

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 201/10
5147610**

BETWEEN WENDY COLLINS
 Applicant

AND ZEAL320 LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: G Lloyd, Counsel for Applicant
 K Thompson, Counsel for Respondent

Investigation Meeting: 9 November 2009 at Auckland

Submissions Received: 20 and 27 November 2009 for Respondent
 23 and 30 November 2009 for Applicant

Further material
received: 29 March 2010 for Respondent
 19 April 2010 for Applicant

Determination: 30 April 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Collins, says her dismissal, effective from 9th October 2008, was unjustified. Ms Collins asks the Authority to find that she has a personal grievance and award her the remedies of reimbursement of lost earnings and compensation of \$12,000. It is noted that Ms Collins is no longer seeking the remedy of reinstatement.

The respondent, Zeal320 (“Zeal”), denies that the dismissal of Ms Collins was unjustified and says that the actions of Ms Collins on the 9th and 10th May 2008, constituted serious misconduct warranting her dismissal.

[2] The Authority heard evidence from Ms Collins and Mr Strachan Crang, Organiser, EPMU. For Zeal, there is evidence from Ms Meredith Thomas, Cabin Crew Manager, Mr Graeme Norton, Senior Legal Counsel, and Dr Timothy Sprott, Chief Medical Officer. The parties have provided comprehensive bundles of documents along with closing submissions. All of the available evidence has been closely considered, albeit it is not all specifically identified or referred to in this determination.

Background Facts and Evidence

[3] Since February 2005 until 9th October 2008, Ms Collins was employed as an Airline Cabin Crew Attendant. Her employer, Zeal320, is a subsidiary of Air New Zealand (“Air NZ”) and is the Air NZ Group entity responsible for the provision of cabin crew or flight attendant services on the Air NZ A320 fleet of aircraft.

[4] On the evening of 9th May 2008, Ms Collins was drinking alcohol with her flatmates and some friends. On the morning of 10th May, she was required to report for duty at 8:00a.m, for an Air NZ international flight to Rarotonga. While driving from her home in Ponsonby out to the Auckland Airport, she was stopped at a New Zealand Police (“NZ Police”) check point and required to take a breath test which she failed. Following the failure of a second breath test, Ms Collins was then required to accompany a police officer to a police station. [She was subsequently convicted of driving with excess breath alcohol (545mg)¹, fined and forfeited her driver’s licence, albeit she was able to arrange a limited licence to travel to and from work.]

[5] The evidence of Ms Collins is that upon realising her situation regarding the failed breath test, she phoned the Zeal Crew Control to inform them that she would not be available for work that day. Ms Collins also sent a text to her direct manager, Ms Yvonne Kearns. Ms Collins informed Ms Kearns that “*something had come up*” and that she had “*to call in sick.*”² Ms Collins says that she sent a text to Ms Kearns rather than make a phone call as she knew Ms Kearns on leave in Brazil at the time.

¹ The legal limit is 400mg per litre of breath.

² I note that in her written statement of evidence in reply to Zeals’s statements, Ms Collins says (at para 8) that: “*I did not actually say that I was sick.*” But, her primary evidence (para 30) is recorded here.

[6] It appears that Ms Collins continued her duties for Zeal as usual with no further mention of the incident of 10th May. However, the evidence of Mr Norton is that some time; “*about mid-May 2008,*” the Air NZ Group, senior executive Personal Assistant, received a phone call from Superintendent Kelly from the New Zealand Police in Auckland. Superintendent Kelly indicated that he wanted to speak to “*someone at the top*” concerning recent incidents involving Air New Zealand employees who had been caught driving to work while under the influence of alcohol.

