

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 197
5331237

BETWEEN SHANE DAVID CLARKE
Applicant
AND AIR NEW ZEALAND
LIMITED
Respondent

Member of Authority: G J Wood
Representatives: Greg Lloyd for the Applicant
Tim Cleary for the Respondent
Investigation Meeting: 30 and 31 August 2011 at Wellington
Submissions Received: 31 August 2011
Determination: 30 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Shane Clarke, claims that he was unjustifiably suspended and dismissed by the respondent, Air New Zealand. He seeks reinstatement, monetary compensation and costs.

[2] Air NZ considers that Mr Clarke had to be suspended and later dismissed for serious misconduct, namely making comments about bringing a gun into company premises to deal with a work-related issue. It needs to be clear from the outset that Mr Clarke never did bring a gun into company premises nor, I accept, did he ever intend to do so. Neither was that what he was dismissed for.

[3] The issues for determination are:

- Was Mr Clarke unjustifiably disadvantaged because of the suspension;

- Was Mr Clarke unjustifiably dismissed; and
- If either unjustifiably disadvantage or unjustifiably dismissed, what remedies, if any, should be awarded to Mr Clarke?

Factual discussion

[4] Mr Clarke was a loader working at Wellington International Airport, a position he had held for 10 years. Aircraft loaders such as Mr Clarke work airside, which means having a security clearance, because they work in a security-controlled area. Even the offices and smoko room (known as the Ready Room), were airside and therefore in a secure area.

[5] On 23 June 2010, a ramp services worker expressed concern to Ms Tania Budney (Ramp Services Manager) about how the ramp training coordinator had been treated by Mr Clarke the day before. Ms Budney then spoke to the ramp training coordinator, who explained her interactions with Mr Clarke the day before. She also informed Ms Budney that the on the job trainer had also indicated that he had had an altercation with Mr Clarke earlier the same day.

[6] Ms Budney, who was responsible for loaders, amongst other things, then arranged for both the ramp training coordinator and the on the job trainer to give her written statements, which were provided that day. The on the job trainer noted that he did have concerns about Mr Clarke's behaviour, noting that Mr Clarke was upset about the newly introduced operator approval cards, which had been implemented without any consultation. (These cards set out what functions a loader was authorised to undertake, and Mr Clarke was very upset that his card failed to include a number of tasks in which he was trained and competent). The on the job trainer's statement stated:

Shane became hostile and said perhaps I should bring in a gun.

I have had more time to think about this and now realise he was very angry.

[7] The ramp training coordinator's written statement recorded an altercation with Mr Clarke later in the day over the introduction of the new cards, and that they had disagreed over whether he was fully trained for some of the jobs. According to the training coordinator, Mr Clarke's response to the suggestion that he could take matters

up with his team manager was that he would not be discussing it with him or the ramp manager. According to the training coordinator, Mr Clarke stated words to the effect that “*they don’t care*” and then as he walked away he said:

... “they will worry when I bring a gun to work”. I don’t think this was pointed at anyone in particular; I think he is a very upset and angry man and needs some assistance. I get the impression he feels undervalued and this has been building for some time, there may also be issues outside of work contributing to his distress ...

[8] As a result of these allegations, Ms Budney, after taking advice, felt that she had no choice but to notify the Police, who said that they would deal with Mr Clarke directly. It was also decided to suspend Mr Clarke, who was on two days’ leave. Mr Clarke first became aware of these issues when contacted by Police, who told him that he was not to return to work. He subsequently received a letter from Ms Budney stating that Air NZ was going to undertake a full investigation and that he would be stood down from work on pay. He would not be able to enter the workplace. He was offered the use of the employee assistance programme.

[9] The parties’ collective employment agreement states:

In circumstances where the disciplinary inquiry relates to possible misconduct by an employee, while no decisions as to the need for disciplinary action will be made until the inquiry is completed; the employer and the employee agree that in appropriate cases an employee can be suspended on pay to allow for adequate investigation of alleged misconduct.

