

Attention is drawn to paragraphs 1 and 2 of this determination, prohibiting publication of certain information.

Determination Number: CA 35/07
File Number: CEA 24/06

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Phillip Crooks (Applicant)
AND Pratt & Whitney Air New Zealand Services (Respondent)
REPRESENTATIVES Dean Kilpatrick, Counsel for the Applicant
Victoria Donaghy, Counsel for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 30 and 31 January 2007
2 February 2007
DATE OF DETERMINATION 2 April 2007

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] I prohibit from publication under clause 10.1 of the Second Schedule to the Employment Relations Act 2000 the name of the complainant/victim and her father. I prohibit from publication any emails between the father's Union, the New Zealand Amalgamated Engineering, Printing and Manufacturing Union, and the respondent. I shall refer to the father as Mr Z in this determination.

[2] I also prohibit from publication the name of the employee referred to in relation to the allegation of disparity of treatment and any details that may lead to the identity of that employee.

Employment relationship problem

[3] The applicant, Phillip Crooks, commenced employment with the predecessor of the respondent as an apprentice aircraft engineer on 19 February 1990. At the time of his dismissal on 18 May 2005, he was employed by the respondent as a licensed and rated aircraft engineer and was a qualified level 2 non-destructive testing engineer in two disciplines. Mr Crooks worked as a team leader in the Christchurch Engineering Centre's non-destructive testing section *NDT*. Mr Crooks' job was technical and of a specialised nature. He had spent a considerable amount of time studying to further his career.

[4] I shall refer in this determination to the respondent, Pratt & Whitney Air New Zealand Services as the Christchurch Engine Centre *CEC*. *CEC* is run by a joint venture operation between Pratt & Whitney, a united technologies company based in America, and Air New Zealand.

[5] On 23 December 2003, the manager of human resources at *CEC*, Chris Brooks, was called to another manager's office. He was advised by that manager that one of his staff, Mr Z, was in an emotional state and required assistance. Mr Brooks went to see Mr Z who explained that a situation had occurred with his daughter, then aged 14, and Mr Crooks. Mr Brooks approached the airport Police because the accusation was of a sexual nature. He was told by the airport Police that Mr Z should contact the Police himself. Mr Brooks accompanied Mr Z to the station for that purpose and then, after introducing him to the officer, returned to work.

[6] Mr Crooks advised Mr Brooks that he had been arrested in or about late December 2003. Due to the serious situation Mr Brooks kept the general manager of *CEC*, Brian Smith, fully advised. Mr Smith has the delegated authority to hire and fire staff at *CEC*. There was some uncertainty about what allegations Mr Crooks faced at that time. Mr Crooks gave some assurances to Mr Brooks that the relationship was not predatory and that activity was consensual. It was decided that as the true nature of the allegations were uncertain, *CEC* would take the approach that Mr Crooks was innocent until proven otherwise.

[7] Mr Crooks was given paid special leave so he could attend to matters following his arrest between 5 and 9 January 2004. He kept Mr Brooks advised about what was happening with upcoming Court appearances. Mr Crooks was released on bail and returned to work on 12 January 2004.

[8] Mr Crooks says that he was unjustifiably disadvantaged by the actions of *CEC* prior to his dismissal on 18 May 2005 and further that he was unjustifiably dismissed on 18 May 2005.

[9] Mr Crooks seeks reimbursement of lost wages and compensation for distress and humiliation in the sum of \$15,000 together with costs.

[10] The respondent says that Mr Crooks has not suffered any unjustified disadvantage as a result of its actions and that his dismissal was entirely justified and he is not entitled to remedies.

The issues

[11] The test for whether a dismissal or action is justified is set out in s.103A of the Employment Relations Act 2000. This requires the Authority to determine, on an objective basis, for those aspects in Mr Crooks's employment relationship problem which occurred post-December 2004, whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[12] There were some specific complaints directed at the actions of the employer between January 2004 and 17 May 2005. In terms of those actions, the question as to justification is whether the action at the time was an action or a decision which a reasonable and fair employer would have taken. If the action was not justified then the issue is whether Mr Crooks suffered disadvantage as a result.

[13] In terms of the dismissal, the issues are:

- Did the circumstances of Mr Crooks' conviction, the imprisonment and the conduct itself justify summary dismissal;

- Was the process adopted by CEC what a fair and reasonable employer would adopt;
- Was the decision to dismiss Mr Crooks justifiable in all the circumstances, including consideration as to whether there was disparity in the way Mr Crooks was treated compared with another employee;
- If the decision to dismiss was not justifiable, then what remedies is Mr Crooks entitled to and are there issues of contribution?

The applicable collective agreement and CEC code of conduct

[14] Mr Crooks was a member of the Aviation & Marine Engineers Association. There was a collective employment agreement which covered Mr Crooks' work and was in force at the material times. CEC was the employer party to the collective agreement and there were two union parties to the agreement. They were the New Zealand Amalgamated Engineering, Printing and Manufacturing Union *EPMU* and the Aviation and Marine Engineers Association Inc *AMEA*.

[15] CEC has a code of conduct in its human resource manual. There is a section in the manual on disciplinary action and Part 9.9.0 of the manual specifically deals with criminal offences. It provides:

9.9.0 Criminal offences

Where an employee is allegedly involved in, or may be charged with, a criminal offence which took place either at work or off duty, he/she shall continue to come to work provided it is practicable to do so.

Where the manager believes it is unwise to have an employee in such a situation continue at work, precautionary suspension on pay may be imposed.

Subject to an employee being found guilty of a criminal offence (see below) the Christchurch Engine Centre may discipline an employee on the grounds of that person's involvement in an external criminal incident not involving a custodial penalty. In these circumstances, the business will conduct an appropriate investigation, independent of any criminal investigation.

Where an employee is taken into custody, that person is considered to be unable to fulfil his/her contractual employment duties. The anticipated length of absence and its implications for the business then need to be assessed. Termination will be considered in cases of significant absence.

If an employee is found guilty of a criminal offence, either at work or off duty, Christchurch Engine Centre always reserves the right to consider continued employment after having regard to the business's reputation, the responsibilities of the employee, the nature of the offence committed and any other relevant factors.

How CEC managed the situation when Mr Crooks returned to work

[16] Management at CEC held meetings and had discussions to deal with the situation that they would face when Mr Crooks returned to work in early January 2004. Mr Z's manager, Mr Crooks' production leader Kerry Rout, and representatives from both *EPMU* and *AMEA* contributed to the discussions.

[17] Mr Rout and Mr Brooks realised it was highly likely that some staff may take the view that Mr Crooks was guilty and make their view of his conduct known to him. Both Mr Z and Mr Crooks

were long standing employees at CEC and had mutual friends amongst employees. CEC recognised that it had to provide a safe working environment for both men. Mr Rout says that there were two main areas of concern with respect to Mr Crooks. The first was how to provide a safe working environment for Mr Crooks and the second was the issue of harassment and how CEC could prevent it. There was also a need to make sure that the emotions did not impact on the safety aspects of the job. Mr Rout said to achieve the safety objectives all efforts were evaluated against four criteria. The criteria were to ensure safety in the workplace, ensure no contact between Mr Crooks and Mr Z, ensure there was no prejudice (innocent until proven guilty) and to be impartial.

[18] To address the concerns about harassment of Mr Crooks, CEC took the following actions. CEC's harassment policy was reiterated to staff both verbally and in the weekly staff circular. Management told staff that it would be for the Court to make the appropriate decision in due course about Mr Crooks' actions. Mr Rout reminded staff of CEC's position that Mr Crooks was innocent until proven otherwise. He did this on more than one occasion. The two Unions made it clear that they would not support any Union member who carried out the action of harassment.

[19] When Mr Crooks returned to work in January 2004, he was placed away from his usual section, unloading containers. He then took some annual leave in early February 2004. Mr Crooks was also offered EAP counselling sessions in February 2004 and he took the offer up. I should add for completeness that EAP counselling had also been offered to Mr Z and his family.

[20] Mr Rout was then able to secure an x-ray contract so that when Mr Crooks returned from leave he could perform that contract in an area away and separate from his usual work section.

[21] When that contract was finished, which I find was in or about mid-April 2004, Mr Crooks returned to his normal NDT duties. He was placed on the opposite shift from Mr Z. CEC had to obtain the other staff members agreement at that time to change their shifts. To further ensure safety for Mr Crooks, Mr Rout made sure that Mr Z finished 15 minutes early from his shift and Mr Crooks started 15 minutes later.

[22] There were difficulties. Mr Rout said that a lot of people made remarks to him about Mr Crooks. He considered that most individuals were simply venting frustration and anger but he remained concerned about Mr Crooks' safety. Mr Rout remained impartial throughout the period leading to Mr Crooks' sentencing when comments were made to him. Mr Rout told me that many staff viewed that as him favouring Mr Crooks and would ask why Mr Crooks was still at work. Mr Rout said he got *a lot of flack*. Mr Rout told staff at the time that Mr Crooks returned to work to ask anyone that harassed Mr Crooks to leave the section and to advise him or human resources. Mr Rout said that the Union representative monitored things that were said in the workplace and about four or five key people were relied on to stop any negative talk.

[23] My impression of Mr Rout was that he was a particularly fair and sensible person. He recognised that Mr Crooks was under significant strain and did not tell Mr Crooks about the negative comments that staff made to him. The management plan and criteria to measure efforts was the type of plan a very good employer would adopt in these particular circumstances.

Difficulty with a particular employee

[24] Mr Crooks recorded negative incidents in a notebook during the period between his arrest and eventual sentence in May 2005. He informed Mr Rout on each occasion. Mr Crooks said that one employee made his life very difficult. The employee was a friend of Mr Z. The Authority heard from another employee, Darren Bassett, who was 2IC at that time and he confirmed that the particular employee was a problem in his behaviour towards Mr Crooks. Mr Bassett kept an eye on the situation and raised several matters of concern about how employees treated Mr Crooks and

Mr Rout. Mr Rout said he did not recall a specific complaint from Mr Bassett about the employee in question, although I am satisfied that Mr Crooks complained about the employee's actions from time to time.

[25] Mr Rout confirmed that the employee in question was one employee amongst others, told *in broad terms to quieten down* because he had been quite vocal about Mr Crooks' charges. As I understand the situation, Mr Rout felt that the employee did then quieten down. After some specific incidents, Mr Rout had the two lead hands on each shift check the shop floor and surrounding areas at the beginning and end of each shift so that problems would not recur. One of the lead hands was the particular employee whose behaviour had caused some problems for Mr Crooks. I find this was a sensible strategy and it seemed to work.

[26] The approach adopted by management was to try and not inflame the situation and manage it without taking sides. Mr Rout said the issue could otherwise have become all-consuming. It was important, Mr Rout said, that staff not be distracted because the nature of the work was such that a mistake which resulted in an engine failure could have tragic consequences.

[27] I would have had to be satisfied in terms of Mr Kilpatrick's submission that there should have been disciplinary action against this particular employee that grounds for such action existed and that failure to discipline was unjustified.

[28] I am not satisfied in the circumstances that existed at the time that the action taken by CEC was unjustified in terms of that particular employee.

Death threats

[29] Mr Crooks said that he heard from people, who heard it directly that Mr Z made a death threat against him. Mr Rout said he did not hear any threats directly although there was a lot of hearsay about what was said.

[30] Mr Brooks also heard, but only third hand, that Mr Z had made some threats against Mr Crooks. He said that notwithstanding that he had not heard the threats directly, he decided to take some action. Mr Brooks said that he asked the youth officer in charge of the case to talk to Mr Z. He said that Mr Z had also been spoken to about the inappropriateness of his behaviour and the consequences if it continued. There is no evidence that threats continued to be made by Mr Z. In my view, given the nature of the issues between Mr Z and Mr Crooks, involving a third party in the matter and having that third party talk to Mr Z, was not an unreasonable or unjustified step to take.

Defacing Mr Crooks' locker

[31] Some offensive words were written on Mr Crooks' locker. Mr Rout immediately removed the printing from the locker. He had no knowledge of who had written the words and did not recognise the printing. Mr Rout said that as at the time of the Authority investigation meeting he still had no idea who had written the words.

[32] Mr Rout made a decision not to take any further action because all staff had access to the locker room. He said that in these circumstances he did not wish to highlight the message and risk a recurrence of the behaviour, particularly when there was virtually no chance that someone would own up to it. There was no recurrence of this behaviour and I do not find the decision to take no action in these circumstances was unjustified.

Newspaper left open on lead hand's desk on Pitcairn Island case

[33] The paper that was left open at a particular page was removed and there had also been earlier removal of a poster. The lead hands were then made responsible for checking the section for any such material and there were no further occurrences.

[34] The Unions were kept advised of concerns throughout this time. Mr Crooks did have to put up with negative comments and unfounded rumours. The steps taken to remove any safety concerns were in accordance with the management plan to maintain a safe workplace and be neutral and impartial with both employees until the matter could be dealt with by the Court. There were reasonable steps taken to ensure Mr Crooks' safety at work and there were no serious incidents. The action taken by CEC when issues did occur was, in my view, justified and what a fair and reasonable employer in these difficult circumstances would do.

Guilty plea

[35] On 21 February 2005, Mr Crooks pleaded guilty to two charges. Mr Brooks' evidence is that CEC was not specifically aware of what charges Mr Crooks had pleaded guilty to. In or about March 2005 Mr Brooks telephoned the youth Police officer who advised that Mr Crooks had accepted two charges of assault of a female but would not give any further details. Mr Brooks' evidence, which I accept, was that it was not until later on the day following Mr Crooks' sentencing on 4 May 2005, that CEC's lawyer advised what the two specific charges for which Mr Crooks was sentenced. The two charges were inducing an indecent act and indecent assault involving a girl aged between 12 and 16 years.

[36] Mr Crooks had however suggested to Mr Brooks early on in 2005 that he would plead guilty. There is a dispute, although it is not one that I find necessary to resolve, as to whether Mr Crooks told Mr Brooks that he would plead guilty once the charges were amended to reflect the reality of the situation. Mr Brooks said that Mr Crooks told him that the main reason for the plea of guilty was to resolve the situation quicker.

[37] I find at or about that time Mr Brooks referred Mr Crooks to the part of the human resource manual that concerned criminal convictions.

[38] Mr Kilpatrick submits that Mr Crooks received no warning that he was going to be dismissed because he was kept on in his employment after he entered a guilty plea until he was sentenced. Mr Kilpatrick submits, therefore, that CEC effectively overlooked the conduct and must be taken to have acquiesced in Mr Crooks' employment: *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421.

[39] I do not accept that submission. Mr Crooks knew that CEC was waiting for the sentencing outcome and that a decision as to his employment would be made at that time. Mr Crooks also knew that termination of his employment was a possibility depending on sentence. Mr Crooks asked CEC to confirm in writing in March 2005 and again through Mr Eaton on the day of his sentencing on 4 May 2005, that his employment would be terminated if he was imprisoned.

[40] CEC came under pressure by Mr Z's union, EPMU, following the guilty plea to urgently ensure that Mr Z and Mr Crooks did not interact at all during the period leading up to sentencing.

[41] There was a meeting held with Mr Crooks, Mr Brooks and Mr Rout to look again at separating Mr Crooks and Mr Z. Mr Crooks subsequently made it very clear in an email to the company on 24 February 2005 that he was not prepared to be removed from the engine shop to make further accommodations for Mr Z. Mr Crooks remained in the engine shop. It was thought that there may be some alternative NDT work on the V2500 engine line, however the work was slower at getting started than originally anticipated so that was not an option for Mr Crooks.

[42] In early March 2005, Mr Z was offered a period of special paid leave and assistance from a doctor who specialised in workplace stress. Mr Z was on special leave from 7 March until 17 April 2005.

March 2005 meeting

[43] As the date for sentencing approached, Mr Crooks' lawyer, Jonathon Eaton, advised him that if there was to be a sentence of imprisonment imposed, he intended to argue for a deferral of sentence pending an application to apply for home detention. Mr Eaton told Mr Crooks that his prospects of being successful in such an application would be enhanced if CEC could confirm to the Court that Mr Crooks' work was integral in the organisation because of his specialist skills or that there was a risk of termination of employment if a custodial sentence was imposed.

[44] Mr Crooks requested a meeting with Mr Brooks in March 2005. The meeting was duly held and attended by Mr Crooks, Mr Bassett, the AMEA Union representative, Peter Sealey, Tim Fowler, the NDT Level 3 Engineer, Mr Rout and Mr Brooks. Mr Brooks said that he was not prepared to put anything in writing about Mr Crooks' specialist skills or that there was a risk of termination of employment. He said that the matter would be dealt with in accordance with the policies within the human resource manual.

[45] Mr Crooks said that Mr Brooks told him that he was acting on instructions from Mr Smith in the matter. Mr Smith denied that. It is possible that Mr Brooks, in conveying to Mr Crooks that CEC would not promise or commit to an outcome at that point, left Mr Crooks with the understanding that was Mr Smith's instruction. I find though that it was the approach CEC had consistently adopted to that point in time rather than a specific instruction at that time.

[46] Mr Crooks was permitted, and did, photocopy the relevant part of the human resources manual which was later provided to the District Court Judge at sentencing.

Email complaint

[47] In early April 2005, Mr Crooks raised a personal grievance in writing to Mr Brooks that Mr Z was in possession of an email which he had sent to Mr Eaton about his sentencing.

[48] I am satisfied that the grievance was followed up. Mr Z was advised that there were issues to be discussed and when he returned from stress leave the matter was investigated and Mr Z received a warning in relation to it. I am satisfied that the matter was appropriately handled and there can be no complaint as a result.

[49] In or about April 2005, Mr Z also raised a personal grievance that CEC had breached its obligations to provide him with a healthy and safe workplace. It was agreed at or about that time to further stagger the separation time for shift change and provide a 30 minute separation period.

Leave application

[50] On 4 April 2005, Mr Crooks applied for 27 days' leave from 4 May 2005 until 10 June 2005. The leave application was submitted to Mr Rout. Mr Rout went to talk to Mr Brooks about the application and Mr Brooks, probably in consultation with Mr Smith, decided to adopt a wait-and-see approach to see what happened at sentencing.

[51] I shall come again to the leave issue when I consider the dismissal, but I find that waiting and seeing what would happen at sentencing was not an unreasonable approach taken by CEC that would give rise to a claim that it was unjustified.

[52] Mr Smith communicated during this time with both Unions because there had been some concerns raised by members of both unions. AMEA did not have any concerns with the way that CEC had handled the difficult situation with the two employees leading up to sentencing and described it as *exemplary* – document 45 agreed bundle.

Sentencing

[53] On 4 May 2005 Mr Crooks appeared for sentencing. It became apparent during the sentencing that a custodial sentence would be imposed. Mr Eaton put forward a submission for deferral of Mr Crooks' sentence on the basis that a custodial sentence would almost inevitably lead to Mr Crooks' dismissal.

[54] The sentencing Judge had the relevant part from the human resources policy which Mr Crooks had provided, together with character and work references for the purposes of sentencing. The Judge was not prepared to grant a deferral on that basis alone, but did grant an adjournment so that Mr Eaton could contact CEC to clarify whether dismissal was a likely outcome of a custodial sentence.

[55] Mr Eaton provided an affidavit for the purpose of the Authority's investigation and described in his affidavit the telephone call he had with Mr Smith from within the Court building. There was no dispute as to Mr Eaton's evidence and I accept that it is an accurate account of the telephone call. Mr Eaton telephoned Mr Smith and explained the position that had been reached at Court. Mr Smith consulted with Mr Brooks for several minutes during that telephone call. Mr Smith then advised Mr Eaton that CEC was unable to confirm that Mr Crooks' employment would be terminated if the deferral application was unsuccessful. Mr Eaton recalled Mr Smith indicating that a number of factors would have to be considered by CEC. Mr Eaton said that his impression was that termination was by no means inevitable and that Mr Crooks was just as likely to retain his job if deferral was not ordered.

[56] Mr Eaton then returned to the Court and confirmed CEC's position for the Judge. The application for deferral was dismissed and Mr Crooks was sentenced to 16 months' imprisonment with leave to apply for home detention.

[57] Mr Kilpatrick submits that it was CEC's actions before and during the sentencing hearing that meant the applicant was unable to perform his employment obligations beyond the date of sentence, 4 May 2005. Mr Kilpatrick submits that a reasonable employer would have confirmed to the Court that a period of imprisonment would have resulted in dismissal so that the Court could grant a deferred sentence.

[58] There certainly are circumstances where an employer voluntarily takes steps to assist employees in terms of sentencing for a criminal offence. Considering the matter objectively, I find in the particular circumstances of this case a fair and reasonable employer with obligations both to Mr Crooks and Mr Z, would not have done anything to influence the outcome of sentencing. The management plan had always been to adopt an impartial and neutral position and Mr Smith's response was appropriate. Mr Smith was further justified in refusing to confirm to the Court that dismissal was likely until he knew the outcome of sentencing. He could then weigh, as CEC's own policy required, the sentencing outcome with other factors in making a final decision. To do otherwise, in my view, would lead CEC open to criticism that there had been predetermination of the disciplinary outcome.

Publicity

[59] On 5 May 2005, there was an article in *The Christchurch Press* about the sentencing. The article did not name CEC but referred to Mr Crooks' name and his occupation. Mr Brooks and Mr Smith fielded some calls about the matter. A few days after sentencing, Mr Eaton was contacted by CEC's solicitor seeking guidance on how to arrange a visit from CEC management to the prison. Mr Crooks sent the necessary forms to Mr Brooks from prison under cover of letter dated 9 May 2005. In that letter Mr Crooks made it clear that he wanted to return to work, that he was remorseful and made reference to the possibility of home detention.

[60] CEC filed an application to visit Mr Crooks with the Department of Corrections on 10 May 2005 and was given permission to visit him in prison on 18 May 2005.

Dismissal

[61] Mr Smith was not able to attend the Authority's investigation meeting in person as he was in America. He provided an affidavit and was contacted by telephone and then attended subsequently at the Authority for questioning by the Authority and counsel.

[62] Mr Smith said that dismissal was a last resort for CEC and such a decision was not made lightly. He said that after Mr Crooks' sentencing he reviewed all the facts, took some legal advice and spoke to Mr Brooks. Mr Smith then made a decision to dismiss Mr Crooks and considered that he should deliver the news to him in person at the prison. Mr Smith prepared a letter of dismissal dated 18 May 2005 which provided the following reasons for dismissal:

- The effect of Mr Crooks' criminal conviction and sentencing meant that he could not fulfil his employment obligations. It was specifically noted that there had been consideration of the leave to apply for home detention and the 26 leave days owing;
- Mr Crooks' conviction as such breached the company's code of conduct; and
- The article in *The Christchurch Press* and the discrediting of CEC.

[63] The letter concluded with advice that Mr Smith had reached the view in light of Mr Crooks' conduct and inability to fulfil his employment obligations that CEC could no longer have the trust and confidence in him that it required of its employees and Mr Crooks was terminated immediately.

[64] Mr Smith expanded somewhat on those reasons in his evidence to include incompatibility, a risk of polarising the workforce and the safety environment.

[65] I find that Mr Smith took the letter of dismissal with him when he went with Mr Brooks to the prison on 18 May 2005. Mr Brooks and Mr Smith had to talk to Mr Crooks through a screen and they were not able to hand the letter of dismissal across to him at the time of the meeting. I find the letter was left with officials at the prison and given to Mr Crooks two days later.

[66] The meeting on 18 May 2005 was very difficult for everyone. Mr Crooks said that the only reason he was given for termination of his employment was the length of the custodial sentence. Mr Smith said he felt he went through all the reasons, including the history of the matter, and took strong exception to it being suggested to him by Mr Kilpatrick that he had tried to subsequently bolster the reasons for dismissal. I find that the reasons in the letter were those in Mr Smith's mind when he dismissed Mr Crooks, although they may not have been clearly articulated to Mr Crooks at the time.

[67] Mr Crooks said that he was *absolutely gutted* when he was told that his employment was to be terminated. Mr Smith was also concerned for Mr Crooks after the meeting and asked prison officials to keep an eye on him. Mr Crooks said that he remained numb for weeks and that there were options other than dismissal. Mr Crooks was released on home detention on 4 July 2005.

Determination

Claim of unjustified actions causing disadvantage from January 2004 until 4 May 2005

[68] Mr Crooks did not lose any income for the 17 months from arrest to sentencing. Employees were told that they were not to harass Mr Crooks and were advised of the consequences of doing so. Employees were further advised that Mr Crooks was to be considered innocent until proven otherwise and told that the Court would in due course make the right decision. That period was not an easy time for many at CEC including Mr Crooks. To Mr Crooks' credit, he did everything he was asked to by Mr Rout and kept his head down. He also kept Mr Brooks updated with what was happening with his Court appearances.

[69] I have not found that any of CEC's actions from January 2004 until sentencing were unjustified actions. CEC has justified all its actions during that period. Mr Crooks does not have a personal grievance that he was disadvantaged as a result of CEC's unjustified actions.

Dismissal

[70] Mr Kilpatrick submits that none of the reasons put forward by CEC for Mr Crooks' dismissal are capable of justifying summary dismissal. Further, Mr Kilpatrick submits that the dismissal was procedurally unfair.

[71] Mr Crooks had a sexual relationship with the 14 year old daughter of a co-worker at CEC. He was sentenced to a term of imprisonment for 16 months although he was placed on home detention having served about two months of that sentence.

[72] CEC was required in terms of its own policy, given the criminal conviction and imprisonment, to assess the anticipated length of Mr Crooks' absence and the implications for the business. It was, in terms of its own policy, entitled to consider continued employment having regard to the business' reputation, the responsibilities of Mr Crooks, the nature of the offence committed and any other relevant factors.

[73] I have not accepted Mr Kilpatrick's submission that CEC was effectively responsible for Mr Crooks not being able to perform his employment obligations because it did not assist him in his application for deferral of sentence. It was Mr Crooks' actions that caused him to be placed in a position where he could no longer perform his employment obligations.

[74] Mr Kilpatrick submits that Mr Crooks' conviction had no bearing on his position as aircraft engineer and no effect on CEC's reputation. He submits that there must be a clear relationship between an employee's conduct and the employee's position and relies for that proposition on *Craigie v Air New Zealand* [2006] 1 ERNZ 147. In that case, some earlier domestic matters were not found to have any bearing on Mr Craigie's employment and had not resulted in publicity. Unlike the earlier incidents, Mr Craigie's conviction under the civil aviation rules and regulations had a direct relationship to and potential impact on his employment and there was publicity which identified the employer.

[75] I do not accept that because Mr Crooks' relationship with the complainant occurred outside work it cannot amount to misconduct. The Employment Court judgment of *Hodgson v The Warehouse* [1998] 3 ERNZ 76 concerned an application for interim reinstatement where the

employee had been convicted for downloading objectionable material on his home computer. In that case it was held that the house rules were not limited so as to exclude activities outside of the workplace in terms of serious misconduct. CEC's policy provides that it has the right to consider continued employment if an employee is found guilty of a criminal offence, either at work or off duty. There was also a relationship between the complainant and another employee of CEC. In terms of publicity and reputation, Mr Crooks says that CEC was not named in the press article and that he has not been known by his published legal name for over 30 years. The evidence was that Mr Smith and Mr Brooks received telephone calls as a result of the article and that people put two and two together about CEC because the article described Mr Crooks as a highly qualified aircraft engineer. The publicity did have impact, I find, on CEC's reputation.

[76] Mr Kilpatrick submitted that the incompatibility between Mr Z and Mr Crooks could not justify dismissal and that the situation had been successfully managed for over a year. He submits in terms of the test in *Hayward v Tairawhiti Polytechnic* AC43/05, 13 August 2005, Travis J, that it was Mr Z who caused the incompatibility in the workplace and therefore the reason for incompatibility cannot be justifiable against Mr Crooks.

[77] The difficulty with that submission is that the incompatibility only arose because Mr Z became aware of the relationship Mr Crooks had with his daughter. It is clear to me after hearing the evidence that from that point on the situation was managed but only with a considerable management input and at some financial cost and disruption to CEC. Although not the sole reason for dismissal, CEC did consider its obligation to other staff in making its decision. Mr Rout said that after Mr Crooks was sentenced most people were pleased that Mr Crooks did not come back to work.

[78] In terms of the substantive justification for the dismissal, a fair and reasonable employer was entitled to conclude that because of Mr Crooks' sentence he could not fulfil his employment obligations even taking into account a possibility of home detention and the leave application. I also find that a fair and reasonable employer was also entitled to conclude that the nature of Mr Crooks' conviction, the relationship between the complainant and Mr Z and the resulting publication at the time of sentencing meant that the foundation of trust and confidence that is essential in an employment relationship was undermined to a significant degree. A fair and reasonable employer would have dismissed Mr Crooks. The dismissal was substantively justified.

[79] It was for Mr Crooks the worst possible outcome. He was feeling very low because of the prison sentence and dismissal was another significant blow on top of that. Clearly the dismissal had a significant and long term effect on him. Mr Crooks was well thought of in his employment and had considerable skills. In my view though it must have occurred to him that there were possible consequences to his actions, not only in a criminal sense but also as an employee.

[80] I now turn to the procedural fairness of the dismissal and consider what a fair and reasonable employer would have done in the circumstances.

[81] Mr Crooks knew that there was a risk that his employment was in jeopardy. He wrote to Mr Brooks and essentially pleaded for his job and apologised for his actions on 9 May 2005. I find that Mr Smith considered that letter, Mr Crooks' sentence, the nature of the conviction, the possibility of home detention, the leave application and the length of Mr Crooks' service before arriving at its decision to dismiss. I do not find that the evidence supports pre-determination of the dismissal prior to sentencing. Essentially Mr Smith and Mr Brooks had all the facts before them.

[82] There was an element of procedural unfairness and it was this. Mr Crooks was not given an opportunity to be heard before he was dismissed. Mr Crooks should have been told that CEC was considering dismissal and the reasons why and given an opportunity to explain or mitigate his

conduct to Mr Smith before a decision was made and he was dismissed. Given the difficulties with Mr Crooks being in prison, a fair and reasonable employer would have written to him prior to the 18 May visit to advise that CEC was considering dismissal and the reasons why. That would have also dealt with any difficulties about the reasons for the dismissal. The meeting on 18 May 2005 could then have been the opportunity for Mr Crooks to be heard in relation to the matter before a decision was made to dismiss.

[83] I have considered whether this procedural unfairness at the last stage of a long process during which the actions of CEC were very fair and reasonable is sufficient to render dismissal unjustified. One of the minimum requirements of a fair process is an opportunity for an employee to be heard to refute, explain or mitigate conduct. On that basis I find that Mr Crooks is entitled to a finding that his dismissal was unjustified because of the procedural deficiencies I have set out above.

[84] In this case, though, even with a fair process, the outcome would have been the same. CEC would have decided to dismiss Mr Crooks and the dismissal would have been substantively justified.

[85] There was an issue raised that Mr Crooks received disparate treatment compared with another employee who was imprisoned for a drink driving charge. That employee was not dismissed but did have some strict conditions attached to continued employment. I heard evidence and was provided with documentation about the other employee's situation. In my view, that employee's situation is different from Mr Crooks' situation. There is a difference in the nature of the offending, the relationship with the co-worker and therefore the need for CEC to take steps at work and the publicity issue. I do not find that the incident was materially similar.

[86] Mr Kilpatrick submits that in terms of remedies there was no contribution by Mr Crooks for the situation giving rise to the personal grievance. I find that there was blameworthy conduct on the part of Mr Crooks. I accept Ms Donaghy's submission that the circumstances Mr Crooks was in were of his own making. Mr Crooks' conduct that gave rise to the personal grievance was so significant that I do not find he is entitled to any remedies save as to a reasonable contribution towards his costs.

Costs

[87] I reserve the issue of costs. I would encourage the parties to see if the matter can be resolved by agreement, failing which the submissions can be provided to the Authority.

H Doyle
Member of Employment Relations Authority