[7] Subsequently, via an exchange of emails (23rd and 27th May 2008) between Mr Norton and Ms Carolyn Richardson, the NZ Police Senior Legal Advisor, Mr Norton was provided with the details of Ms Collins’ details pertaining to her breath test result of 10th May 2008. Mr Norton also had contact with Superintendent Kelly and the two men duly met on 30th May. The evidence of Mr Norton is that following the meeting with Superintendent Kelly, it seemed that: “*... in the eyes of the New Zealand Police that our [Air New Zealand] reputation had been negatively affected,*” albeit Superintendent Kelly subsequently appeared to be satisfied with the approach taken by the company in regard to its approach to alcohol and other drugs.³

[8] As a result of the information obtained from the NZ Police, Ms Collins received a letter from Ms Thomas dated 6th June 2008. Ms Collins was informed that Ms Thomas had received information from the NZ Police in relation to Ms Collins being stopped and failing the breath test on 10 May 2008. Ms Thomas informed that Zeal had several concerns, namely:

- (1) That there was possible non-compliance by Ms Collins in regard to the Air New Zealand Group Alcohol and other Drugs Policy in that as Ms Collins was on her way to work at the time she was breath tested, she would have been in breach of the policy if she had attended work.
- (2) That Ms Collins had possibly brought the company in disrepute as she was in full Air NZ uniform which caused the police to be “*extremely concerned*” about matters of aviation safety.

³ A subsequent email (6 November 2008) from Mr Kevin Kelly, National Manager Policy and Legal Services, Police National Headquarters, as provided to Mr Lloyd for the applicant, suggests that Superintendent Kelly’s view of the reputation of Air NZ, regarding alcohol consumption by employees, was not as negative as Mr Norton appears to suggest.

- (3) That it appeared that Ms Collins could have been in breach of the General Operations Manual as she may have consumed alcohol within 10 hours of reporting for duty in her role as a Flight Attendant.
- (4) That on 10th May, Ms Collins called in sick at short notice and the flight that Ms Collins was rostered on was delayed while a replacement crew member was found.

[9] On 11th June 2008, a meeting took place between Ms Collins and Ms Thomas. Also present was Ms Collins' then boyfriend (Tom), Ms Ryan, a Human Resources representative for Zeal, and Mr Norton. The four issues set out above were discussed with particular focus on the zero alcohol limit provided in the company's Alcohol and Other Drugs Policy. Ms Collins explained how much she had had to drink and that she had stopped drinking on the evening of 9th May just before 10:00p.m, hence she believed that she had complied with the requirement of her employment that she must report to work with a zero blood alcohol level.⁴ While Ms Collins appeared not to be completely familiar with the term "zero blood alcohol" and the requirement to have this when reporting for duty, she was certainly aware of the associated policy that she should not consume alcohol within 10 hours of being on duty.⁵

[10] The evidence of Ms Thomas is that she had concerns with the explanations of Ms Collins in that at 7:30a.m. on the morning of 10th May, within 30 minutes of reporting for duty, Ms Collins recorded a alcohol level well over the legal limit for driving, albeit Ms Collins had said that she had not consumed any alcohol after 10:00p.m. the evening before.

[11] The outcome of the meeting was that Ms Collins was referred to the Air NZ Group Medical Team. The evidence of Ms Thomas is that the purpose of this reference was to provide her [Ms Thomas] with a fuller understanding of whether there could have been other circumstances existing, for example, an undiagnosed alcohol dependence issue which existed or may have been developing.

[12] Ms Collins met with Dr Sprott on 26th June 2008 for "*an initial assessment.*" The evidence of Dr Sprott is that he determined that it was appropriate the Ms Collins

⁴ *Air New Zealand Alcohol and Other Drugs Programme Manual*, Clause 2.1.8.

⁵ *Cabin Crew General Operating Procedures Manual*.

should meet with the company's Alcohol and Other Drug Specialist, Mr Gavin Stevens, Riverside Counselling, for "*a more detailed referral.*" Following his meeting with Ms Collins on 14th July 2008, Mr Stevens prepared a report (undated) which has been provided to the Authority. In an email dated 24th July 2008, to Ms Thomas, Dr Sprott referred to the report of Mr Stevens; who had assessed that Ms Collins did not have an alcohol dependency and that:

The suggested treatment plan is that Wendy would benefit from an alcohol awareness programme including safe drinking guidelines and possible abstinence. This could be provided through Riverstone Counselling. The expected prognosis is that if Wendy undergoes the recommended programme, and she addresses the issues identified, that her prognosis is good.

[13] The evidence of Dr Sprott is that Ms Thomas sought further information from him as to whether the alcohol reading taken from Ms Collins by the Police was consistent with the quantity of alcohol that Ms Collins had said that she had consumed. In his emailed response to Ms Thomas dated 29th July 2008, Dr Sprott indicated that there are a number of factors that influence breath and blood alcohol levels and hence he was unable to say conclusively whether the alcohol consumption admitted to by Ms Collins could explain the reading obtained by the Police. But in any event, it was the view of Dr Sprott, pertaining to Ms Collins, that any speculation about such factors did not: "*...change the following-*

1. *She failed a road side EBT.*
2. *Had she not been stopped by the NZ Police and had she attended work her breath alcohol level would have been well in excess of the Company's AOD Policy of 100. Thus attendance to work on that day, had it occurred, would have meant that she breached the Policy.*
3. *That her reported level of drinking that evening equates to binge drinking and a pattern of such use with consequences, e.g. DIC charge, is consistent with the diagnosis of alcohol abuse.*

[14] In his evidence to the Authority, Dr Sprott says that he was surprised that the amount of alcohol that Ms Collins said she had consumed over a five hour period up until 10:00p.m. on 9th May, and the subsequent period until the breath test on 10th May, had resulted in the recorded test outcome. Dr Sprott said that from his perspective, there are two "*more likely*" explanations for this. Firstly, that Ms Collins consumed more alcohol than she said, or that her alcohol consumption continued after 10:00p.m. on the evening before the breath test.⁶

⁶ All of the above email content was provided to Ms Collins prior to a further meeting on 8 August 2008.

[15] I note that in an email to Ms Thomas dated 31st July 2008, Dr Sprott informs that he had met with Ms Collins and discussed Mr Stevens' report and recommendations, and that Ms Collins had agreed to attend an alcohol awareness programme. And that: *"I have emailed Gavin [Mr Stevens] so that this can be arranged."*

[16] On 8th August 2008, Ms Collins attended a further meeting with Ms Thomas, Mr Norton and Mr Blokker, Human Resources Manager. Ms Collins was represented by Mr Crang, EPMU. Minutes of this meeting have been provided to the Authority. Ms Thomas prepared a written summary of the investigation into Ms Collins' conduct. The salient points that were conveyed to Ms Collins (paraphrased) are:

- (a) Ms Collins' role is in a safety sensitive environment and she has a responsibility for herself, her colleagues and the travelling public.
- (b) Without the intervention of the police, via a failed evidential breath test, Ms Collins would have been in direct contravention of the Company's Alcohol and Other Drugs Policy which requires employees to attend work with a zero blood alcohol level.
- (c) Ms Collins had informed that she did not think she was drunk and that she had not had a drink within 10 hours of being on duty, hence she did not believe that she was in breach of the Company's policy.
- (d) Mr Crang had submitted that:
 - (i) Ms Collins did not have any behavioural problems and that she had received recognition from her Base Manager as being an outstanding employee.
 - (ii) That there was not a trust and confidence issue as Ms Collins had been appointed as a temporary In-flight Service Manager.
 - (iii) That Ms Collins was willingly participating in the recommendations of Dr Sprott.
 - (iv) That Ms Collins had not brought the Company into disrepute nor was it a public matter.
 - (v) That the incident had highlighted for Ms Collins that her body processes alcohol at a different rate than other people.
- (e) That there was a concern that when the police stopped Ms Collins, she was in the Company uniform and that by having a positive blood test and coming to the attention of the police, had brought the Company into disrepute. Having

heard the submission from Mr Crang to the contrary, Ms Thomas arrived at a finding that Ms Collins had brought the Company into disrepute, given that the police were concerned with safety issues associated with Ms Collins having failed a breath test on her way to work and this prompted the police to contact the Company at a senior level.

