

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Grant Alexander Craigie (Applicant)
AND Air New Zealand Ltd (Respondent)
REPRESENTATIVES Ray Parmenter, counsel for Applicant
Kevin Thompson, counsel for Respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 17 and 18 February 2005
DATE OF DETERMINATION 12 April 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Following an inquiry carried out by Air New Zealand into the conduct of Mr Grant Craigie an employee, the airline concluded that he had committed serious misconduct and decided to summarily dismiss him for that reason.

[2] When he was dismissed in September 2004, Mr Craigie had been employed by Air NZ as a pilot for about 16 years and had attained the position of Captain in the airline's Boeing 737 fleet.

[3] He raised a personal grievance in which he claimed that the dismissal was unjustified. Although that is the primary employment relationship problem for the Authority to now resolve, linked to it are complaints Mr Craigie made in 2003 about the way Air NZ was then carrying out a disciplinary enquiry into his alleged misconduct. In particular he complained that there was no basis for having the enquiry at all, that it was taking too long to complete and that one of the Air NZ managers conducting it had displayed bias against him and had predetermined the outcome of it. As these earlier matters did not get resolved they remained within the scope of the final investigation the Authority has now carried out.

[4] To resolve all of the problems Mr Craigie seeks an order reinstating him as a pilot with Air NZ. He also seeks orders reimbursing him for remuneration he has lost and compensating him for distress and other harm he has suffered as a result of the airline's actions which, he contends, were unjustified.

[5] The parties have tried to settle the claims through mediation but have not been successful. They have also taken part in earlier meetings with the Authority, before and after the dismissal, following applications made by Mr Craigie for interim orders. After each meeting a determination was issued, one on 9 February 2004 (under AA 47/04) and another on 8 November 2004 (under AA

360A/04).

[6] The only order that has been made by the Authority before this final determination has been one requiring Air NZ to comply with a particular term of its employment agreement with Mr Craigie. Under that term he had been entitled to receive a written statement detailing the alleged misconduct which Air NZ wished to enquire into. That statement was given to him in February 2004.

The misconduct

[7] The misconduct as alleged by Air NZ against Mr Craigie and which the company subsequently found established, occurred on three separate occasions between 1996 and 2001. First, in June 1996 there was a domestic related incident which occurred at a private address while Mr Craigie was off duty. This led to his arrest by the Police and his appearance the following day before the District Court on five charges. They alleged assault (2), intentional damage to property (2) and unlawful possession of a restricted weapon (1). After pleading guilty to all charges Mr Craigie was discharged without conviction by the Court on three of them and bonded to keep the peace on the remaining two.

[8] The second occasion was in April 2001 when Mr Craigie made three flights between Auckland and New Plymouth while off duty and in his own aircraft. This activity led to his prosecution and his conviction by the District Court on five charges laid under the Civil Aviation Act 1990 and related legislation. They alleged that he had failed to obtain airworthiness certification for the aircraft. Fines of \$3,600 in total were imposed by the Court.

[9] The third occasion of misconduct was in December 2001 when another domestic related incident occurred. As in 1996, this too was at a private address while he was off duty. He was prosecuted by the Police, convicted of assault by the District Court and punished with a fine of \$650.

[10] There is no dispute in this case that the actions described above took place or that the disposal by the District Court of the charges resulting from them was also as described.

Air NZ's view of the misconduct

[11] Air NZ concluded that collectively the three occasions of misconduct constituted serious misconduct and that individually each occasion also amounted to serious misconduct.

[12] The employer concluded that Mr Craigie's actions and their court sequels in relation to each of these three occasions, constituted conduct of a kind that was not compatible with the attributes required of a commercial airline pilot. Air NZ also concluded that his conduct demonstrated a general pattern of behaviour falling below the standards required of an airline pilot. In dismissing him Air NZ expressed to Mr Craigie its doubt as to whether he could respond consistently if put under stress and also whether he could exercise sound judgement. He was told he had shown a lack of understanding as to the impact his actions could have on his employment relationship in his occupation.

