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Butler v Air New Zealand Ltd AA 225/07 (Auckland) [2007] NZERA 643 (1 August 2007)

Last Updated: 18 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

5048228
AA 225/07

BETWEEN	MARIA TERESA BUTLER Applicant
AND	AIR NEW ZEALAND LIMITED Respondent

Member of Authority: Marija Urlich

Representatives: Kristina Andersen, Counsel for Applicant

Kevin Thompson Counsel for Respondent Investigation Meeting: 15 May 2007

Submissions received: 13 June, 2 July 2007 from Applicant

25 June, 6 July 2007 from Respondent

Determination: 1 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Maria Butler was employed by Air New Zealand Limited as a flight attendant from September 2003 until her dismissal on 2 August 2006 for serious misconduct. Her dismissal concerns use of staff travel privileges to travel to London to attend a memorial service for her recently deceased grandfather. Ms Butler was on sick leave at the time. Ms Butler's partner, Michael Spence is also an international flight attendant. He booked the staff travel for himself and Ms Butler using Ms Butler's credit card.

[2] Ms Butler says her dismissal was unjustified because Air New Zealand wrongly applied its staff travel policy and failed to conduct a fair investigation process into the disciplinary allegations she faced. She says the decision to dismiss her was harsh given her personal circumstances at the time and the state of her health, that the policy has been wrongly applied and the process followed by Air New Zealand was unfair.

[3] Air New Zealand says Ms Butler's dismissal was fair and reasonable in all the circumstances and complied with

the obligations of good faith owed to her. It says Ms Butler knew what she was doing when she travelled to London, that it accepts that she was unwell at the time and needed to be on sick leave but that it was reasonable for Air New Zealand to expect that she would remain in New Zealand to aid her recuperation and that it was improper of her to fly to the UK on staff privilege travel to resolve personal issues while she received paid sick leave.

[4] The parties have attended mediation in an attempt to settle this employment relationship problem.

Issues

[5] To determine this employment relationship problem the Authority must consider whether:

- (i) Ms Butler's use of staff travel whilst on sick leave breached the staff travel policy;
- (ii) If it did, then did that conduct amount to serious misconduct;
- (iii) If so, could dismissal be said to be justified given all the relevant circumstances.

The staff travel policy

[6] The relevant sections of Air New Zealand's disciplinary policy ("Disciplinary Action – Policy and Procedures") provide:

"Sick Leave

...

Staff travel privileges can not be used by employees, or other travel beneficiaries (e.g. nominees, dependent children, buddies) while the employee is absent on sick leave, domestic leave or ACC.

Exceptions to this policy may only be made by the divisional HR Manager in the following circumstances:

- *Employees travelling to recuperate with immediate family member or other caregiver*
- *Employees travelling to care for sick immediate family member*
- *Bereavement of a family member*
- *Or, in other extreme circumstances where it is deemed reasonable to allow travel"*

[7] A pamphlet entitled "Staff Travel Privileges" provides:

"Staff travel is not available to you, or your nominee, dependant children and/or buddies if you are on sick leave or ACC, unless approved by the GGM HR, who may delegate this authority to the appropriate GM HR."

[8] Air New Zealand says this pamphlet was widely distributed amongst staff in September 2005 and that Ms Butler would have received one by file drop. Ms Butler denies ever receiving the document and says she has not seen it prior to the events at issue.

[9] The staff travel policy provides the rationale and application of discounted travel for staff. This policy was available to staff over the company intranet (Korunet) at the time Ms Butler travelled to London. For the purpose of this determination the relevant sections are:

“...

2. Statement of Purpose

The principle purpose of staff travel is to enable employees to have holidays with family and friends.

With this in mind, staff travel is available to employees of Air New Zealand, their nominee and dependant child/children or (on a limited basis) to 'buddies'. In addition, a range of staff travel benefits are available to former employees who meet certain criteria.

Staff travel is a privilege – not a benefit – that employees have access to as of right. As such Air new Zealand may withdraw that privilege, amend the criteria, change or withdraw the benefits and any or all of the condition associated with staff travel at any time that it considers such action necessary or appropriate.

...

3. Application

It is not the intention of this policy document or the detailed staff travel procedures that can be accessed on the Staff Travel website to address every conceivable behavioural issue that may be associated with staff travel. Instead, Air New Zealand takes the view that the overwhelming majority of employees (and those travelling with them) adhere to this policy and the associated procedures and act responsibly at all times.

...

Where the Airline considers that any employee and/or their nominee, dependant children or buddy has not behaved in accordance with that principle, ..., then the Airline will take appropriate disciplinary action against the Air New Zealand employee. Where that occurs, the penalty or penalties imposed could range from suspension of staff travel up to and including dismissal.”

[10] Ms Thomas’ evidence was that the travel policy was widely available to all staff in printed brochure form, on Korunet, through staff updates and when travel is booked by staff.

[11] At the investigation meeting written applications for staff travel made by Ms Butler in April and May 2005 were put to her to comment on (as they had been during the disciplinary investigation). In particular, Ms Butler was asked to comment on the following declaration located immediately above her signature:

“DECLARATION

I have read the information on the back of this form. I understand the regulations and conditions under which these tickets are provided and that the travel is ordered per my request. I confirm this travel is not for business purposes and not to be used while on sick leave. I understand it is my responsibility to return to work on time regardless of the personal expense I may incur.”

[12] Ms Butler acknowledged that she signed the declarations on the staff travel applications. She said she had not turned her mind to the sick leave issue.

[13] I note that the policy statement contained in the declaration is no different in substance to that contained in the September 2005 policy pamphlet. There is a clear prohibition on staff travel whilst on sick leave.

The disciplinary investigation

[14] On 5 April 2006 Ms Butler’s manager, Sue Mercer, Performance and Development Manager, wrote to her summarising a conversation held earlier that day:

CONFIRMATION OF MEETING

Dear Maria

During your recent illness, it has been (sic) brought to my attention that you used staff travel.

Maria, as you are aware, using staff travel while on leave due to sickness is a breach of company policy so I would like to meet with you to discuss this issue.

...

The above performance issue is potentially serious and, if found to be substantiated, may lead to disciplinary action up to and including termination of your employment. You are entitled to bring a representative of your choice to the meeting. A Company representative will also be present at the meeting to take an accurate record of what is said.

...”

[15] The letter provided a date and time for the disciplinary meeting, Friday 7 April 2006, advised that Ms Butler would be rostered on an administration day, invited her to contact Ms Mercer if she had any queries and drew her attention to the availability of the employee assistance programme.

[16] On 6 April 2006 Ms Mercer wrote again to Ms Butler confirming the date and time of the meeting. This letter sets out the allegation faced by Ms Butler:

“The purpose of this meeting is to discuss an allegation of what appears to be a serious breach of the Company Policy. It is alleged that whilst on sick leave, you used staff travel to travel to the UK.

At this meeting you will be given an opportunity to give your explanation or view of events. You will be provided with copies of witness statements prior to this meeting.

This allegation is serious and if proven, may result in disciplinary action being taken up to and including termination of your employment.”

[17] The 7 April 2006 meeting proceeded. Ms Butler was represented by her union organiser, Heather Stanley. The company was represented by Meredith Thomas, who then held the position of Performance and Development Manager for Air New Zealand’s International Airline. Ms Thomas took Ms Mercer’s place, who was unavailable to conduct the meeting. Also present for the company was Mark Nicholson, HR manager for International Cabin Crew and Catherine Brabbs, who minuted the meeting. Minutes of that meeting, as with subsequent meetings, have been provided to the Authority. The content of those minutes have not been disputed and I accept them as an accurate record.

[18] Ms Butler presented a written statement in response to the allegation. In summary her statement provided:

- She had booked annual leave to attend a memorial service for her grandfather;
- Her partner was to attend with her for support; she needed to see family lawyers because of issues arising from her grandfather’s will;
- On 7 March 2006 Ms Butler attended her doctor because she was not coping very well with the family problems and had a lump which was worrying her;
- On 15 March 2006 Ms Butler returned to her doctor; matters with the family were escalating and she felt she could not cope, she had developed welts on her legs. Ms Butler’s doctor told her she was in no state to work, that she needed to rest and signed her off on two weeks stress leave;
- On 17 March 2006 Ms Butler had a further doctor’s visit for a counselling session. She told her doctor that she had to go to London because it would make matters worse if she did not;
- Mr Spence booked the staff travel on iFly, the electronic staff travel booking system, when the doctor okayed flying. Ms Butler said they used his staff travel because he is a more senior employee and they were concerned about loadings i.e., could they get on the flights they had booked;
- Ms Butler’s credit card was used for the booking, the system kept crashing and over charged her credit card;
- Staff travel did the booking manually; Mr Spence discussed their travel plans and Ms Butler’s stress leave with a number of staff at staff travel. They were not told she could not travel;
- Ms Butler was totally unaware that staff travel could not be used whilst a staff member was on sick leave;
- She was so stressed at the time that it did not occur to her that it would be a problem;
- Before she got sick she already had the annual leave granted;
- On her return to Auckland Ms Butler obtained ultra sounds for the lump as required by her doctor. She was referred to a surgeon who removed the lump on 12 April 2006;
- Ms Butler said she was totally unprepared for Ms Mercer’s telephone call regarding the staff travel whilst on sick leave;
- Ms Butler said she was never told about the staff travel/sick leave rule, that it is not in her employment agreement;
- She said she would not do anything to jeopardise her position with the company and that she had an unblemished work history;
- She said it was a real blow to be told she could face disciplinary action for an honest mistake, the impact of which was compounded by the company knowing she was unwell;
- She apologised if she had broken any rule;
- She reiterated that she had never heard of the staff travel/sick leave rule.

[19] Ms Butler confirmed that she was on sick leave at the time Mr Spence booked the staff travel. She confirmed that her credit card was used to book the travel. Ms Butler said she did not know about the staff travel/sick leave rule and that she had not seen any policy document on that issue. Ms Stanley said that the administrative staff in staff travel know the policy and that they should have directed Mr Spencer to her manager to get approval for the staff travel.

[20] The meeting adjourned. Ms Butler was scheduled to have surgery the following week to remove the lump. It was agreed that the meeting should not reconvene until Ms Butler had recovered from the surgery.

[21] The next meeting was held on 29 May 2006. Ms Butler attended with Ms Stanley and Mr Spence. Ms Thomas and Mr Nicholson attended for the company. Eralynn Ryan took the notes.

[22] At this meeting Ms Butler confirmed that she was not aware of the policy around staff travel. She said that Ms Mercer knew she was on sick leave and intending to access staff travel. Ms Butler also said that colleagues of Mr Spence's knew they were accessing staff travel while she was on sick leave because he had told them, that none of them said anything to him about the staff travel/sick leave rule and that she believed those colleagues must have complained once they had taken the travel. It is worth noting here that under her terms of employment Ms Butler was entitled to unlimited sick leave with appropriate review provisions.

[23] Ms Thomas said that in September 2005 every crew member received, by file drop, a copy of the staff travel policy and that it is available on Korunet, the company

intranet. Ms Butler said she could not say whether she had received the pamphlet or not.

[24] During the course of the meeting Ms Butler confirmed to Ms Thomas that:

- She had applied for annual leave for the period 20 to 26 March 2006;
- that she had called in sick on 15 March 2006 advising she was on sick leave from 15 to 31 March 2006;
- That she left Auckland for London on 20 March and returned to 31 March 2006;
- That she had requested three days annual leave 27, 28 and 29 March 2006; and
- That she had taken steps to swap rosters duties before 15 March 2006.

[25] Ms Thomas put to Ms Butler that she took sick leave and not annual leave for the duration of her travel to the UK and that it was her intention to travel on staff travel while on sick leave.

[26] Ms Butler said it was not her intention to break any rule, that she did not know about the staff travel/sick leave rule, Ms Mercer knew she was going away and did not say anything to her about the rule.

[27] Ms Stanley said, in support of Ms Butler, that the policy was not well known among staff, Ms Butler tried to swap her rostered duties and this shows her taking staff travel while on sick leave was not intentional and that the policy is not clear that the staff travel/sick leave rule applies to staff travelling as nominees.

[28] The meeting adjourned to consider Ms Butler's explanation.

[29] The meeting was not reconvened until 13 July 2006. The attendees were the same with the exception of the note-taker, now Ms Brabbs.

[30] Ms Thomas said she had put to Ms Mercer if she knew Ms Butler was on sick leave and intended to travel and that Ms Mercer had denied this.

[31] Ms Thomas asked Ms Butler to explain how travelling to the UK would aid her recovery when she was not well, off work on sick leave and had surgery coming up. Ms Butler said she was very stressed at the time and under a lot of pressure, that she discussed the travel with her doctor and that he said it was in her best interests to travel to the UK to deal with the issues and get closure.

[32] Ms Butler consented to the company speaking with her doctor. The purpose was to assess whether it was reasonable to travel to the UK given her health. As it turned out Ms Butler did not meet with the family lawyer as she had intended.

[33] Ms Butler asked if telephone calls to staff travel were recorded. Ms Thomas advised she would inquire.

[34] On 19 July 2006 Ms Butler's doctor wrote:

“Re Medical sick note given for 14 – 31 March 2006

Maria was severely depressed and emotionally distressed when I decided to book her off after a prolonged medical consultation with her – I recommended to her that it might be as good idea to go for her grandfather's memorial. She was not well enough to work as she was very emotional. But still sane of mind to travel.

Yours sincerely

..."

[35] This letter was provided to Air New Zealand on about 21 July.

[36] The next meeting was held on 2 August 2006. The attendees were as before with the addition of Ms Andersen and Graeme Norton, company secretary. The meeting had been scheduled for 26 July 2006 but was rescheduled to 2 August 2006. On 27 July 2006 Ms Andersen had written to Air New Zealand setting out Ms Butler's response to the allegations, her concerns about the events to date and requesting a time to view Ms Butler's personal file. Mr Norton replied to this letter on 1 August providing all relevant information.

[37] Ms Butler was asked if she had any further information to provide. She confirmed that there was nothing else. Ms Andersen submitted that there were no grounds for dismissal; either legal or compassionate.

[38] Ms Thomas advised that she had completed her investigation into the allegations of serious misconduct against Ms Butler. She said she had considered all the information available along with Ms Butler's representations along with those made on her behalf and had prepared notes setting out the investigation and her conclusions. She said, in summary, her conclusions where:

"I have concluded that as an employee you used staff travel while on company paid sick leave and travelled to the UK. The travel was taken to attend to personal business. I believe the rule prohibiting this is clear. I believe you knew the rule. I've considered the explanations and don't accept that the intended action was communicated to and condoned by your management.

I have found that neither Staff Travel nor Crew Control are accountable for managing your actions. I don't accept your GP's note excuses your actions. Above all this with your various medical conditions which were serious, it would be expected that you would rest and recuperate at home – not undertake a long international trip for personal reasons. While I have considered the compassionate grounds raised, I do not accept they excuse your actions.

I believe your actions amount to serious misconduct. I have considered what the appropriate action is to take and I have decided to terminate your employment effective today."

[39] The prepared notes were provided to Ms Butler. They run to 7 pages. Ms Butler was asked to hand in her identification and receiving personal items was discussed. Ms Butler expressed her distress. The meeting ended.

[40] On 7 August 2006 Ms Thomas wrote to Ms Butler confirming the termination of her employment. Ms Butler's personal grievance was formally raised by letter dated 10 August 2006.

Did Ms Butler's actions breach the staff travel policy?

[41] At the investigation meeting, and during the disciplinary investigation, Ms Butler accepted that her actions amounted to a breach of the staff travel policy but she says it was not a knowing breach because she was not aware of the policy. I take from this concession that Ms Butler accepts that there was a problem with staff accessing travel privileges while on sick leave.

[42] Ms Andersen has submitted that there was no evidence that Mr Spence or Ms Butler confirmed the terms of staff travel when it was booked over the telephone and

no evidence that they knew there would be issues with their planned travel. The booking was not made electronically and no record of the telephone booking was made. Mr Spence's evidence that he was not told when he made the booking over the telephone that staff travel privileges were not available to staff on sick leave has not been challenged.

[43] The company says that it is not the role of staff travel administration staff to authorise staff travel requests. Their role is to process ticket requests. I accept that that is the case. Staff travel requests are not authorised. If a staff member wishes to access staff travel privileges and they are not eligible, e.g., they are on sick leave, then they must apply for an exemption.

[44] It is fair to say that the system places a high level of trust in staff that their requests for staff travel fall within

the policy guidelines and if not that they will seek the appropriate authorisation. There is no dispute Ms Butler did not apply for an exemption to travel on staff privileges while on paid sick leave. Her evidence was that after 14 March 2007, and before she went on sick leave, she did not advise anyone at Air New Zealand that it remained her intention to travel to London.

[45] Staff travel is a significant benefit made available to Air New Zealand staff. It is self evident that access to such a benefit would be subject to reasonable restrictions and that one of those restrictions would be that one is not able to access staff travel privileges while on sick leave. The staff travel policy was well documented, distributed and available. Clear evidence was provided to the Authority that Ms Butler had acknowledged the policy in applications for staff travel which predated that which gave rise to the disciplinary action.

[46] I find Ms Butler knew, or ought reasonably to have known, of the policy prohibiting staff travel whilst on sick leave.

[47] Ms Andersen submits that given Ms Butler's state of mind at the time she accessed staff travel, she was unable to understand any potential employment difficulties with accessing staff travel while on sick leave.

[48] Ms Butler's actions around this time indicate that she was mindful of her employment rights and obligations as demonstrated by her:

- attempts to swap shifts to facilitate her extended annual leave request;
- prompt advice to the company that she had been signed off on sick leave and that her annual leave should be converted to sick leave; and
- active involvement in Mr Spencer's attempts to book the staff travel.

[49] Further Ms Butler's doctor says she was of "sane mind" to undertake a round trip to London. If Ms Butler was well enough to undertake such a journey then it was reasonable for Ms Thomas to conclude that Ms Butler was well enough to appreciate the possible consequences of her actions.

[50] Ms Andersen submits the wording of the staff travel policy allows disciplinary action to only be taken against a staff member on sick leave who accesses staff travel. Ms Butler travelled as Mr Spence's nominee. Ms Andersen submits if there is any ambiguity in the policy then it should be resolved in favour of Ms Butler and relies on the following section of the staff travel pamphlet:

"Staff travel is not available to you, or your nominee, dependant children and/or buddies if you are on sick leave or ACC, unless approved by the GGM HR, who may delegate this authority to the appropriate GM HR."

[51] There is no evidence that Ms Butler relied on an allegedly unclear statement of policy to her detriment. She says she did not know about the policy. If, for the sake of argument, it is accepted that that section of the staff travel pamphlet is ambiguous, then that ambiguity is resolved when the whole policy is read. The policy is clear that staff cannot access staff travel if they are sick. The policy does not create a distinction between staff travelling as nominees and staff applying for staff travel privileges for nominees. Ms Butler was a staff member who accessed staff travel privileges while on sick leave.

[52] Ms Butler's actions breached the staff travel policy. Air New Zealand had a reasonable basis for forming this view. I turn now to the question of whether it was reasonable for Air New Zealand to find that that breach amounted to serious misconduct.

Did Ms Butler's conduct amount to serious misconduct?

[53] In *Air New Zealand v Hudson1* the Employment Court discussed how serious misconduct is to be assessed under the section 103A test, that is by assessing the employer's actions against those of an objective standard of a reasonable and fair employer:

"The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which it characterised as serious misconduct happened. It must, however, show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The employer is not required to conduct a trial or even a judicial process but there are some fundamental

requirements of natural justice which are appropriate and which, in this case, are reinforced by the company's policies. As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her."

[54] Ms Andersen submits that there was no reasonable basis upon which Air New Zealand could find Ms Butler's conduct amounted to serious misconduct. She submits that the process undertaken to investigate the allegation was seriously flawed in that:

- (i) the delay in concluding the investigation was significant;
- (ii) Ms Thomas failed to make direct enquiry of Ms Butler's GP and did not request her medical notes;
- (iii) Ms Thomas failed to make any enquiry of staff travel as to their procedure; and
- (iv) that the enquiry shifted its focus for no fair reason.

[52] The delays in concluding this disciplinary investigation were considerable. Where those delays were not to accommodate Ms Butler's recovery, and were caused by the unavailability of Ms Thomas or another Air New Zealand representative, the evidence establishes they were discussed with Ms Butler or her representative and that no challenge was raised at the time. I accept the delays would have compounded what was already a stressful experience for Ms Butler, however, the delays, though not ideal, do not amount to a serious flaw in this process.

1 Unreported AC 30/06

[53] No medical need for the travel has been established either by the medical certificate provided to the employer or evidence to the Authority. The medical certificate from Ms Butler's GP does not say that the travel was necessary for recuperative purposes. What the medical certificate says is that Ms Butler was in a state where she was able to undertake an international flight and that her doctor was of the view it would do no harm. Ms Butler said at the investigation meeting that the travel did not aid her recovery. The inquiry cannot be criticised for falling to make further medical inquiry, when there was none to make.

[54] Ms Thomas formed the view that the travel would not have aided Ms Butler's recovery and that the employer could reasonably have expected her to remain at home to rest and recuperate. The first conclusion is supported by the doctor's certificate. The second conclusion is a statement of the obvious. It is reasonable that an employer would expect an employee on paid sick leave to remain in New Zealand to recuperate.

[55] The criticism that no enquiry was made of staff travel is not borne out by the evidence. Ms Thomas undertook to enquire if any record of Mr Spencer's telephone conversation had been kept, she did and none were kept.

[56] In response to the criticism that the investigation shifted in focus, Air New Zealand says that it was necessary to look at the nature of Ms Butler's illness because she raised it as an explanation for her conduct and this explanation was investigated and rejected. I accept that was the case. I have already dealt with the question of the reasonableness or otherwise of Ms Butler's explanation for her conduct and why I believe it was reasonable for Air New Zealand not to have accepted the doctor's note as explaining the alleged conduct.

[57] Applying the principles enunciated in *Hudson* to the conclusions reached above, I find Ms Butler was given a fair opportunity to comment on the allegations she faced, that those comments were fairly considered and that the conclusions reached by Air New Zealand were open to a fair and reasonable employer. It was reasonable for Air New Zealand to conclude that Ms Butler's conduct amounted to serious misconduct.

Disparity of treatment

[58] Air New Zealand has responded to the claims that Ms Butler was treated differently to other staff. These claims of disparity were not raised during Ms Butler's disciplinary investigation.

[59] The strongest claim relates to Mr Spence, whose part in these events was subject to a disciplinary investigation. He was not dismissed. His circumstances are not sufficiently similar² to those of Ms Butler; he was not on sick leave when he accessed staff travel.

[60] The evidence does not support a finding that Ms Butler was treated differently from other staff in similar situations.

Unjustified action – withdrawal from duty

[61] Ms Butler was rostered off duties to attend disciplinary meetings. As a consequence she says she lost an opportunity to incur costs for which she would receive a reimbursing allowance. While I accept Ms Butler saw these reimbursements as an important part of her remuneration, if expenses were not incurred then no claim arises.

[62] I accept that Air New Zealand could not require Ms Butler to attend disciplinary meetings on her days off, even with her consent; they are rest days which are necessary for someone in her role. The disadvantage was not unjustified.

Was dismissal reasonable in all the circumstances?

[63] Ms Butler says Ms Thomas failed to consider alternatives to dismissal, that this conduct could not be seen as the most serious that it would warrant dismissal.

[64] I have found that the finding of serious misconduct was reasonable and fair and that that misconduct involved breaches of policy which resulted in improper use of staff travel privileges. I have also found that the process used was fair, that Ms

2 Sutherland v Air New Zealand Limited [\[1993\] NZEmpC 106](#); [\[1993\] 2 ERNZ 386](#)

Butler was given a fair opportunity to put forward a response and that that response was fairly considered. Ms Butler's response included submissions as to penalty. The decision to dismiss was one open to Air New Zealand in all the circumstances.

Costs

[65] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to do so, Mr Thompson should file and serve costs memoranda within 28 days of the date of this determination. Ms Andersen should file and serve any reply within 14 days of receipt of such.

Marija Urlich

Member, Employment Relations Authority

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