- (f) The Company records showed that Ms Collins called in sick at 7:37a.m. on 10th May when the operational duty report time was 8:00a.m. The flight was subsequently delayed while a replacement crew member was found. Ms Thomas had found that the actions of Ms Collins in calling in sick at short notice contravened the Company's policy in regard to calling in within an appropriate time and contributed to the delay of a commercial flight.

[17] Ms Thomas concluded her summary:

I've considered both your and Strachan's [Mr Crang] responses and your subsequent commitment to the alcohol awareness programme. You told me that you are now aware of how your body processes alcohol. I endorse your retrospective commitment to alcohol awareness; however my view is that this does not excuse your earlier actions in relation to your alcohol level. I have found that your actions comprised serious misconduct.

Ms Collins was informed that Ms Thomas needed to consider an appropriate outcome and that the termination of Ms Collins' employment was being considered. She was given an opportunity to make any comment about the possible outcome.

[18] Following a period of leave for Ms Collins, meetings took place on 1st October and 9th October 2008. At the latter meeting, Mr Crang presented further submissions on behalf of Ms Collins in regard to the allegation of serious misconduct. The evidence of Ms Thomas is that she noted all of these submissions and responded to them but upon reflection, came to a decision that dismissal of Ms Collins was the appropriate outcome. The outcome of the meeting is that Ms Collins was informed that her employment was terminated with immediate effect. The evidence of Ms Thomas is that in coming to this decision she took account of:

“106.1 Wendy's conduct both leading up to the time when she was stopped by the Police and then her actions subsequently in relation to her employment, and all matters relating to the findings of serious misconduct.

106.2 The nature of our business which is obviously highly safety sensitive.

106.3 The nature of the position held by Wendy which was a highly safety sensitive role, including Wendy's heightened awareness of safety considerations in light of her training and then performance as an In-Flight Service Manager.

106.4 *The level of awareness and training that Wendy had received around safety considerations concerning alcohol and our policies and procedures in general, yet Wendy had still acted as she had.*

106.5 *Wendy's employment record. (I am aware that Wendy had received a final warning in December 2005 as a result of not disclosing a conviction when Wendy applied for employment, but that warning had since expired.)"*

[19] Via a letter dated 13 October 2008, Ms Thomas confirmed the dismissal of Ms Collins.

Analysis and Conclusions

[20] In assessing Ms Collins's claim of dismissal, the test that the Authority must apply is provided by s.103A of the Employment Relations Act 2000. The Authority must objectively consider 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 that the actions occurred.

[21] Summarised, there were three substantial reasons why Ms Collins was dismissed on the grounds of serious misconduct:

1. A breach of the Company's alcohol and drug policy;
2. Bringing the Company into disrepute; and
3. Calling in sick to crew control at short notice and delaying the departure of a commercial flight.

1. The breach of the alcohol and drug policy

[22] The primary reason for the dismissal of Ms Collins is that she breached the Company's alcohol and drug policy. The substance of the policy is to be found at clause 2.1.8 of the all-embracing Air New Zealand *Alcohol and Other Drugs Programme* whereby employees:

Have a duty to report to work with a zero blood alcohol level and drug free, and remain so at all times at work.

Accompanying this policy are certain provisions in the *Cabin Crew General Operating Procedures Manual*:

- a. *No personnel/flight attendants may undertake flying duties if they are under the influence of alcohol and/or any sedative, narcotic, psychoactive or stimulant drug.*

- b. *No personnel/flight attendants may consume alcohol during the 10 hour period preceding [sic] the required report time (including reporting for duty in Auckland) or at an outstation, and rostered dead heading sectors.*

The importance of reporting to work with a zero blood alcohol level has also been repeated in various publications issued by Air New Zealand, such as the *Keeping Our Workplace Safe from the Impact of Alcohol and Other Drugs* bulletins and the *We Guide – Key Policies for Employees of the Air New Zealand Group*.

