot be blamed for thinking that what she was doing was acceptable when Mr Amos, who was more senior than her, made the same mistake.

[31] I do not accept this argument. The fact that [C] gave his approval did not legitimise what Ms Barton did. His error did not rectify hers.

[32] To summarise: the outcome of the respondent's investigation into the first allegation was a conclusion that Ms Barton set out to obtain an AD75 discount for her partner in PPE in breach of policy. It was also concluded that given her background and work for the respondent, she would have been well aware of the various rules and procedures relevant to providing discounted airfares. I am satisfied that the respondent was justified in reaching these conclusions. I find that Ms Barton's attempts to purchase an AD75 PPE airfare were actions for personal gain and for the improper benefit of another party.

[33] Mr Edwards has noted that the consequence for [C] for his part in the matter was a written warning, not dismissal, and argues that this constituted an unjustified disparity of treatment. I will return to the issue of disparity of treatment in the discussion on whether the test in s.103A has been met.

(ii) Misleading the Sales Support Supervisor

[34] After speaking with Ms Lowe on 8 October Ms Barton went to see Mr Somerville and asked him who she should see to ticket the travel arrangements. She did not tell him that Ms Lowe had declined to ticket the travel or even that she had already seen her about it. Nor did she mention that the AD75 was not for a travel agent. Only after questions from Mr Somerville did she inform him that [C] had authorised the AD75 ticket (in PPE, outside policy even it was for an agent) on "compassionate grounds." She told him that the mother of the passenger had been ill

for some time and had a son in London who could not travel to New Zealand to visit her. She said that the passenger, whom she named, was going to travel to London to give an update on their mother's condition.

[35] Mr Somerville told me:

"I asked Ms Barton who the passenger was as I thought I recognised the name. This was because of a previous incident involving Ms Barton where cheques she had provided to pay for travel for [her partner] had 'bounced.'

Ms Barton replied that she had "better come clean", to which I responded "come clean about what?" Ms Barton then told me that [the passenger] was her partner.

[36] Mr Barton told me she recalled her exact words were not that she should come clean, but rather that after several questions from Mr Somerville she responded "to tell you the truth" it was her partner. She acknowledged that she was guarded with Mr Somerville but told me that this was out of a concern to protect [C].

[37] Mr Somerville ended the discussion at this point, telling Ms Barton that the ticketing was on hold until he had spoken to [C]. He told me that he felt that Ms Barton had set out to deliberately mislead him and endeavoured to withhold relevant information to gain approval for an AD75 ticket.

[38] In her evidence Ms Barton said that while she might not have told Mr Somerville at the beginning of the conversation that the ticket was for her partner, she did tell him. She said she did not lie to him at any stage and did not mislead him about who the ticket was for. She also stands by her assertion that there were compassionate grounds for the ticket as she had stated.

[39] The respondent says that this was misleading in itself. The respondent's compassionate travel policy relates to travel to visit sick, dying or bereaved family members, not to report about the health of a family member. Furthermore, it is not in dispute that Ms Barton's partner was spending the bulk of his trip with friends in the US, not in London with his brother. For these reasons the respondent submits that a fair and reasonable employer would have concluded that the applicant attempted to

mislead Mr Somerville in an effort to obtain an extremely generous discount on international travel.

[40] I accept that Ms Barton did not lie to Mr Somerville however she was not open and forthcoming in providing all the relevant information to him, as she should have been. I do not find her assertion that she was attempting to protect [C] to be credible. She could have done this most effectively by abandoning the AD75 and booking another legitimate flight for her partner. I consider it more likely that she was guarded because she was still hoping to obtain the AD75. I accept that Mr O'Connell was justified in concluding that she attempted to mislead Mr Somerville.

(ii) The 2006 “compassionate” booking

[41] After speaking with Ms Barton and with [C], Mr Somerville remained concerned about her conduct. On 10 October he advised Mr O'Connell about it and Mr O'Connell commenced a formal investigation into what she had done. During the course of that investigation inspection of Ms Barton's email correspondence and booking activities brought to light a further issue.

[42] The fresh allegation related to travel arrangements Ms Barton had made for a friend for a return flight to Sydney in 2006. She made the booking at a significant discount under the airline's Compassionate Travel Policy however the booking was outside the scope of the policy. The friend's travel to Sydney related to the death of an uncle and at that time, the loss of an aunt or uncle did not fall under the Compassionate Policy. Ms Barton also used a fare that was not available for the dates of travel, with the effect that the traveller got a further significant reduction.

[43] Ms Barton did not obtain authorisation from her manager but got the ticket through what the airline considers inappropriate channels: someone in a different team who did not supervise her, and a ticketing clerk at a similar level of seniority to Ms Barton herself. To compound matters the approval she received was for a particular category of fare but she nonetheless went ahead and purchased a more expensive fare, thus increasing the loss to the airline from the application of the discount.

[44] Mr O'Connell also provided to the authority an email from passenger [A] to Ms Barton which came to light during the disciplinary process. Dated 14 August 2007 it read:

"I hope you are not planning on leaving Air NZ anytime soon...we have a wedding to go to in Northern Ireland in 2009 so we might have to call on a big fave from you again!!!!!"

[45] Mr O'Connell told me that this email indicated to him that passenger [A] had formed a view that she would be able to obtain further discounted airfares and that Ms Barton may have created this expectation by her conduct.

[46] I agree with Mr O'Connell's assessment of passenger [A]'s apparent view. Ms Barton's response (which was provided to me) contained nothing to disabuse passenger [A] of that view.

[47] Ms Barton did not deny making the favourable bookings, nor does she dispute that what she did was outside policy. She explained her actions by saying that her friend had suffered a bereavement and (at the time) she genuinely believed she had some discretion around the issuing of compassionate tickets. She also notes that the current compassionate policy does extend to aunts and uncles. Finally, as with the other allegation, she also relies on the fact that, rightly or wrongly, the arrangements were approved.

[48] Other than Ms Barton's own assertion I heard nothing to support the contention that she had a discretion in relation to compassionate travel. I find that it was reasonable for Mr O'Connell to conclude that she had knowingly breached the Compassionate Travel Policy and that she failed to provide a satisfactory explanation for doing so.

(iv) Was the dismissal justified?

[49] On 9 October Mr Somerville confirmed to Ms Barton that the AD75 could not be authorised. He told her that apart from Staff Travel only one other option could be authorised for her partner's trip. He offered to waive the 4% commission on a full-

revenue “U” class PPE fare, and gave her until 5.00pm that day to confirm whether she wanted that.

[50] She did not accept this offer. Instead, that afternoon, she went through a series of colleagues in different departments to organise a discounted “O” class fare for a lower price than the “U” class ticket. Her partner flew out on it the next day. The discount applied was not outside policy and was authorised by a manager with the requisite authority to do so. However unbeknown to him “O” class was overbooked for one of the sectors travelled, with potential revenue loss.³ Even more importantly, from the respondent’s point of view, Ms Barton again acted without Mr Somerville’s knowledge and contrary to his clear instructions to her.

[51] The respondent does not say that it was serious misconduct for Ms Barton to have obtained this fare and her doing so does not form part of the justification for the dismissal. I was told however that in the circumstances, this conduct reinforced the perception (in the minds of Mr Somerville and Mr O’Connell) that they could not rely on Ms Barton. Once again she was perceived as being less than open and honest.

[52] Mr O’Connell’s inquiry and disciplinary process continued until November 29 when Ms Barton was advised that she was dismissed. (The decision was later confirmed by letter dated 4 December.) Initially, the applicant raised one concern about the procedural fairness of this process. She believed that Mr O’Connell had failed to meet certain contractual obligations to consult his superiors before dismissing her. Evidence before the Authority made it clear that proper consultation had occurred. I understand that there are no further procedural challenges to the dismissal.

[53] It is submitted for the respondent that there were not three separate reasons for dismissal, but rather that the three elements indicated a pattern of untrustworthy conduct which justified dismissal. Through breaches of policy and misleading behaviour she had set out to secure financial benefits for her partner and for a friend. Mr O’Connell told me that he concluded that Ms Barton’s conduct had caused the complete breakdown of the employment relationship. He explained:

³ Overbooking in this context would require a higher revenue seat to be reclassified to the cheaper “O” class.

“Ms Barton was in a position which required Air New Zealand to trust her to perform her duties with honesty and integrity. She was responsible for the sale and booking of international commercial airfares which come at significant cost.

While there are various discounting arrangements in place, Air New Zealand is a commercial airline and preference must be given to customers paying full fares. Air New Zealand has clear policies setting out the type of fares that can be discounted and the circumstances in which employees can be access discounted fares for themselves or others. Any improper discounting directly impacts on the company’s revenue and ultimately its profitability.”

[54] I fully accept Mr O’Connell’s assertion. I conclude that the behaviour Ms Barton engaged in was clearly serious misconduct which was destructive of the trust and confidence necessary in the employment relationship.

[55] However, the overall question for determination remains 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 occurred. Under this head one important issue has yet to be disposed of. That is the question how the respondent can justify dismissing Ms Barton but not [C].

[56] In submissions for the respondent Mr France has noted that this issue can be considered in the context of whether disparity of treatment arose or in the context of whether the difference in treatment indicates that the decision to dismiss was too harsh and outside the realms of what a reasonable employer would have done.

[57] Mr France referred me to the decision of the Court of Appeal in *Department of Inland Revenue v Buchanan and Anor* [2005] 1 ERNZ 767 where it was held that where there is disparity of treatment the issues for consideration are whether there is an adequate explanation for the disparity and if not, whether the dismissal is justified despite the disparity.

[58] Mr France argues that the misconduct of the two employees in this case was not at the same level and that there is adequate explanation for the difference in their treatment. Specifically he distinguishes between the treatment of the two as follows:

- The disciplinary process involving [C] was handled by his own manager not Mr O'Connell;
- The involvement of [C] involved no personal gain;
- [C] had no involvement in the 2006 compassionate travel bookings;
- [C] did not attempt to mislead Mr Somerville or the subsequent investigation;
- Overall the nature and level of Ms Barton's conduct was more serious and warranted a higher penalty.

[59] I am not able to conclude that the first two of these factors justify different treatment. The involvement of a different manager in a disciplinary process does not by itself counter a disparity argument. Nor am I persuaded that the absence of personal gain is a factor. [C] acted (as I have heard) out of a desire to "do a favour" for Ms Barton, just as she acted out of a desire to do favours for her partner and for a friend, [A]. For both [C] and for Ms Barton there was personal gain in the sense that the gain was not for their employer, the airline.

[60] However I am satisfied that the conduct of the two can be distinguished, and that is because what [C] did appears to have been an isolated incident, whereas Ms Barton engaged in a series of actions that breached policy, including misleading the respondent's investigation into her conduct. She also maintained the view, right up to her meeting with me, that she had done no wrong. I am satisfied that the company has put forward a reasonable basis for concluding that a level of trust remained in one case, but had been irrevocably broken in the other.

[61] I conclude that the dismissal was what a fair and reasonable employer would have done in all the circumstances at the time. It was justified. I can do nothing more to assist with this employment relationship problem.

Costs

[62] This issue is reserved. Should it be required that the Authority make a determination on the issue submissions should be lodged within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority