

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 6/10
5272220

BETWEEN C
 Applicant

AND AL LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: John Haigh QC and Richard McCabe, counsel for
 Applicant
 Kit Toogood QC and Kevin Thompson, counsel for
 Respondent

Investigation Meeting: 17 and 18 November 2009

Submissions Received 27 November, 16 and 23 December 2009

Determination: 13 January 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated personal grievance claims raised with AL Limited by C in response to the latter being suspended and later dismissed from his employment as an airline pilot with the company.

[2] C was dismissed on 25 June 2009 following a prolonged inquiry carried out by AL into conduct alleged of him in relation to;

- obtaining and consuming alcohol,
- failing to act responsibly as a Captain, and
- sexual harassment.

[3] C claimed that he was unjustifiably disadvantaged by his suspension from flying duties and that the dismissal, which occurred after he had remained suspended for over a year, was also unjustified.

[4] C's grievance claims remained unresolved, even after mediation. He sought interim reinstatement but the Authority declined his application, for the reasons given in its determination of 21 August 2009 (AA 296/09).

[5] To remedy his grievances C has especially sought from the Authority reinstatement to his former employment as a Captain with AL, as well as reimbursement of lost salary and compensation for hurt feelings, humiliation and general distress.

Determination

[6] In concluding its investigation of the grievance claims, for the reasons given below the Authority has determined that C does not have a sustainable personal grievance of any kind, whether unjustifiable dismissal or other type. The remedies sought are therefore declined.

Non-publication order to continue

[7] In determining C's interim reinstatement application in August 2009, the Authority by order prohibited from publication the names of C and AL Limited, and also those of the First Officer ("FO") and the Flight Attendant ("FA") employed by AL and who were closely involved in the circumstances that led C to raise grievances about both his suspension and subsequent dismissal.

[8] In final submissions C applied for the interim prohibition order to be continued beyond the Authority's investigation, which ends with this determination. AL submitted that the order should now be discharged unless the Authority considers there are exceptional circumstances.

[9] I consider it is in the interests of justice that the interim order of 21 August 2009 should, at least temporarily, remain in force to allow for the possibility of orders being made by the Employment Court in the event of a challenge to this determination. If the Court has made no order about publication by 15 February

2010 the Authority will then review the current order and decide whether it should remain in force or be discharged.

[10] Pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000, the order of the Authority is that until further order or direction of either the Authority or the Court the names of C, FO and FA are not to be published in any form to anyone beyond the parties to this case and their advisers. The name of AL Limited and any evidence given or submissions made which could identify the employer and employees who were involved in this case, are not to be published either.

Authority's role in this investigation

[11] As provided at s 157 of the Employment Relations Act, the Authority has the general role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case. There is little or no dispute between the parties as to core material facts surrounding the inquiry AL commenced into C's alleged misconduct, or as to the facts in relation to the decision- making of AL to dismiss, or the implementation of that decision.

[12] As the determination of this case turns on the application of legal principles to facts largely agreed or accepted by the parties, rather than setting those facts out I adopt the description of them given in the final written submissions (dated 26 November 2009) provided by AL's counsel Mr Toogood QC and Mr Thompson, particularly at sections B to E inclusive of those submissions. The Authority's determination of 21 August 2009 also sets out the factual background to the case.

[13] The primary principle of law the Authority must have regard to is the statutory test of justification to be applied when investigating and determining every personal grievance claim.

Test of justification

[14] Section 103A of the Act provides:

..... the question of whether 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.

[15] C was dismissed by AL because of his alleged conduct at the end of one particular day and early on the morning of the next day (Days 1 and 2). In determining justification the Authority is not required to establish what C did or did not do on those days. It is required to investigate and consider the way that AL inquired (“*the employer’s actions*”) into what it thought C had done or might have done and the conclusion AL reached that there had been serious misconduct by C. Also, the Authority is required to investigate the conclusion of AL that dismissal was the appropriate final outcome from its inquiry (“*how the employer acted*”).

[16] Section 103A requires the Authority to consider those matters against the standard of what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[17] I have found that C’s dismissal and his suspension preceding it were both justifiable. Overall I am in agreement with the submissions given by counsel for AL that, viewed objectively, the airline’s actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time of acting.

Suspension grievance

[18] The claim of unjustified disadvantage raised shortly after C was suspended, and over a year before he was dismissed, was not pursued as a separate grievance from the claim of unjustified dismissal, although it had been presented as such to the Authority in the statement of problem. The suspension was however referred to as an action of AL that demonstrated a contended failure by the employer from early on to keep an open mind when inquiring into C’s conduct, and which gave weight to the claim that AL had generally acted unfairly and unreasonably towards him in relation to the dismissal.

[19] C declined the opportunity offered by AL to be consulted before suspension was imposed, because of the Police investigation then being carried out following a complaint of sexual violation made by FA to the Police. The choice was then the employer’s whether to suspend and in my view that action was a reasonable option in the circumstances known to it at the time.

[20] Given that C became and remained for several months the subject of a Police investigation into a complaint of serious criminal offending by him, there were obvious safety considerations in deciding whether, with the possibility of prosecution

hanging over him, he should continue performing the exacting work of piloting an airliner and commanding its crew. Also, if there were many wide rumours about his conduct circulating in and beyond the workplace as apparently was the case, the employer's legitimate concerns for the interests of its other employees and customers is likely to have justified suspension.

[21] To be clear, as well as C's dismissal this determination of the Authority covers his earlier suspension, which I find does not give rise to any grievance.

The dismissal

[22] C's dismissal was confirmed to him in writing on 26 June 2009 by AL's General Manager, whose advice was:

Dear [C]

I wish to confirm my verbal advice on 25 June 2009 that taking account of our findings in the employment investigation and all the circumstances surrounding matters which took place on the unscheduled overnight at [place] on [Day 1 and Day 2] your employment with the company has been terminated effective from 25 June 2009.

This decision was arrived at after reviewing and considering my findings provided to you on 25 May 2009 and the representations subsequently received from you and your representative Richard McCabe [of ALPA the airline pilots' union].

As noted at the meeting we had from the outset signalled that the issues were of a serious nature involving:

- *Alcohol*
- *Responsibilities as a Captain, and*
- *Sexual harassment*

[23] The detailed findings provided to C and his representative a month earlier on 25 May 2009 had been given in writing. In summary, the employer's findings were that C's actions amounted to serious misconduct in relation to his purchase and consumption of alcohol, his failure as a Captain to act responsibly and to exercise leadership, and his sexual harassment of a flight attendant, FA, by acts including sexual intercourse with her.

[24] Before C was advised of the dismissal he had taken up the opportunity offered by AL to make representations about his employer's proposal to dismiss him.

Lack of justification

[25] In written closing submissions C's counsel Mr Haigh QC and Mr McCabe contended that the dismissal was unjustified substantively and procedurally. With regard to the former, it was submitted the Authority should conclude that none of the grounds relied upon by the employer as constituting serious misconduct, either jointly or solely, had been made out.

[26] With to procedural justification, in particular it was submitted that there had been predetermination and bias on the part of AL in finding that C's actions constituted serious misconduct.

The employer's inquiry

[27] In commencing an inquiry AL had been presented with a highly unusual if not unique combination of circumstances bearing directly on its employment relationship with C. Late one evening aircraft crew members (C, FO and FA) faced with an unplanned overnight stopover had bought and consumed a large amount of alcohol in a short space of time and when likely to be resuming flying duties next morning. Only a few hours after the drinking stopped one of the crew (FA) had complained to the Police of a serious sexual offence being committed against her by one or both of her co-workers while she was affected by drink or drugs.

[28] AL commenced an inquiry into diverse complex and technical matters while at the same time being required to balance the rights of C and FO as employees and also the rights of FA as a member of the public entitled to complain to the Police. As well, in worsening economic conditions AL had highly regulated operations to keep running, and also a business on which others besides C were reliant for their employment.

[29] It is plain from the volume of material presented to the Authority and the contents of it that AL committed a great deal of time and other resource to its inquiry, which I find was thorough, extensive and methodical.

[30] Although the employer's inquiry occupied more than a year AL cannot reasonably be held responsible for any delay with its progress. The course of the inquiry was largely determined by a stance C took at the beginning of it that while he was being investigated by the Police, for possible criminal offending in relation to his

actions towards FA on Days 1 and 2, he had a right to say nothing to AL about his conduct on those days.

[31] In response to AL's attempt to consult with C about its proposal to suspend his employment while it inquired into what had happened, he claimed to have the same right.

[32] The delay does not seem to have compromised the integrity of AL's investigation or inquiry, but if C was disadvantaged the responsibility for the delay must be his, as he elected not to engage with AL from the beginning of its inquiry when the opportunity was offered to him.

[33] To the extent that AL was not provided with or did not obtain all information that might have been relevant to its investigation or inquiry, mostly this was outside AL's control. Although C had urged AL as part of its inquiry to view a video made when he was interviewed by the Police, his request for a copy to give AL was declined by the Police because of privacy considerations relevant to FA, who did not give consent for the video to be released.

[34] AL had no control over the investigation being undertaken independently by the Police. Nor could AL as an employer reasonably be expected to have tried to influence FA in the decision she reached to withhold consent for the Police to release the video. AL properly respected the boundaries between its employment relationship with FA and her rights, and responsibilities, as a member of the public centrally involved in a Police investigation.

[35] To the extent that C's level of alcohol consumption on Day 1 became important to the employer's inquiry, AL could possibly have sought a blood test from C some hours earlier than eventually the test was requested and carried out on Day 2. C was not responsible for the time it took before the testing was done, which required approval from AL's medical officer to be given on a 'reasonable cause' basis.

[36] When C eventually gave his explanation to AL as part of its inquiry into his conduct he admitted that the amount of alcohol bought by him and FO was six small bottles (each 330ml) of beer and four large bottles (each 750ml) of red wine. The empties were still in the hotel rooms of C and FO when AL had them inspected on Day 2. I find that AL accepted from C and FO that not all four bottles of wine had

been drunk but that C, FO and FA had each consumed two bottles of beer and about three glasses of wine.

[37] Further I find that AL accepted from C that he had stopped drinking at about 11.30pm on Day 1 and had not continued to midnight. AL accepted from C that he had not had any alcohol to drink within the 8 hour period before he may have been required to report for duty next morning. The employer accepted that C had not infringed the Flight Crew rule specifying that period of 8 hours before duty in which a pilot is not to drink alcohol, and no test had been carried out on the morning of Day 2 to establish whether C still had alcohol in his body when due to report for duty that day.

[38] In assessing the drinking that had taken place I find that AL made genuine allowance in favour of C's account, which had been largely confirmed by FO, but looked carefully at the amount C said he had drunk, and how quickly and how close to the 8 hour cut-off point the drinking had taken place. AL concluded that C's judgement would have become impaired by the drink he had, a conclusion to be further considered in this determination.

[39] The Authority has been asked to infer from various circumstances the presence of bias and predetermination, making the employer's inquiry unfair and AL's conclusions from it unreasonable. I consider there is no foundation for the claim that the employer acted unjustifiably in this regard.

[40] Claims of bias and predetermination are easily and routinely advanced by parties and this case is no exception. Such claims need to be considered against the acceptance by the courts that an employer inquiring into allegations of misconduct may indeed be "*a judge in its own cause*," as it has an interest in the outcome; *Frank v Air New Zealand Limited* (unreported) Auckland Employment Court, A 121/95, Goddard CJ. Also, an employer cannot reasonably be expected to approach a disciplinary inquiry, and one possibly leading to dismissal, "*with a mind untainted by preconceptions*;" *Peters v Collinge* [1993] 2 NZLR 554, at 566.

[41] One particular circumstance relied upon in support of the claim of bias and predetermination was C's role during some of the period of the employer's inquiry as a negotiator for his union ALPA, in bargaining with AL for a new collective agreement. Since 2000 under the Act this situation has been commonplace generally

in employment and of itself gives rise to no reasonable inference of bias or predetermination. The history of collective bargaining involving a mix of non-management and management personnel who are involved in some capacity across the table from each other, goes back much further than the present legislation. And AL and its parent company have had greater experience than many employers of collective bargaining involving employees taking a strongly adversarial position against their employer, sometimes in bitter disputes, for the purposes of negotiating a collective employment agreement. There is no evidence that C was victimised in any way because he had been in that role for his union while AL was inquiring into allegations of misconduct against him.

[42] The lasting impression the Authority retains from its investigation of AL's inquiry is that the employer was not only painstaking and patient in the necessarily prolonged inquiry it made but was careful both to be seen to be fair, and to be fair, to C in weighing up his interests with AL's. This comes through particularly strongly from the comprehensive written report of 15 pages compiled by AL and given to C and his representatives on 25 May 2009. In it the author extensively set out his analysis of the circumstances revealed by the inquiry. He gave his reasoning, putting his thinking on display. The depth of consideration he gave is obvious. Given the purpose of the report and the usual occupation of its author, allowance ought to be made for some slippage of expression. No doubt fine examination might show flaws in some of the reasoning too, but overall the report is a workmanlike and robust exposition of AL's inquiry and the views it had formed from that. The report gives no sense that AL was simply going through the motions with a preconceived view of C's responsibility for serious misconduct.

[43] It is also noticeable from AL's correspondence to C's representatives that the employer took great care to keep C advised of the exact nature of all the concerns it was inquiring into. AL sought responses from C about each matter and it was up to C how, or even whether, he chose to respond.

[44] I conclude that no lack of justification in this case arose from the way AL inquired into C's alleged misconduct on Days 1 and 2.

AL's conclusion that there was serious misconduct by C

[45] It was submitted for C (para.2.3. of closing submissions) that none of the grounds relied upon by AL as constituting serious misconduct had been made out. It is not for the Authority to determine whether serious misconduct occurred, as that was for AL to decide. The question is whether AL had reasonable grounds for believing (and did believe) that serious misconduct had occurred. My determination is that the answer must be in the affirmative.

[46] I accept the submission made for AL (para.93.) that whether the findings of the employer about C's conduct are looked at cumulatively or separately, the grounds relied upon to support the decision to dismiss constituted a level of serious misconduct warranting summary dismissal.

[47] As to the allegation of sexual harassment, I am satisfied that the question addressed by AL was whether C had sexually harassed FA and not whether C's actions constituted a crime or offence of a sexual nature.

[48] Sexual harassment is capable of being a serious breach of an employment agreement and it is also proscribed in statute law such as the Employment Relations Act, but sexual harassment is not itself a particular crime or offence.

[49] Sexual harassment was described in AL's Human Resources Policy Manual as being the most common form of workplace harassment. This was defined as including;

.....physical conduct in relation togender.....and is:

Unwelcome or offensive to the recipient; and

Of a serious nature or persistent to the extent that it has a detrimental effect on the individual's employment, job performance, opportunities or job satisfaction.

[50] Specifically sexual harassment was defined as including;

.....physical behaviour of sexual nature that is unwelcome and has the effect of offending, intimidating or humiliating the person being harassed.

"Unwanted physical contact" was provided by the Manual as one example of sexual harassment.

[51] AL's findings and conclusions given in its report of 25 May that there had been sexual harassment, were expressly that the sexual intercourse admitted by C to

have taken place “*was both unwelcome and offensive.*” The presence or absence of consent by FA to that activity was not the primary consideration in those findings and I do not find AL viewed lack of consent as being an essential component of sexual harassment from the way that conduct was defined in the Manual.

[52] Particularly compelling circumstances leading to a reasonable belief by AL that sexual harassment had occurred included;

FA’s expressed distaste for sexual encounters with men in C’s personal circumstances – married with children - and her aversion to sexual intercourse while having a period (both matters about which FA could reasonably accept the views she gave),

The reaction of FA upon waking up on Day 2, including ringing two friends for help and ringing her father, and in complaining to the Police later that day.

The highly distressed condition FA’s co-worker and friend told AL she had seen FA in early on Day 2, after being rung up by her and going to get FA to take her back to her home. In a detailed interview as part of AL’s inquiry FA was described by her friend as being beside herself and hysterical (and much more).

[53] Although from all the circumstances, including the explanation C eventually gave that the sexual activity had been consensual and welcomed by FA, doubt may exist that C sexually harassed FA, the appropriate standard to be applied by the Authority in considering the reasonableness of the employer’s conclusion is the balance of probabilities, not the standard of beyond a reasonable doubt. As held by the Court of Appeal, the civil standard of proof must be applied flexibly to take account of the gravity of the matter; *Whanganui College Board of Trustees Limited v Lewis* [2000] 1 ERNZ 397 at 403.

[54] To that standard, objectively viewed, I find that the conclusion of AL from the inquiry it carried out that C had sexually harassed FA, was one that a fair and reasonable employer would have reached in the circumstances.

[55] The criticism is unfounded that AL had ignored advice from C and his representatives in giving his explanation that he had made a prior consistent statement to the Police. AL was not in a position to confirm or reject that advice without

seeing the Police video of the interview C had given, but for reasons outside of AL's control (and C's) that video could not be obtained.

[56] Neither can AL be fairly criticised for placing no particular weight on the decision eventually made by the Police not to charge C with any offence. It can reasonably be inferred that AL management, in a business highly regulated by a prosecuting authority, the CAA, had some understanding of the rigour required of proof in criminal cases.

[57] I accept that in one respect AL resorted to speculation in considering whether C had sexually harassed FA. This was its finding that intercourse had taken place much earlier on Day 2 than C claimed. C's statement that intercourse took place from about 4am. was the only information provided as to the timing of events, as FA said she could remember nothing, so it is not easy to find a basis for fixing a different time to the one C gave. Nevertheless in my view the totality of the statements and other information obtained from its inquiry gave AL a foundation far stronger than mere speculation for its overall conclusion that FA had been sexually harassed by C.

[58] The finding expressed in AL's report of 25 May (at page 11) was;

.....I do not believe that the sexual activity that took place was consensual and welcomed in the manner described by [C].

It was the nature of the activity rather than the exact timing of it that AL focussed on in finding there had been sexual harassment. Although AL seems to have regarded timing as relevant to opportunity, C had not disputed that sexual activity occurred.

[59] AL had compelling information from which to reasonably conclude that FA had been sexually harassed. That information was from FA's friend, who had gone to her early on Day 2, as well as from FA herself, and it tended to show that the sexual activity admitted to by C had not been gladly invited or cordially allowed by FA as C described, but had caused her deep distress, humiliation and offence once she was able to apprehend what had been done to her.

[60] I am satisfied that AL did have sufficient regard to the seriousness of sexual harassment as a form of misconduct in employment generally and also to the scale of the particular misconduct alleged in the circumstances of this case, which involved the act of sexual intercourse by C with FA.

[61] I find that AL viewed this form of misconduct in the circumstances as a stand alone ground justifying dismissal and as also providing grounds for dismissal when taken in conjunction with misconduct relating to buying and consuming alcohol.

[62] In the circumstances as found by AL it was also a reasonable conclusion reached from its inquiry that C had breached his employment through his actions and his involvement in buying and consuming alcohol. Those circumstances included the amount purchased, the amount consumed, the proximity of the drinking to the likely time of reporting for duty next day, and the encouragement, or lack of discouragement, given to FO and FA to partake with him in drinking.

[63] I find that as submitted for AL (para.61.) the employer was reasonably able to conclude from its inquiry, and did conclude, the following;

.....that [C] had failed in his duty to it in relation to the purchase and personal consumption of alcohol, and in relation to the consumption of alcohol by the other crew members, in circumstances where the quantity and timing of the consumption were inappropriate and unacceptable; that it was contrary to his obligations as a reasonable pilot and [AL] captain with civil aviation obligations to be actively involved in [FA's] excessive alcohol consumption, and that these failures amount to serious misconduct.

[64] At the beginning of questioning by Mr Toogood, C accepted most if not all the many propositions put to him about his responsibilities and obligations as a Captain and employee of AL. He accepted that his conduct, found to amount to serious misconduct, on Days 1 and 2 had occurred in a work or working environment and that his obligations to AL were continuing ones in such environment even if he was not on duty. C accepted that high standards could be expected of him by his employer and that as a Captain he had added responsibilities to those of less senior employees, such as FO and FA. He accepted that starting drinking on Day 1 had probably been inconsistent with the high standards to be met by him.

[65] C told the Authority he regretted buying the quantity of alcohol taken back to the hotel, and also drinking that much. He accepted his judgement had been poor in that regard, and he accepted some but not all blame was for what happened.

[66] As to C's expression to the Authority of remorse and regret, which although widespread was also qualified to some extent particularly in relation to the sexual intercourse with FA, this has little bearing on the question of justification to be determined by the Authority in accordance with s 103A of the Act. This kind of

response if made by C at the time of AL's inquiry was more a matter for the employer to consider, when determining whether there had been serious misconduct by C sufficient to justify dismissal. It is apparent that C was far less remorseful and regretful at that critical time.

[67] C's acceptance at an Authority investigation meeting of most of the propositions put to him by counsel for the employer is relevant to the assessment the Authority must make of the reasonableness of AL's conclusions that there had been serious misconduct. I view C's acceptance of those matters as providing some confirmation that AL's conclusions about them were reasonable.

[68] It was also a reasonable conclusion of AL that C's conduct amounted to serious misconduct to a degree that could justify immediate dismissal.

[69] Although the conduct of C occurred in between periods of duty and away from any aircraft or premises of AL, as was made clear by the Court of Appeal in *Smith v Christchurch Press Company Ltd* [2000] 1 ERNZ 624 serious misconduct in an employment context is not to be confined to actions of the employee carried out in the workplace, although there needs to be a connection between the conduct and the employment before it will be sufficient to justify dismissal or other disciplinary action to punish that conduct. The Court held at page 631 of its judgment;

It is not so much a question of where the conduct occurs but rather its impact or potential impact on the employer's business, whether that is because the business may be damaged in some way; because the conduct is incompatible with the proper discharge of the employee's duties; because it impacts upon the employer's obligations to other employees or for any other reason it undermines the trust and confidence necessary between employer and employee.

[70] I find there was a direct relationship between C's conduct at the hotel on days 1 and 2 – with regard to drinking and sexual harassment - and the special or specialised nature of the employment C carried out for AL as an airline captain.

[71] There was I find a real and substantial basis for the claim by AL that C's actions had caused it to lose trust and confidence in him as a senior employee with responsibilities to FO and FA and also under a duty to comply with aviation law, even although he was not on duty flying or even present at the employer's premises when those actions occurred. C accepted that although not physically in the workplace he

was in a work or working environment when the conduct for which he was dismissed occurred.

[72] In one respect there might seem to be a dubious conclusion expressed by AL about the effect on C of the amount of alcohol he said he had consumed. AL's written report that was addressed with C on 25 May 2009 (at page 8) stated the employer's belief that he had had so much to drink that he "*would not have been able to assess at the time he finished drinking whether he would be alcohol free in the event that arrangements were changed and taking account of the report time for duty the following morning.*"

[73] There was no basis for AL having such a high degree of certainty about the effects of alcohol on C's judgement. While it would have been reasonable for AL to consider that generally drinking alcohol will probably impair a person's judgement and that the likelihood or risk increases with the amount that is drunk, there was no evidence from AL's inquiry that C had been unable to manage his own particular tolerance to alcohol or of how or whether the amount he drank had affected his judgement in any way. There were no scientific measurements to show how C's senses reacted to drink at any level.

[74] As it was put in submissions (para.64.) made for AL itself, the effect of drinking on C's judgement was at least "*questionable,*" but there was no certainty about the answer in the way AL concluded, in what was described to the Authority by its principal witness as being a "*key*" finding against C.

[75] To make so much of this particular blemish in the employer's conclusions that it provides the only reason for finding dismissal to be unjustified would be to subject the employer's considerations to pedantic scrutiny, something that as submitted for AL is not required or appropriate. As with the sexual activity, the employer's conclusions about C's drinking were more to do with what he drank between duties and how he drank, rather than the exact timing of the drinking in relation to the report time for duty next morning.

[76] If AL may seem to have strained to reach the conclusion that C's judgement became impaired by what he drank that is understandable given the high importance of safety in the airline business. Safety is expressed by AL's Flight Crew Operating Manual to be "*the prime factor in all air transport operations.*" The step must only

be a short one before the question of a pilot's exercise of judgement about the appropriate use of alcohol, both by him and others in the crew he commands, becomes a matter of safety.

[77] Questions of safety may be given special consideration by the Authority in applying s 103A. As stated by the Employment Court in *Fuiava v Air New Zealand* [2006] ERNZ 806, at page 823;

Issues of safety may therefore be critical, as they are in this case, in considering whether the actions taken by the employer are those that would have been taken by a fair and reasonable employer in all the circumstances.

[78] In *Fuiava*, also a case falling to be decided under s 103A of the Act, the Court noted the caution that had been frequently exercised in earlier cases before reaching any decision contrary to the employer where safety issues are involved. It is clear from the judgment of Travis J that no less caution is required under s 103A.

[79] With regard to safety, in the written report from its inquiry presented by AL on 25 May 2009, in relation to the purchase and consumption of alcohol as well as other conduct of C, the following finding was expressed against him;

I believe that the decisions made and condoned by [C] fell well short of the standard of professional conduct and leadership the Company could reasonably expect of a Captain on an unscheduled overnight. Further I believe that these actions not only compromised the welfare of crew members involved but also placed at risk the safety and good reputation of [AL].

(underlining added)

[80] In his affidavit of 6 August 2009 the principal witness for AL, who had made the findings from the employers inquiry, stated (at para.40.4(d)) that overall the actions of C had placed the safety of the airline at risk.

[81] Accordingly, AL's conclusion that C's judgement was impaired by the amount of alcohol he drank should not be held by the Authority as unsupportable and unreasonable when reached in the critical context of safety.

[82] I find that safety in this employment was a particularly important circumstance among "all the circumstances" that are to be taken into account when considering justification for the dismissal under s 103A of the Act. As well as the special nature of the employers airline business, also important were the circumstances of the employee.

[83] Although until Day 1 the record of C in nearly 5 years of employment with AL had been untarnished in any way, he had been appointed a senior pilot following promotion to Captain 2 ½ years earlier. He conceded that he had had additional responsibilities in that role, which required him to demonstrate leadership attributes by way of setting an example to other employees and also looking after their welfare.

[84] I am satisfied that from its inquiry AL established, to the appropriate standard, the presence of grounds on which a fair and reasonable employer would have acted by making a decision to dismiss C, having regard to all the circumstances.

AL's conclusion that dismissal appropriate

[85] I do not consider that there was inconsistency of treatment of C by comparison with the way FO and FA were treated by AL, to the point where C's dismissal was unjustified. Some disciplinary action was taken against FO, although not to the extent of dismissal. (He has raised a grievance about that action.) After an inquiry by AL into her conduct no action was taken against FA. Although she remains in employment, since Day 1 she has not worked again as a flight attendant.

[86] The major distinction between C and FO and FA is that C was the person entrusted with a command position in relation to the crew members and aircraft flown by them, and also neither FO nor FA were found to have sexually harassed another employee of AL. The idea of buying alcohol had not come from FA and she did not pay for any of the drink. Passively she had accompanied C and FO to the supermarket where it was bought, as she was sharing a taxi with them to get from the airfield to the hotel. Because of her youth, inexperience in the job and her position of employment all relative to those of C, she was in her behaviour susceptible to his influence and example, a factor for which AL could reasonably make allowance in deciding whether to take any action against her.

[87] It was submitted that AL did not consider at all, or did not consider properly, other alternatives to dismissal as a response to the serious misconduct found to have occurred. The application of s 103A of the Act draws in the duty under s 4 of an employer to act in good faith. In particular a fair and reasonable employer which is proposing to make a decision that will have an adverse effect on the continuation of employment must comply with the requirements of s 4(1A)(c)(i) and (ii) of the Act. I find that is what AL did with regard to a specific proposal to dismiss C, and I can see

no real basis for attacking the scope or depth of the employer's considerations as to what action was to be taken once it had reasonably concluded there was justification to dismiss C.

[88] The proposal to dismiss was I find already soundly based at the point where AL invited representations from C about that action. AL heard those representations but opted not to impose a lesser punishment, an election that was AL's to make. In this regard AL's actions and how AL acted were I find what a fair and reasonable employer would have done in the circumstances at the time the dismissal occurred.

Determination

[89] For the reasons above, applying s 103A of the Act I find that C has no sustainable personal grievance arising from the actions of AL that culminated in his dismissal.

Recorded Police interviews

[90] Before the investigation meeting copies of the interviews with AF, C and FO were obtained by the Authority from the Police and given to counsel, with directions as to who could have access to them and as to their return at the end of this investigation. Upon reaching the finding that the dismissal of C was justified under s 103A of the Act, it became unnecessary for me to look at and listen to the interviews recorded by the Police and I have not done so. This was not information AL had access to when carrying out its inquiry and at the time it decided upon dismissal as the appropriate disciplinary action to be taken against C. Its relevance could only have been to the issue of contribution, which now does not arise for determination in this investigation because of the finding of justification.

[91] As directed at the time this material was made available to counsel, it is now to be returned to the Authority which will return it to the Police. Directions must be sought from the Authority if counsel wish to retain the material for the purposes of any challenge to the Employment Court, or other good reason. Any directions are to be sought within 21 days of the date of this determination.

Costs

[92] Costs are reserved. In the usual way it is expected that on behalf of the parties counsel will try to resolve any issue themselves. If an order is to be sought AL within 14 days of the date of this determination is to file a memorandum in the Authority and serve C, who will have 14 days in which to reply from the date of service.

A Dumbleton
Member of the Employment Relations Authority