[23] It has been argued for Ms Collins that because she did not undertake any work related duties on 10th May 2010, she did not breach Company policy. Against this, Zeal say that had it not been for the intervention of the Police stopping Ms Collins at the checkpoint, she would have reported for duty with a blood alcohol level well over the legal driving limit and therefore would most certainly have been in breach of the zero blood alcohol requirement. It is further advanced for Ms Collins that because she was aware of the requirement to cease drinking alcohol at least 10 hours before reporting for duty she did so and was subsequently surprised to find, that she was over the legal limit following the breath test. And, she now appreciates that her body does not process alcohol as quickly as others might.

[24] While it has been suggested that Ms Collins did not fully understand the zero alcohol policy, she acknowledges that she was fully aware of the associated requirement not to consume alcohol within 10 hours of reporting for duty. I consider that Ms Collins was well aware of the conditions of her employment in regard to alcohol consumption prior to reporting for duty in her role as a cabin attendant. In any event, given the ready availability of information provided by Zeal, I conclude that it can be reasonably assumed that Ms Collins would have known of her overall obligations regarding the consumption of alcohol prior to reporting for duty, and that she should not be impaired.

[25] While some effort has been expended by both parties in explaining the quantity of alcohol that Ms Collins consumed, it is not necessary for the Authority to reach any conclusions on this. Regardless of how much Ms Collins says she had to drink and/or when she stopped drinking on the evening of 9th May 2008, there is no

escaping the conclusive evidence of the Police breath test,⁷ in that very shortly before reporting for duty, Ms Collins had a much higher level of blood alcohol than her employment conditions allowed. Hence, she was seriously in breach of a fundamental term of her employment and her employer concluded that this amounted to serious misconduct. This was a conclusion that in all the circumstances, Zeal was fairly and reasonably entitled to arrive at. This is particularly so given the policies of the Company and the pertinent role of Ms Collins in a safety sensitive environment in which she had a vital responsibility to the travelling public, her colleagues and indeed to her own safety, particularly should an emergency situation arise where maximum alertness and response is required.

2. **Bringing the Company into disrepute**

[26] A further reason for the dismissal of Ms Collins was that Zeal concluded that she had brought the Company into disrepute in the eyes of the Police. Zeal reached this conclusion on the basis that when Ms Collins was stopped by the Police and subjected to a breath alcohol test, which was positive; she was in an Air NZ uniform and making her way to report for work. Zeal says that the disrepute was manifested by the fact that Superintendent Kelly saw fit to raise the matter with the Company at a senior level. I think that it may be a step too far for Zeal to say that it was solely the incident involving Ms Collins that aroused the interest of Superintendent Kelly. As I understand it, other Air NZ staff had been found by the Police to have excessive breath alcohol whilst commuting to work. Nonetheless, I accept that it was fair and reasonable for Zeal to conclude that the actions of Ms Collins had made a contribution to bringing the Company to the attention of the Police.

[27] It has been argued for Ms Collins that the company entity, Zeal320 Limited, was not brought into disrepute by Ms Collins. I accept that in a technical sense, this is probably so. But given the inextricable existence of Zeal320 Limited as a component of the Air New Zealand Group, and the fact that Ms Collins was in an Air NZ uniform at the time she was stopped by the Police, logically, it is impossible - for practical

⁷ On behalf of Ms Collins, criticism has been made about the role of the Police in regard to divulging information to the Company regarding her excessive blood alcohol level. That is not really a matter for the consideration of the Authority, except to observe that both the Police and Zeal have an important role to play in ensuring the safety of the travelling public and it seems reasonable that the Police would take the view that they have a responsibility to pass on such information where public safety may be seen to have been put at risk. And generally, any possible Privacy Act issues that might arise from this exchange of information do not fall within the jurisdiction of the Authority.

purposes, in an employment setting - to separate the two entities. Even if this is not correct, I accept the submission of Mr Thompson that, it is possibly an even more serious offence to bring the sole client of Zeal (Air NZ), into disrepute.