[10] Air NZ did not pursue its investigation promptly. The major reasons for this were that Ms Budney was transferred to Auckland and the investigation was transferred to Mr Kevin Williams, the passenger services manager, and Air NZ had to interview a number of potential witnesses to the two conversations. During that time, Air NZ had been told by the Police that Mr Clarke had been spoken to twice. The Police documentation states:

Both times Mr Clarke appeared very remorseful for his actions and understood why his comments were being treated so seriously, he also stated he had no intentions of carrying out such a threat and that the comments were made in anger.

As a result of our conversations I have concluded Police involvement in the matter by formally warning Mr Clarke for his threatening comments.

[11] During this period, Ms Budney and then Mr Williams had interviewed a number of staff who may have overheard the conversations. I accept that it made reasonable efforts, by calling several times, to contact a worker who was present at one of the conversations, but he was unable to be contacted.

[12] Part of Mr Clarke's security clearance involved him attending security briefings. One training session he had attended a year or two previously was on airline operations and safety. One of the PowerPoint presentations dealt with "*recognition and procedures regarding: bombs, weapons and other explosives*". A poster, which Mr Clarke admitted was shown prominently airport side rather than airside, referred to jokes about security being taken seriously and that the Police would be informed. The training also stated "*Air NZ has a **zero tolerance** towards bombs or weapon claims (even if they are said as a joke). If you receive a threat, alert your supervisor immediately*".

[13] Mr Williams' letter of 13 July provided Mr Clarke with a copy of Air NZ's reports and notes from interviews with witnesses. A meeting was set for 15 July, which in fact took place on 22 July.

[14] The interview notes collected before the disciplinary meeting showed the following. The ramp training coordinator did not feel personally threatened, but stated that Mr Clarke was really angry. She also noted that after Mr Clarke made his comment about the gun he went and sat in the corner looking into space and not conversing with anyone. She stated that she did not think matters were quite so serious until she spoke to the on the job trainer, who had had a similar experience. She also stated that she was still concerned for Mr Clarke's wellbeing.

[15] The on the job trainer stated that at the time he could not tell if Mr Clarke was being serious, even though he was angry and upset, and that he himself had made a joke about Mr Clarke's comments.

[16] A witness to the second incident stated that Mr Clarke was getting quite angry and raising his voice, which was unusual. He only heard Mr Clarke say that he would go home and get something, not what that something was.

[17] Another witness to the second incident said that Mr Clarke was angry and was swearing (which he did not normally do) and that he was heard to say "*I'm going to get a gun and shoot*" but he did not hear if anyone was referred to.

[18] Another witness, a friend of Mr Clarke's, stated that he was just venting his frustration and it was out of character for him to *blow his stack*. He confirmed in evidence that he heard a mention of the word shoot, but was unclear whether or not it was stated, as quoted by Air NZ in its notes, that he had heard Mr Clarke say "*I'll come back with a gun and shoot you all*".

[19] Another witness to the second incident could not hear what was said, but noted that Mr Clarke was aggressive and very upset and was swearing.

[20] Mr Clarke attended the meeting on 22 July with his union organiser. At the meeting, Mr Clarke was given an opportunity to give his version of events. Mr Clarke accepted being frustrated because of the new cards being brought in without consultation and his lack of certification for a number of tasks. After not being given any proper explanation over that he:

... made a comment out of frustration and to lighten the mood that "maybe a shooting spree would sort it all out".

This brought a round of laughter from all in attendance and a reply from [the on the job trainer] of "I'll make sure I'm far away when you do" followed by laughter. "I'll make sure I'm on my RDA when it happens".

[21] In respect of the second incident, Mr Clarke stated that the lack of certification on many tasks was raised with the ramp training coordinator, who told him she would not need them as he would not be doing them, and then out of frustration Mr Clarke noted that that was all he had to show for giving Air NZ ten years of his life. He was then asked to calm down and look at the notice being provided to all staff (which explained the full reasoning behind the issuing of the cards and how any issues with it would be dealt). Mr Clarke accepted that he became even more frustrated and, as he turned to leave, stated:

This is bullshit, I may as well just go get a gun and blow my head off.

[22] Mr Clarke was then told to go and see his manager, who he described as useless.

[23] In answer to questions, Mr Clarke made it clear that his comment during the first incident broke the mood, that it was treated as a joke and people were very calm. Mr Clarke admitted to being more frustrated during the second incident and that his voice was raised, but that he was not yelling at the ramp training coordinator

personally. He accepted that his words were not the right ones to use, but that he was just frustrated at having qualifications that he worked hard to get being taken away from him. He also noted that people swear all the time at the ramp, but he hardly swore at all. It also was noted that this was done in jest and not in a public area.

[24] At the end of the meeting, Mr Clarke apologised for what he had done. He had no idea matters would get this far and had said what he said just to blow off steam. As a result of the meeting, Air NZ decided to interview two other staff members and reinterview the on the job trainer.

[25] The on the job trainer made it clear that Mr Clarke was not happy and that he had said perhaps he should bring in a gun, to which the trainer replied “*make sure you do it on my day off*”. The trainer accepted that he did not take Mr Clarke seriously at the time, and that he had heard this sort of thing before from ramp workers, who do get upset from time to time.

[26] One new witness did not hear any reference to guns, although he noted that Mr Clarke was more aggressive than during the first incident.

[27] Another new witness to the second incident did not hear anything about a firearm either, although he stated that Mr Clarke was swearing and was animated, but not in a heated way.

[28] Mr Clarke was provided with the notes of those three interviews and was called to another disciplinary meeting, which was held on 18 August with the same participants.

[29] Mr Clarke and the union organiser confirmed Air NZ’s notes, which I have utilised above, together with the union organiser’s notes, to ascertain what happened at that meeting.

[30] It was put to Mr Clarke at the second meeting that he was angry and frustrated during the first incident, but he denied that. He accepted, however, that he was frustrated in the second incident. His comments in the first incident were seen as a mood breaker. Although he accepted that he was upset he made it clear that he was never going to do what he said. He accepted that statements about guns are not acceptable in the airline industry, but noted that he was frustrated and blowing off steam. He maintained his assertion that what he had said in the second incident was

that he “*may as well get a gun and shoot my head off*”, noting that he did not have access to a gun anyway.

[31] The union organiser made it clear that while Mr Clarke realised he should not have said what he did, that similar comments had been made before on the ramp, which is a robust environment. It was made clear that Mr Clarke had no intention of bringing a firearm to work, or blowing his head off. It was also noted that Mr Clarke was hugely apologetic, and regretted what he had said, which was solely due to frustration.

[32] The meeting was then adjourned for a final meeting on 9 September. At that meeting, Mr Clarke was provided with a copy of Air NZ’s findings. Those findings traversed the allegations and the company’s investigation process. The findings in respect of the first incident were that Mr Clarke was frustrated, the conversation was not heated and that there were some joking comments made. There was, however, reference to a shooting rampage and that was not said to lighten the mood, rather out of frustration. Air NZ did accept, however, that Mr Clarke’s comments were not taken seriously at the time.

[33] Over the second incident, it was found that Mr Clarke was very angry, upset and frustrated. There was a common theme of him getting a gun to deal with a work-related issue. This was found to be not a joke, as Mr Clarke was very angry and upset at the time. It was noted that only one person other than Mr Clarke had raised the issue of similar comments being made in the past, but that Air NZ was not aware of them and there had never been any previous complaints about them.

[34] Air NZ took into consideration Mr Clarke’s 10 years of good service, that he acted out of character and that Air NZ appreciated that the lack of communication about the new card system had led to his frustration. However, it was found that Mr Clarke’s comments were highly inappropriate for the work environment, as he himself had confirmed. The high safety and security standards required in the aviation industry was also noted, as was that comments in the workplace about firearms, particularly associated with anger and frustration, are completely unacceptable. Air NZ considered that Mr Clarke would be very aware of the high level of sensitivity around security in the airline environment and that he had been trained about such issues. It was also noted that other staff did not agree with what was on their cards, but they did not react in the same way.

[35] It was therefore considered that the comments involving a gun, arising out of frustration and anger, were made in the form of a threat in response to a work-related issue, which constituted serious misconduct.

[36] Mr Clarke was then given time to make a response. It was submitted on his behalf that the finding be that of misconduct rather than serious misconduct, because of the lack of communication about the new card system, that Mr Clarke's behaviour was out of character, that there is a culture in the loading area of such comments, that Mr Clarke did not threaten anyone else, that he has 10 blemish-free years employment, that nobody believed he would enact what he had said, and that the threat was only to himself. Mr Clarke also noted that he had, through EAP, found better ways to deal with frustration and stress, that he was hugely remorseful and was willing to apologise to all parties in writing.

[37] Air NZ felt that there was essentially no new information provided in the submission, as all the matters raised had already been taken into account. It therefore determined that, because of the serious misconduct, summary dismissal was the appropriate outcome.

[38] Despite the union subsequently obtaining over 20 statements from co-workers, who stated that there were often inappropriate comments and jokes made in the workplace, Air NZ did not change its position. The parties have since been unable to resolve matters through mediation and so it therefore falls to the Authority to make a determination.

Determination

[39] Though not ideal, I am satisfied that how Air NZ acted in suspending Mr Clarke was how a fair and reasonable employer would have acted and what it would have done in all the circumstances at the time. The collective employment agreement does not require consultation prior to suspension. Even in the absence of contractual agreement on the matter, consultation is not required in all circumstances. Safety of staff and the public may clearly be one exception.

[40] In this case, a complaint had been made about Mr Clarke's conduct of a very serious nature. There was a possibility, even though in hindsight it was proven to be without foundation, of Mr Clarke acting on his threats at work, which was clearly sufficient (given international aviation and workplace experience) to mean that

prompt action was required, particularly when Mr Clarke was on two rostered days off. The Police's involvement was sufficient testimony of that.

[41] While I agree that the suspension was longer than ideal, I accept Air NZ's explanations for the delays, given the difficulty in contacting a number of witnesses and the shift of Ms Budney to Auckland and her replacement in the investigation process by Mr Williams. It is also relevant that suspension was on pay and allowed Mr Clarke time to gather information in support of his defence of the allegations.

[42] Given the seriousness of the allegations, suspension was clearly appropriate, as staff and public safety must be given priority, and therefore I determine that the suspension was justified.

[43] I also accept that how Air NZ acted over the process that led to the dismissal of Mr Clarke was what a fair and reasonable employer would have done in all the circumstances at the time. Mr Clarke was given all relevant documentation. He was invited to three meetings, during which he was given an opportunity not only to explain his conduct, but also to make submissions on the validity of Air NZ's findings and submissions on what penalty ought to be imposed on him.

[44] Having heard from the witness who questioned the accuracy of the notes of his statement, I do not accept that there has been any material failing by Air NZ to accurately record it. I also accept that it was reasonable, given the number of people Air NZ spoke to, that it did not make more effort to speak to one potential witness, who did not respond to several phone calls to him. The reasonable assumption to make in these circumstances was that the potential witness was unlikely to be forthcoming.

[45] I accept that Air NZ's failure to investigate the alleged culture of jokes with violent overtones was not unfair, because there was sufficiently compelling evidence that Mr Clarke was not joking, particularly during the second incident. Even on Mr Clarke's own account, there is nothing funny about threatening to blow one's head off. No comparison whatsoever can be made between such comments and those that are made generally about aviation-related violence. This is particularly so in the context of a discussion about important work matters and Mr Clarke's clear frustration, if not anger. While it is claimed that there was a culture of angry and aggressive outbursts amongst loaders, that does not condone the comments Mr Clarke

made, which could have had real implications for airline security. In this context, the airline industry situation, vis-à-vis terrorism and other acts of violence, is important, and Air NZ was entitled to treat it as such. Therefore no wider an investigation into ramp services culture was required. Mr Clarke's statements stood on their own.

[46] Similarly, I do not accept that, as submitted on Mr Clarke's behalf, Air NZ was required to closely investigate Mr Clarke's mental state and/or his likelihood of carrying out his comments by Air NZ security and/or medical teams. Mr Clarke was offered and took up EAP services, which was entirely appropriate. It would be too great a burden on employers to require, even when they have such expertise within their ranks, for such resources to be utilised in disciplinary investigations such as this. An experienced manager should be able to conduct an investigation into the sorts of comments Mr Clarke made.

[47] Furthermore, I do not accept that there was any predetermination or closed mind adopted by Air NZ. The extensive interviews undertaken, the long duration of the investigation and the comprehensive findings document are all strong indicators that belie this.

[48] Finally, I do not accept that it was wrong of Air NZ not to have simply accepted at face value submissions on the Police determination that there was no threat of criminal behaviour. This was not entirely accurate anyway, as Air NZ was told that the Police involvement was concluded by formally warning Mr Clarke for his comments.

[49] Next, I turn to assess whether what Air NZ did, namely its decision to summarily dismiss Mr Clarke, was what a fair and reasonable employer would have done in all the circumstances at the time. The Authority's role is to scrutinise the effectiveness of Air NZ's investigation and subsequent decisions in disciplinary proceedings, not to substitute its judgment for that of Air NZ, even after the Authority had followed a comprehensive and detailed investigative process.

[50] In essence, this matter is basically about whether the well known requirement not to make comments in an airline setting about bombs or guns, even if in jest, should have been applied to the loaders' Ready Room, airside in Wellington International Airport. The culture within Air NZ of not tolerating threats, even as jokes, as it operates in a security conscious environment, is particularly relevant

(*Arthur D Riley & Co Ltd v Wood* [2008] ERNZ 462). I accept that Mr Clarke was fully aware of this prohibition, not only because it is well publicised throughout the airport, but also because he had been trained on the issue. His excuse that that only applied to the public does not ring true, particularly when compared with the evidence of his co-workers. For example, it is significant that at the training Mr Clarke admits to attending, reference was made to a moderate risk from people holding grudges. There is no doubt that Mr Clarke's actions could have been described as a person holding a grudge. Similarly, the training programme noted that "*Air NZ has a **zero tolerance** towards bombs or weapons claims (even if they are said as a joke). If you receive a threat alert your supervisor immediately*".

[51] I accept that a number of staff and a union official had informed Air NZ that there was a culture of jokes amongst the loaders, extending to jokes about such things as bombs and guns, which would never have been made in the area where the public was. On the other hand, Air NZ heard from a number of staff who believed that Mr Clarke was not joking at the time. Even if he did not mean the comments that he made, they were not made as a joke. This was a conclusion open to Air NZ on the information before it, including Mr Clarke's own statements. In particular, in a written statement, Mr Clarke admitted to making comments out of frustration in the first incident, albeit to lighten the mood. In the second incident, he noted that he had become even more frustrated before making another comment about guns. He also made comments about his manager being useless.

[52] I conclude that while the weapons claims were not made with the intention of carrying them out, the second one in particular was made in a serious manner. Neither was either comment a joke that one might laugh at. Jokes are designed to lighten the mood, not darken it. Furthermore, such comments are less likely to be seen as a joke when the person making them is acting out of character, such as them swearing. If Mr Clarke had only made the first set of comments a finding of serious misconduct would not have been a reasonable conclusion. However, the second incident built on the first, and this time Mr Clarke was more upset and frustrated, and made comments that were more threatening accordingly. Any fair and reasonable employer would conclude that, at the very least, the comments were completely unacceptable as they were threatening, and were delivered in a serious rather than joking manner by someone who (at least during the second incident) was clearly upset.

[53] In these circumstances, I accept that Air NZ could safely conclude that Mr Clarke's behaviour was such that it could not be sure that in similar circumstances his anger and frustration might again boil over, with (at the very least) unpleasant consequences for his workplace and managers if he were to make such sorts of comments again. Whatever Mr Clarke might think, his comments were serious, even if not intended to be acted upon. A passenger making such comments in an airport could even potentially be prosecuted for such actions. Whatever the culture may have been on the loading ramp, this was the first formal investigation into such behaviour by a loader. In any event, previous similar behaviour does not justify such behaviour by Mr Clarke – two wrongs do not make a right.

[54] Air NZ was therefore entitled to conclude that Mr Clarke's loss of self-control was such that it could not trust that he might repeat such conduct. This is particularly serious misconduct in the security conscious environment of the aviation industry. Such findings were what a fair and reasonable employer would make, whether or not Mr Clarke had, in the second and most serious, threatened to shoot others, or just himself. It therefore follows that Mr Clarke's dismissal was justifiable.

Costs

[55] Costs are reserved.

G J Wood
Member of the Employment Relations Authority