Authority investigation

[13] Following legal principle, the fundamental enquiry made by the Authority has been whether the disciplinary investigation into the alleged misconduct, in terms of both the process applied by the employer and the extent of the investigation, was such as to leave it open to Air NZ to decide that Mr Craigie could be dismissed. In cases like this the Authority asks itself, was dismissal a decision available to a fair and reasonable employer in the circumstances?

June 1996 conduct

[14] The two domestic related incidents in June 1996 and December 2001 are of a quite different nature to the flying incident of April 2001, which involved conduct directly related to Mr Craigie's profession. Also, the flying incident more directly involved a matter of safety.

[15] I find that it was not open to Air NZ as a fair and reasonable employer to dismiss Mr Craigie for the 1996 offending. In the circumstances a fair and reasonable employer could not have regarded that conduct as serious misconduct. Further I find that even if the conduct could be viewed as such, summary dismissal as punishment for it would have amounted to a disparity in the treatment of Mr Craigie which, in the circumstances, was an unreasonable response by the employer.

[16] Air NZ did not find out about the 1996 offending until the end of 2002, over 6 years later. I do not consider that Mr Craigie had a duty to disclose to his employer in 1996 what had happened then, because the conduct was unrelated to flying and occurred while Mr Craigie was off duty. It attracted no publicity despite Mr Craigie's arrest and appearance in Court. Although employed by Air NZ neither victim of the assaults complained to the company about the conduct. Also, at the time of the offending Mr Craigie had not previously misconducted himself and had received no warnings. He had no convictions for assault or any other offence, and there is no evidence that he had engaged in similar behaviour before.

[17] Air NZ should have viewed the seriousness of the conduct according to the way the Court had dealt with it by discharging Mr Craigie without conviction. By pleading guilty Mr Craigie had acknowledged his wrongdoing and accepted responsibility for it. By itself the conduct showed no pattern of unlawful or unacceptable behaviour or any propensity on his part to lose self control and react violently. In 2000, four years after the conduct took place, Air NZ found Mr Craigie to be acceptable for promotion to Captain, indicating that Mr Craigie had not habitually been offending or misconducting himself.

[18] At most the June 1996 offending would have justified a warning when Air NZ found out about it.

Disciplinary treatment for the Singapore misconduct

[19] Even if the 1996 offending could fairly and objectively be viewed as having severely impaired the employment relationship, for this misbehaviour summary dismissal in 2004 was not justified in the circumstances because Air NZ had earlier treated another of its pilots quite differently after he too had been arrested and dealt with by a court.

[20] Air NZ through its management witnesses confirmed to the Authority that in about 1997 this other pilot had been arrested after making a physical approach towards a woman in a bar or club in Singapore. The pilot was a member of an aircrew on a tour of duty flying to and from various overseas destinations. Because he was placed under arrest and could not rejoin the tour, costly

arrangements had to be made to allow the aircraft to continue its scheduled flights. Eventually the pilot paid a fine or compensation to the complainant and was released. He was told off by Air NZ for his misbehaviour and made to pay back some of the expense the airline had been put to as a result of it, but he was not dismissed.

[21] Air NZ has accused Mr Craigie of downplaying his conduct, yet that seems to be what the company itself has tried to do in relation to the pilot concerned in the Singapore incident. According to the company he had fallen victim to his own inexperience and naivety, and it was suggested he may have even been set-up. His conduct however involved a degree of assault on a woman for which the pilot could have been sentenced to corporal punishment had he not paid some money to secure his release from arrest.

[22] I am sure Air NZ regards it as important that its employees observe the laws of the overseas countries in which the airline carries on its business, whether those same laws exist in New Zealand or not. I do not therefore accept that the Singapore conduct was or could be viewed as less serious than the behaviour of Mr Craigie. The disciplinary consequences were however quite different. Insofar as the 1996 offending was viewed on its own by Air NZ as amounting to serious misconduct, I consider that there was a disparity of treatment between Mr Craigie and the pilot arrested in Singapore, for one employee was dismissed while the other was not. I have found no reasonable explanation for that disparity and I therefore regard it as unjustified in relation to the 1996 conduct and punishment for that. The dismissal of Mr Craigie in 2004 was not the action of a fair and reasonable employer in the circumstances of the 1996 conduct.

[23] After June 1996 it was nearly five years before the next offending occurred in June 2001. In my view a reasonable employer would have regarded the 1996 conduct as spent after that period of time. It should fairly have been viewed by Air NZ in 2004 as having no life left in it for disciplinary purposes, even when considered in conjunction with the offending in April and December 2001. With a nearly five year gap between the first incident and the second, the 1996 incident could not realistically be viewed as the beginning of any pattern of behaviour. That is not to say that an employer must disregard other kinds of more serious offending by an employee which is not discovered for five years or for an even longer time. In each case it must depend on the nature and circumstances of the conduct.

December 2001 conduct

[24] The second occurrence of domestic related offending was in December 2001. This time Mr Craigie was convicted of assaulting another man who had been associating with his former partner. She was also the mother of his children, one of whom was involved in the incident. In my view that conduct looked at in isolation could be regarded by a fair and reasonable employer as misconduct and as such, in other circumstances, may have given grounds for a disciplinary warning and even dismissal.

[25] I consider that summary dismissal was unjustified for the conduct looked at on its own, because of the disparity between the punishment of Mr Craigie and the pilot arrested in Singapore. Both appeared before the courts and were found or regarded as guilty in relation to an offence committed against the person of the victim or complainant. Mr Craigie was fined \$650 whereas the other pilot could have suffered corporal punishment if he had not paid compensation to the victim. Mr Craigie was summarily dismissed but the other pilot was allowed to keep his job. Mr Craigie's conduct did not cause any disruption to the airline's business whereas that of the other pilot did.

[26] In the dismissal letter Air NZ told Mr Craigie it had concluded that several of its concerns about his December 2001 conduct had been borne out by its disciplinary investigation. It is to be

inferred that in the eyes of Air NZ those matters of concern increased the gravity of the December 2001 conduct, but in my view there was no foundation for concluding that all of the concerns had been borne out. This is another reason why the airline's conclusion that there had been serious misconduct in December 2001 is not justified.

[27] In its letter of 18 February 2004 to Mr Craigie, the airline said it was concerned that the assault may have shown a lack of judgement and self control such as might; *impair your ability to command or be a crew member of an airliner and/or that such conduct may not be compatible with the attributes required of a person to fulfil those duties.* Mr Craigie's judgement and self control were examined by a psychologist who expressed no adverse opinion of them in his written report. That report had been obtained and provided in support of Mr Craigie's successful application for medical clearance to resume flying. Air NZ was given that report when it was conducting the disciplinary investigation. I can find no basis on which Air NZ could reasonably prefer its own lay conclusion over the professional opinion of the psychologist in this regard.

[28] Further, I consider it was unreasonable for the airline to conclude that the bystanders who had seen Mr Craigie suddenly throw himself on another man during a barbeque at a private house where his children were living, might somehow have thought the less of his employer as a result. Any eye witness making that connection between Mr Craigie's off-duty conduct of this kind and the responsibility of Air NZ for it, would not be thinking realistically.

[29] If the April 2001 flying conduct amounted to misconduct but not serious misconduct, it was reasonable for Air NZ to consider whether in combination the April and December 2001 conduct and offending amounted to serious misconduct.

Flying conduct - April 2001

[30] I find that a reasonable employer viewing the April 2001 flying conduct in conjunction with the December 2001 assault conduct and the court cases resulting from both, could fairly conclude that the combination amounted to misconduct of a serious nature.

[31] Further, I find that on its own the April 2001 flying conduct amounted to serious misconduct within the particular employment relationship between Mr Craigie and Air NZ.

[32] There is no dispute that for the flights made by Mr Craigie on 11, 14 and 15 April 2001 between Auckland and New Plymouth, the aircraft he owned was required to have airworthiness certification but did not. Mr Craigie has always denied being told by Mr Paul Muller the aircraft serviceman at New Plymouth that the particular certification was needed. Mr Craigie claimed that he acted under a misapprehension about what was required and whether his aircraft already had the certification.

[33] I find that Air NZ had reasonable grounds for believing that Mr Craigie knew he needed certification for his aircraft before flying it and that he also knew he did not have it. This was therefore a situation of wilful breach rather than genuine misunderstanding or confusion. In that state of mind Mr Craigie undertook not one but three flights, two of them for several hundred kilometres. For those reasons Air NZ was entitled to view the conduct as even more serious.

Flying conduct as serious misconduct

[34] The test of serious misconduct was stated by the Court of Appeal in *North Island Wholesale Groceries v Hewin* [1982] 2 NZLR 176, to be whether the behaviour of the employee had struck at the heart or root of the employment relationship. In assessing the behaviour the Court said;

Regard must be had to the nature and degree of the alleged misbehaviour and so to its significance in relation to the business of the employer and to the position held by the employee. In making the factual assessment, the Court must weigh the question of conduct and, viewing the matter objectively, its effect on the maintenance of the confidential relationship between them as against the severe consequences of immediate dismissal. If it is to warrant that response the behaviour must go to the heart or root of the contract between them.

[35] Above all else the business of Air NZ requires that the safety standards of airline operation are to be respected and observed by the company. No matter how profitable it may be, the core airline business of the company cannot continue to operate without the approval of the Civil Aviation Authority (referred to as the “CAA”), the independent statutory body that has been charged with enforcing regulatory requirements for airline safety. As the responsibility for maintaining flight safety must be entrusted to employees such as Mr Craigie, his was a key position of employment in the airline.

[36] Mr Craigie’s loss of a highly paid job and of a career that he enjoyed and was dedicated to, has deeply disrupted both his professional life and his personal life, extending as that does to looking after the well-being of his children. He is unlikely to fully recover from this loss and if he is not reinstated will need to go overseas to find a similar job with another airline before he can even begin to get himself back to where he was.

[37] There is no doubt that his dismissal has had severe consequences to Mr Craigie. The question is however, whether his off-duty flying in April 2001 together with its court sequel, as a matter of degree was conduct that destroyed or deeply impaired the confidential relationship he was required to maintain with Air NZ. If so, although dismissal might have seemed harsh in view of the consequences to Mr Craigie, dismissal may be regarded as a response to the behaviour that was open to Air NZ acting as a fair and reasonable employer; see *W&H Newspapers v Oram* [2000] 2 ERNZ 461, Court of Appeal, at paragraph [44] in particular.

[38] There is clear authority, referred to by counsel Mr Parmenter and Mr Thompson, that conduct outside the work relationship but which brings the employer or its business into disrepute, may warrant dismissal. This was held to be the law by the Court of Appeal in *Smith v The Christchurch Press Co Ltd* [2000] 1 ERNZ 624, at paragraph [21]. The Court observed that;

.....conduct outside work may demonstrate that an employee has lost the attributes essential for the particular job.

And the Court further stated in relation to such conduct that;

.....we do not accept it as necessary for there to be demonstrated actual adverse effect on the employment situation before the employer is entitled to conclude that the conduct warrants dismissal.

[39] Applying legal principle as stated by the Court in *Smith* (above), I find that Air NZ was justified in having concerns about its reputation and in taking that matter into account in deciding to dismiss Mr Craigie. It did not have to survey its customers or the public to find out how they felt about the conduct.

Attributes essential for an airline pilot

[40] I find that it was reasonable for the company to regard the conduct as showing that Mr Craigie had lost attributes essential for his job as an airline pilot. The conduct clearly reflected adversely on his attitude and also on his ability to exercise sound judgement in relation to the vital matter of flight safety. While the CAA might have been satisfied that the conduct did not compromise safety, Air NZ was entitled to take a different view in relation to the “employment situation” and standards of the employer.

[41] Mr Michael Fransham, who is a Captain and senior pilot of Air NZ, gave evidence that it is regarded as basic airmanship for a pilot to ensure that his aircraft has the required airworthiness certification before any flight is undertaken. When questioned he agreed that it was a serious matter for a pilot to operate an aircraft knowing that it did not have the required certification. He further agreed that the charges successfully laid against Mr Craigie in relation to his April 2001 flying were serious and that the prosecution was not good for Air NZ as the employer of Mr Craigie.

[42] Mr Fransham told the Authority that the Standard Operating Procedures airline pilots must follow require the Captain or commander of an airliner to check before each flight that the aircraft has the required certificate of airworthiness. It seems that the check can be made in different ways, not just by looking at the certificate itself but by looking at other related documentation on board, such as the maintenance log. The effect seems to be the same however; the pilot must not fly the aircraft if he or she has any doubt about its airworthiness certification for the flight.

[43] From the evidence I am satisfied that viewed objectively Mr Craigie's flying conduct in April 2001 was misconduct to a degree capable of being viewed as serious misconduct. It was open to Air NZ as a fair and reasonable employer to see it in that way. Once that conclusion is reached there is no licence for the Authority to substitute its own view for that of Air NZ as to whether the misconduct should or should not have been regarded as serious misconduct. In *Oram* (above), at paragraph [41], the Court of Appeal emphasised the need to avoid making this substitution, particularly “in an area of the technical operation of a complex business”. Such, in this case, is the airline operation and business of the employer.

District Court case added to the seriousness of the misconduct

[44] I find it was also a reasonable concern of Air NZ that the District Court had made strongly adverse comment about the way Mr Craigie presented to the Court as a witness. This particular concern was perhaps not clearly expressed by Air NZ in the February 2004 notification but it was encompassed by the concern stated that the company name may have been brought into disrepute. A court finding that an employee has been untruthful may have the effect of further diminishing the employer's reputation, in the eyes of some at least. In any event the District Court finding was a matter of judicial decision and record and was not something an employer could usefully ask an employee to explain. Air NZ was entitled to be concerned about that finding made in relation to a senior employee in whom a high level of trust had been placed.

Misleading the employers investigation

[45] As the employer stated in the dismissal letter, Air NZ concluded that Mr Craigie had misled the company's investigation with his account of the circumstances in which he had flown on 11, 14 and 15 April 2001 in breach of the law. I find that this conclusion was reasonably open to Air NZ, as it had investigated what had happened with Mr Muller personally as well as with Mr Craigie. To the extent their accounts conflicted it was open to the employer to prefer one account over the other. No doubt it felt some reassurance that the Court applying a much higher standard had also accepted what Mr Muller had said in evidence in preference to testimony given by Mr Craigie.

[46] This particular concern on the part of Air NZ was therefore a reasonable one. Misleading his employer was an exacerbating feature of Mr Craigie's conduct, as in doing so he would tend to diminish the employers trust and confidence in him. Although it was not a concern that was notified to Mr Craigie in the February 2004 letter, I do not consider that omission gave rise to any failure in the employer's investigation process. Mr Craigie ought to have been aware from Mr Dorrian's affidavit of 19 December 2003 filed in response to his application to the Authority for interim relief, that this concern about his conduct was held, for it was stated to be at paragraph 45.9(f) of the affidavit. After the December 2003 application had been heard and determined, the investigation by Air NZ in which Mr Craigie actively participated, continued for several months before he was dismissed.

[47] Further, the conclusion that Air NZ's investigation had been misled arises inevitably from the fact that two contradictory accounts in relation to a key issue were given to the employer. It was entitled to prefer one account over the other according to which one seemed more plausible in the light of all known information.

[48] As has been observed by the Court of Appeal, in this situation an employer is not conducting a trial process. The opportunity that must be given by it to an employee is an opportunity to present an explanation, rather than to prosecute or defend a legal action. An employer is not required to point out its concerns about inconsistencies and allow cross-examination and further opportunities to rebut the evidence of others. A similar situation was considered by the Court of Appeal in *Oram* (above), where it said at paragraph [39];

Mr Oram was given full opportunity to provide his explanation for the mistake. He knew his explanation would be taken into account by his employer in the discipline process. It would be to extend the right to be heard and to answer allegations too far to impose an obligation requiring employers to invite comment upon the assessment of the employee's explanation or attitude to what had occurred. To do that could lead to an interminable process.

This passage is also apt in view of the way Air NZ was influenced by the dismissive attitude it considered Mr Craigie displayed towards the conduct under investigation.

[49] I also find that even if the flying conduct was not serious enough misconduct on its own to justify summary dismissal, a combination of it with the 2001 assault and subsequent conviction for that gave Air NZ grounds for instant dismissal.

Initial response of Air NZ to the conduct

[50] When Air NZ learned of the three separate instances of misconduct by Mr Craigie, to begin with it chose not to commence a disciplinary investigation. Its initial response was to look at rehabilitating Mr Craigie and, with training and other assistance, to induct him safely back into

operational flying. With knowledge of his court appearance in June 1996 and convictions in 2002 for the April and December 2001 conduct, Air NZ looked at preserving rather than ending the employment relationship. I do not however consider that this initial reaction prevented Air NZ from later changing its mind and viewing the conduct as a matter which should be the subject of a disciplinary investigation, with dismissal a possible outcome.

[51] I find that Air NZ in its initial response to the conduct in meetings held with Mr Craigie in January 2003 did not represent to him, either by words or actions, that it had forgiven any of his misconduct and or that it would forgo having a disciplinary investigation into it. Although in January 2003 an “agreement in principle”, as it was termed, had been reached about Mr Craigie resuming his job, this did not later prevent Air NZ from taking a closer look at Mr Craigie’s conduct. It decided to do so after it found out in February 2003 that the CAA had commenced a statutory “fit and proper person” review to examine whether Mr Craigie should retain his pilots licence. While this was being carried out Mr Craigie’s licence was suspended by the CAA from 24 February until the end of April 2003.

[52] Another cause for the employer to hesitate and reflect on the way it should respond to the various court appearances and convictions that had come to light at the end of 2002, was the contents of the court’s sentencing notes for the 2001 assault. In these the Judge expressed her views about the seriousness of the offending and said she thought the convictions for the April 2001 flying would have meant an end to his career as a pilot. The Court had been made aware of his occupation and his employer. These remarks made by a District Court Judge about an Air NZ employee and his conduct, would inevitably have made the company pause to reconsider the gravity of the misconduct and how it might best contain possible harm to its reputation.

[53] Just as Air NZ had no responsibility for the words the District Court had chosen to use when sentencing Mr Craigie, the company could not control the fact that the CAA investigator (wrongly it seems) volunteered to the 737 Fleet Manager, Mr Dorrian, a strong indication that Mr Craigie would lose his pilots licence as the outcome of the CAA review. Mr Dorrian was surprised when this did not happen and naturally I think wanted to look further into the CAA review to try and understand what information had led the investigator to “notify” him that an adverse recommendation was going to be made about Mr Craigie. Permission was sought from Mr Craigie to see the CAA report but he chose not to consent to that and predictably Mr Dorrian was left mystified and no doubt more than a little suspicious. Understandably he decided to investigate further and try and get the full picture of Mr Craigie’s conduct before making any decisions about the future of his employment.

[54] Although in the final result of the CAA review Mr Craigie did retain his pilots licence, that outcome cannot be taken as any form of exoneration in relation to misconduct in the context of an employment relationship. The CAA review had not been about his fitness to be an employee (or to be a contractor or owner-pilot) but was concerned with his ability to operate an aircraft safely in whatever capacity he flew. Air NZ was therefore not duplicating the CAA review but was enquiring from a different perspective, looking in particular at the effect of Mr Craigie’s conduct on trust and confidence in the employment relationship.

[55] Once Air NZ had stepped back from the rehabilitation path it had first started down with Mr Craigie, it obtained more information about his conduct which ultimately led it to dismiss him. That information included the District Court judgment entering the convictions for the flying offences committed in April 2001, which was not supplied until December 2003. In view of the contents of that judgment it is not surprising that Mr Craigie had previously been unwilling to let Air NZ see it. However the nature of that and other information obtained in the lengthy course of the disciplinary investigation shows that the change of tack away from rehabilitation and towards

dismissal was not a mere whim on the part of the employer but was a move reasonably open to it in the circumstances.

[56] I find therefore that after having conciliatory discussions in January 2003 and reaching agreement “in principle” for Mr Craigie to return to flying, the parties were affected by the advent of the CAA review. More time went by because of it and more information came to light. Still more remained to be uncovered. Circumstances changed and Air NZ changed its response to the situation, but I do not consider Air NZ acted capriciously and unreasonably in later deciding to go down the disciplinary path after it had first looked at putting the employment relationship back on track.

Disparity of treatment

[57] In relation to Mr Craigie’s non-flying misconduct, being the incidents in June 1996 and December 2001, I have earlier in this determination found that he was subject to unjustified disparity of treatment when compared to the pilot who misbehaved in a bar or club while off duty in Singapore in about 1997. However I do not consider a valid comparison can be made in relation to that particular misbehaviour and Mr Craigie’s flying conduct, as the conduct is dissimilar.

[58] Further, as an issue of safety arose from Mr Craigie’s flying conduct, employment law principles in relation to disparity of treatment have limited application. As was said by the Employment Court in *Air NZ v Samu* [1994] 1 ERNZ 93, at page 95, while consistency is highly desirable and should be looked for in safety matters, it is not in principle superior to safety. It must clearly be contrary to common sense and reason, and therefore contrary to good law, for an employer to have to continue the employment of an unsafe employee simply because for some reason in the past the employer has tolerated or allowed to go unpunished breaches of safety by other employees.

[59] There was evidence given to the Authority by a pilot about an assault committed on him by another pilot while the two were off duty staying in a hotel in the United States. I accept from the victim that he was assaulted in a bizarre and serious way. I accept that a complaint was made to Air NZ about that conduct and the company carried out an investigation. It seems however from the letter of 23 January 1996 that the Manager of Flight Operations did not consider that any disciplinary action was appropriate. This was apparently because the evidence the company had was not considered to be satisfactory proof of “culpability”. The victim and his alleged assailant, who has not been a witness in the Authority, gave conflicting accounts to their employer of the incident. I am unable to find a basis for a disparity of treatment argument in relation to this incident, as for good reason it simply did not get to a stage where any disciplinary action was taken or even considered.

[60] Other evidence was given to the Authority about particular conduct of Air NZ pilots and maintenance staff that either had no disciplinary consequences at all for the employee or did not result in dismissal. This conduct was directly related to flight operations of company aircraft. I readily accept that the events spoken of by Mr Fransham did occur during flights he crewed. I consider it extremely unlikely that Air NZ would simply have ignored safety matters such as those spoken of by Mr Fransham, if they had been brought to its attention whether by Mr Fransham or anyone else having responsibility for doing so. Again, there is no evidence that the incidents reached a stage where a decision about taking any disciplinary action was made. Only at that point is there a basis for comparing treatment.

[61] On the evidence seen by the Authority, I do not find any disparity of treatment arising from the flying related conduct of other Air NZ employees. Further, if there was any such evidence it

would need to be highly compelling before it could show that dismissal was unjustified in a case where a matter of safety was at the fore.

Complaints about the disciplinary investigation

[62] I find that there were genuine and reasonable concerns held by Air NZ about Mr Craigie's conduct which led it to begin a disciplinary investigation to determine whether his conduct amounted to misconduct. He claimed part way through that investigation that his conduct could not be regarded as misconduct and that therefore the investigation should not be allowed to proceed further. However if the Authority had ordered an end to it, that would have served only to defeat the legitimate purpose of a disciplinary investigation.

[63] The findings in this determination are confirmation that there was indeed a sound basis for commencing and continuing the disciplinary investigation.

[64] I find that there were no grounds for the complaint that the disciplinary investigation commenced in May 2003 was carried on for too long without good reason and to the detriment of Mr Craigie. The circumstances were highly unusual, unique even, in relation to the employment of any pilot by Air NZ. The employer tried to investigate the investigations carried out by the Police and the CAA, as well as independently investigate the subject of those other investigations. It spoke to a good many people and along the way had to put the investigation on hold when the 2003 application was made to the Authority by Mr Craigie.

[65] Mr Craigie's complaint about delay is not a reasonable one. The scope of his conduct under investigation was not something Air NZ had any control over. He also chose not to allow Air NZ access to information that had some conceivable relevance to the investigation. It was not until December 2003 that he provided the judgment of the District Court in which were entered his convictions on the flying offences committed in April 2001. The contents of the judgment helped Air NZ to conclude the investigation, although not in the way Mr Craigie had hoped for. It lay partly in his hands to facilitate or expedite the investigation, the broad sweep of which also dictated its length.

[66] Further I find that the investigation was conducted fairly without bias or predetermination on the part of the employer. I consider that this was also the case from the time the disciplinary investigation first commenced in May 2003. As has been said by the Court before, an employer necessarily has a direct interest in the outcome of a disciplinary investigation. The employer's leanings in that regard are not therefore to be mistaken as bias against the employee.

[67] I have found no evidence that Mr Dorrian demonstrated anything other than managerial concern about the conduct of an employee he was responsible for controlling and supervising. Being the professional leader of the B737 pilots it must be assumed that Mr Dorrian set the highest standards and expected other pilots to meet those. As Mr Craigie seemed unable to allow that the employer could have reasonable concerns about the extent of his conduct, Mr Dorrian's sense of frustration and exasperation evident from his letter of 6 May 2003 is perfectly understandable. It does not however indicate that Mr Dorrian was biased against Mr Craigie and had already decided he should be dismissed.

[68] After the 2003 application had been heard by the Authority, in view of the complaints made (but not upheld) about bias and predetermination the employer took the wise precaution of having Mr David Morgan take part in the investigation. He is the airline's General Manager Operations Standards and Safety and is also its Chief Pilot. From the way he viewed and carried out his role I am satisfied that Mr Craigie was protected against any breach of natural justice occurring in the

course of the disciplinary investigation. I find that the decision to dismiss was not predetermined or tainted with bias.

[69] I find that after it began again in February 2004, the disciplinary investigation was a full, thorough and fair one. Accordingly it was open to Air NZ to reach the conclusions it did reach about the conduct of Mr Craigie and the impact that conduct had on the employment relationship and the maintenance of the integrity of that relationship.

Determination

[70] For the above reasons I conclude that overall the employment relationship problems of Mr Craigie which arose from the disciplinary investigation and from his dismissal, are not matters that Air NZ can be held legally responsible for. Accordingly I decline to order reinstatement or make any other orders against the company to resolve those problems.

Costs

[71] Costs are reserved. Counsel Mr Parmenter and Mr Thompson will I anticipate try to resolve this matter themselves. If they cannot do so then application may be made to the Authority.

A Dumbleton
Member of Employment Relations Authority