3. **Calling in sick to crew control at short notice – delay of the commercial flight**

[28] A further conclusion of Zeal, leading to the dismissal of Ms Collins, is that her action in calling in sick to crew control at short notice was a contravention of Company policy and contributed to the delay of a commercial flight. Perhaps on its own, this is not a particularly strong aspect of the case for Zeal. This is because, while there was short notice given by Ms Collins, and the flight was apparently delayed (albeit the evidence as to the length and effect of the delay is vague), and there was a contravention of the “call in” policy, Zeal never saw fit to raise this with Ms Collins when she next reported for duty after 10th May, or even at the least, in close proximity to the episode. The impression is that the Company did not have any immediate concerns. It was not until the Company commenced its investigation into the alcohol related issues that this matter was raised with Ms Collins. Nonetheless, once the Company’s investigation revealed why Ms Collins called in “sick” and that the reason given was false, then I conclude that Zeal was entitled to take this into account as a part of the overall matrix pertaining to the breach of the alcohol policy.

Serious misconduct warranting dismissal

[29] Having taken into account all of the circumstances, I conclude that Zeal was entitled to treat the combination of the three specific matters set out above as serious misconduct. In practical terms, the latter two actions were the immediate outcome of the excessive alcohol consumed by Ms Collins that placed her in contravention of the Company’s Alcohol and Other Drug policies, for which I conclude, taken on its own, the Company were entitled to exercise the sanction of dismissal. Having reached this conclusion: Is there anything that makes the decision to dismiss Ms Collins unfair and/or unreasonable to the extent that it was unjustified?

The arguments for Ms Collins as to why the dismissal was unjustified

[30] Two particular arguments have been advanced for Ms Collins as to why the dismissal was unjustified:

- (a) Disparity of treatment as compared with other employees; and

- (b) The failure of Zeal to comply with the Alcohol and Other Drugs policy in regard to rehabilitation where alcohol or other drug abuse is found to exist.

(a) **Disparity of treatment as compared with other employees**

[31] It has been advanced for Ms Collins that she was treated in a disparate manner as compared with another Zeal employee, Mr Dean Mitchell. The evidence of Ms Collins is that in April 2007⁸, she was on duty during a flight to Sydney. Ms Collins says that Mr Mitchell was on duty on the same flight and he: “... *was so drunk that he required medical attention*” by a doctor who was a passenger. The further evidence of Ms Collins is that Mr Mitchell spent most of the flight receiving oxygen and he was hospitalised upon arrival in Sydney. Ms Collins says that she was aware that Mr Mitchell had been seen in Auckland city at “*about 4:00 a.m.*” on the morning of the flight; four hours before signing on for duty, and that on the flight he was: “*completely and utterly drunk*” and compromised passenger safety.

[32] The evidence of Ms Thomas is that it is “*incorrect*” that Mr Mitchell was drunk on the flight as alleged by Ms Collins. Ms Thomas says that it is correct that Mr Mitchell was unwell and oxygen was administered to him after he was moved to the flight deck. Upon landing he was admitted to a Sydney hospital and the doctor’s report indicated there were no irregularities in Mr Mitchell’s blood test results. The further evidence of Ms Thomas is that she subsequently (1st May 2007) received an email from the In-flight Service Manager (Ms Barrett-Hamilton) who was concerned that she had heard from other crew that Mr Mitchell was drunk the night before the flight, and that had she known this, she would have stood him down from the flight. Ms Thomas says that if Mr Mitchell was in the condition that Ms Collins alleges, then this would have been obvious to Ms Barrett-Hamilton and others at the time. Ms Thomas also says that as part of the investigation into whether Mr Mitchell had been drinking within 10 hours of being on duty, interviews were conducted with (among others) Captain Phillip Maguire (flight pilot) and Mr Stephen Jones, who was also on the flight and at the time, General Manager, Tasman Pacific. Ms Thomas attests that Captain Maguire stated that Mr Mitchell was at all times clearly spoken, lucid and alert, showing no signs of impairment. Mr Jones is reported as stating that Mr Mitchell did not smell of alcohol nor did he display anything that caused Mr Jones to

⁸ The evidence of Ms Thomas is that the flight was on 28th April 2007.

suspect he was drunk or sick. Ms Thomas says that it should be noted that Mr Jones was responsible to the CAA as the senior person responsible for the Airline Operator Certificate of Zeal320 and therefore held the ultimate accountability to the CAA. In conclusion, Ms Thomas says that if Mr Mitchell had been “*completely and utterly drunk*” as alleged by Ms Collins, this would have been revealed during the flight and/or by the subsequent investigation.

[33] While it is clear that Ms Collins believes that her version of events about the situation regarding Mr Mitchell is correct, the evidence of Ms Thomas is more compelling. This is particularly so given that an investigation was conducted into the circumstances at the time. But in any event, even if some disparity did exist (which has not been proven), I accept the submission by Mr Thompson for Zeal, that allowing an earlier safety infringement to go unpunished could not justify a later infringement; particularly in the environment within which Zeal operates and is responsible for, where safety considerations are a dominant factor. This proposition is supported by the findings of the Court of Appeal in *Samu v Air New Zealand Limited* [1995] 1 ERNZ 636 at 639:

All the circumstances must be considered. There is certainly no requirement that an employer is for ever after bound by the mistaken or overgenerous treatment of a particular employee on a particular occasion.

[34] Subsequent to closing submissions being provided, and following considerable media interest in the circumstances of an Air NZ pilot, Mr Warwick West (whom following several convictions for drunk driving, had apparently undergone a rehabilitation programme and returned to active flying), the Authority was asked by the applicant to take into account the treatment of Ms Collins as compared with Mr West. Because the evidence presented, regarding the circumstances pertaining to Mr West, was simply a series of media reports and nothing more, I confirm the previous advice, given via a conference call with the parties, following memoranda received from them, that I am unable to give any weight to this evidence in regard to it showing any disparate treatment of Ms Collins.

(b) **The alleged failure of Zeal to comply with the Alcohol and Other Drugs policy in regard to rehabilitation where alcohol or other drug abuse is found to exist.**

[35] It is further advanced for Ms Collins that Zeal relied on its alcohol and drug policy to refer her for assessment but then failed to allow her access to a rehabilitation

programme. The Authority has been referred to clause 2.10.3 of the *Air NZ Alcohol and Other Drugs Programme Manual* which provides:

Following Assessor or Rehabilitation Provider assessments

The medical assessment and rehabilitation of an employee following the recommendation by an assessor or rehabilitation provider that an employee has alcohol or other drug abuse or dependency is outlined in the 3.1.3 Rehabilitation procedure.

[36] The rehabilitation procedure provided by clause 3.1.3 is comprehensive with its purpose being that: *Alcohol and other drug rehabilitation involves providing assistance to employees and maintaining a safe workplace.* Rehabilitation may require a written rehabilitation agreement between the employee and the Company and this requires written consent from the employee. Relevant to the circumstances of Ms Collins, it is further provided that a rehabilitation agreement may be offered following:

- *An assessment when an employee has had a positive alcohol or other drugs test; and*
- *Advice of an assessor or rehabilitation provider that an employee has alcohol or other drug abuse or dependency.*

It is further provided that:

The offer of a Rehabilitation Agreement to an employee will be at the discretion of the Company. The decision to offer the employee an agreement will be made after considering the circumstances of the discovery of alcohol or other drug use by the employee, the opinion from a MRO [Medical Review Officer] or Chief Medical Officer, and the outcome of any Company investigation.

Also most relevant is one of the ***Important notes***:

- *Referral for rehabilitation does not preclude disciplinary actions depending upon the circumstances of the testing and the outcomes of any investigation.*

[37] The argument for Ms Collins is that she met with Dr Spratt and was then subsequently assessed by Mr Stevens, who found alcohol abuse had occurred and recommended an alcohol awareness programme for her, with a positive prognosis. It is argued for Ms Collins that she was subsequently denied the opportunity to be considered for rehabilitation under the provisions of the *Alcohol and Other Drugs Programme Manual*. However, Zeal says that Ms Collins was contacted by Mr

Stevens but she failed to respond to the messages left by him relating to her participation in an alcohol awareness programme.

[38] The Authority has received an affidavit from Mr Stevens in which he attests to making three phone calls to Ms Collins for the purpose of arranging with her the commencement of an alcohol awareness programme. The telephone records provided by Mr Stevens show that he made the calls to Ms Collins on 6th August, 11th August and 18th August 2008. Mr Stevens deposes that on each occasion he left a message for Ms Collins (with his contact details) but she failed to return any of his calls. In her affidavit in response Ms Collins acknowledges that Mr Stevens left messages for her as he has attested, but she says that “*around this time*” she was on annual leave. Ms Collins also says she relied on Ms Thomas telling her that she (Ms Collins) should “*not worry about things*” until she got back from her holiday.

[39] It seems to me that the argument advanced for Ms Collins, that Zeal failed to comply with its Alcohol and Other Drugs policy in regard to rehabilitation, where alcohol or other drug abuse is found to exist, is not sustainable on two counts. Firstly, and most importantly, under the alcohol and drugs policies, the option to enter into any form of a rehabilitation agreement is at the absolute discretion of the Company after consideration of the circumstances pertaining to the alcohol use and/or abuse and “*the outcome of any investigation.*” Furthermore, and fatal to any possibility of a rehabilitation process for Ms Collins, is the fact that she chose not to respond to Mr Stevens when he attempted to contact her. I do not find Ms Collins attempts to mitigate her actions in regard to failing to contact Mr Stevens to be convincing. But in any event, it seems more than likely that as part of the investigation and decision making process relating to appropriate disciplinary action, Ms Thomas was taking a prudent approach to ensure that Ms Collins did not have an alcohol dependency problem rather than any intention or possibility that Ms Collins may be able to overcome or mitigate the substantial breach of the alcohol and drugs policy by attending an alcohol awareness programme.

Determination

[40] It is difficult not to have some empathy for Ms Collins in that her dismissal cut short what appears to have been a reasonably successful career, which given her demeanour and presentation, she appeared to be most suitable. Some would say that her dismissal could be seen as unduly harsh. However, what must be taken into account is that Zeal operates in an environment and an industry where safety considerations are a dominant and critical factor. The Company invests substantial resources in ensuring that the safety of the travelling public is paramount to its operations and that people using the services can be confident that this is so. Ms Collins was well aware of the Company's policies in regard the consumption of alcohol prior to reporting for duty and the reasons for strict adherence to those policies. Had she not been stopped at the NZ Police checkpoint, she would have reported for duty with a blood alcohol level that was well in excess of the zero tolerance requirements. For the reasons set out in the body of this determination, I find that Ms Collins was in serious breach of the policies of the Company in regard to her excessive alcohol consumption prior to reporting for duty on 10th May 2008. It was fair and reasonable of Zeal to treat this as serious misconduct. Given the overall circumstances, it was also a fair and reasonable decision for Zeal to terminate the employment of Ms Collins. She does not have a personal grievance and her claims are dismissed.

Costs

[41] Costs are reserved. The parties are invited to resolve the matter if they can. In the event they cannot, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority