Determination Number: AA 396/05
File Number: AEA 421/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Maxwell Henry Davenport (Applicant)
AND	Air New Zealand Limited (Respondent)
REPRESENTATIVES	Ross France, Counsel for Applicant Kevin Thompson, Counsel for Respondent
MEMBER OF AUTHORITY	Marija Urlich
INVESTIGATION MEETING	25 August 2005
DATE OF DETERMINATION	5 October 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Max Davenport was employed by Air New Zealand Limited from 1997 until his dismissal on 6 April 2005 following the investigation into an allegation of serious misconduct. Mr Davenport is a qualified diesel mechanic with many years experience. He commenced employment with Air NZ as an allied tradesperson in the wheels and brakes division in October 1997 and transferred to the marine and industrial division (M&I division") in October 1999 eventually moving to the role of aircraft tradesperson. M&I is a division of Air NZ's engineering services business unit where large gas turbine engines are overhauled and repaired. Mr Davenport remained employed in M&I until his dismissal. Prior to his move to M&I Mr Davenport's employment was uneventful but at M&I Mr Davenport says he was denied training opportunities and unfairly labelled "thick and dumb". He says that attitude towards him unfairly tainted the employer's investigation into the allegation of serious misconduct for which he was dismissed.

[2] Mr Davenport seeks reinstatement to the position from which he was dismissed, reimbursement of wages lost as a consequence of his dismissal and compensation for the hurt and humiliation suffered as a consequence of his dismissal.

[3] Air NZ says Mr Davenport was treated fairly throughout his employment, that he was provided with training opportunities and the decision to dismiss him was one open to Air NZ having conducted a fair and reasonable investigation into the allegation of serious misconduct.

[4] To resolve this employment relationship problem the Authority must determine whether the decision to dismiss Mr Davenport was fair and reasonable in all the circumstances. The applicable test for justification to apply to a consideration of Mr Davenport's dismissal is that provided by section 103A of the Employment Relations Act 2000.

[5] I record that the parties have attended mediation in an attempt to resolve this employment

relationship problem themselves.

(i) The complaint – abusive behaviour on 6 February 2005

[6] On Thursday, 10 February 2005 Air NZ received a complaint from Glenn Macfarlane, a co-worker of Mr Davenport's in M&I, that Mr Davenport had directed unwarranted abuse at him on Sunday, 6 February 2005. Mr Macfarlane sent his complaint to George Mollison, a production leader and copied it to another production leader, Bob Cox and John Callesen, who at that time held the position of Maintenance Manager, M&I.

[7] Mr Macfarlane's complaint detailed the following alleged abuse; that at about 7.30am on 6 February Mr Davenport seemed to have "a bee in his bonnet" about Mr Macfarlane's representation of him as union delegate in 2004, Mr Macfarlane spoke with Mr Davenport outside and was relieved when Wayne Hunter arrived and Mr Davenport returned to work, that at about 1pm that day Mr Davenport approached Mr Macfarlane "out of the blue" and started to abuse him with comments such as "you think you're cool because you're the union rep", "you're nothing but an arsehole, and you know what happens to arseholes? They get wiped and I'm going to make sure I'll do the wiping" and also called Mr Macfarlane a "f***wit" and "c***". Mr Macfarlane says he tried to ignore Mr Davenport and asked him to leave him alone. He says he felt extremely uncomfortable and threatened and thought Mr Davenport may become "physical". Mr Macfarlane says the incident was witnessed by Wayne Hunter and Matthew Sharp.

[8] Also on 10 February Mr Mollison, at Mr Callesen's request, received statements from Mr Hunter and Mr Sharp which corroborate Mr Macfarlane's complaint.

(ii) The investigation

[9] On Friday, 11 February Mr Callesen spoke with Mr Mollison about Mr Macfarlane's complaint. Mr Mollison gave Mr Callesen Mr Hunter and Mr Sharp's statements. Mr Callesen read through the documents and said he quickly came to the conclusion that an investigation into the alleged incident was required. He also considered that it may be appropriate to suspend Mr Davenport given the nature of the incident, Mr Macfarlane's expressed concern for his safety, Mr Hunter and Mr Sharp's comments to Mr Mollison, as related to Mr Callesen, that they were concerned Mr Davenport may retaliate if he knew they had provided statements and the safety sensitive nature of the work environment.

[10] On Monday, 14 February Mr Callesen wrote to Mr Davenport advising he had received a report of an alleged incident on 6 February involving Mr Davenport and Mr Macfarlane and inviting Mr Davenport to attend a preliminary meeting that same day to discuss the appropriateness of suspension pending an investigation. The letter also advised Mr Davenport to bring a union representative with him to the meeting.

[11] The meeting proceeded as advised. Mr Davenport attended with his union delegate, Don Cheale. Mr Callesen outlined the allegations, said they were serious and invited Mr Davenport to comment on the appropriateness of suspension. Mr Callesen said Mr Davenport accepted the suspension and his only question was whether he would receive full pay while suspended, which was confirmed. Mr Davenport told me accepted the suspension because he already felt he was guilty; Mr Macfarlane had not been suspended and there were two of them involved right from the start. Mr Davenport said he told the meeting he did not accept the allegation and that it was all lies. Mr Davenport was then advised he was suspended on full pay. The details of the suspension were set out in a letter to Mr Davenport dated 14 February. The letter also advised that the next disciplinary meeting would be held on Wednesday, 23 February and asked Mr Davenport to contact

either of the production leaders every morning to ensure close communication.

[12] On 16 February Mr Callesen wrote to Mr Davenport advising:

(i) an investigation into an alleged incident between Mr Davenport and a fellow employee had commenced;
(ii) the allegation concerned reports of extremely abusive conduct towards that employee;
(iii) copies of reports gathered in that investigation were enclosed – the complaint and statements of the two witnesses named in the complaint;
(iv) Mr Davenport had previously been counselled and disciplined for similar incidents;
(v) Mr Davenport would have an opportunity to provide an explanation at the meeting to be held on 23 February; and
(vi) if the allegation of misconduct was upheld this could lead to disciplinary action up to and including dismissal.

[13] The meeting scheduled for 23 February was postponed to 4 March 2005 following a request for an adjournment from Mr Davenport's solicitor, Mr France. Mr Davenport's personnel file was made available to Mr France.

[14] Mr Callesen asked Mr Motet, the business unit's human resource advisor, to check the content and accuracy of the complaint and witness statements by speaking with Mr Macfarlane, Mr Hunter and Mr Sharp. On 27 February Mr Motet advised he was satisfied with the integrity of the statements.

[15] On 4 March Mr Davenport and Mr France, meet with Mr Callesen and Roxanne Saba, who, due to availability, took over the human resource advisor role from Mr Motet. Mr Davenport tabled a written response to the allegation contained in the complaint. This response included:

Unfair treatment in M&I

(i) that Mr Davenport had been unreasonably denied training opportunities during his employment in M&I;
(ii) that in October 1999 he had been told he did not have the skill level required to work in M&I and put on stator case modules until his skill level improved, at which he remained;
(iii) since then he believed he had been labelled "thick and dumb" and this attitude towards him had filtered to the shop floor;
(iv) the morale at M&I was very low because staff could not communicate with management;
(v) Mr Davenport had been treated badly and labelled a "stirrer" because he had stood up for himself;

6 February 2005, 7.30am

(vi) Mr Davenport said to Mr Macfarlane "I hope you're not going to represent Wayne [Hunter] like you represented me." Mr Macfarlane replied "If you have got a problem lets talk about it outside.";
(vii) Mr Macfarlane then became verbally aggressive towards Mr Davenport; he spoke disparagingly of Mr Davenport's recently deceased father, said he "didn't fit in" at Air NZ and that Air NZ was trying to get rid of him, and moved into Mr Davenport's physical space with his fists up. Mr Davenport felt uncomfortable and threatened. Mr Hunter then joined them and Mr Macfarlane backed away;

6 February 2005, 1pm

(viii) Mr Davenport approached Mr Macfarlane at 1pm and said "let's forget what was said this morning". Mr Davenport described his approach as conciliatory;
(ix) Mr Macfarlane told him he did not want to talk to him and Mr Davenport walked away;
(x) Mr Davenport denied threatening Mr McFarlane verbally or physically;
(xi) Mr Davenport said he could not understand Mr Macfarlane's claim that he felt threatened because Mr Macfarlane was considerably larger than Mr Davenport;
(xii) Mr Davenport believed it was significant that Mr Macfarlane did not raise his complaint immediately; and
(xiii) Mr Hunter and Mr Sharp were working in the same area but not close enough to hear.

[16] The meeting adjourned for Mr Callesen and Ms Saba to read the statement. On reconvening the meeting there was some discussion of the issues raised by Mr Davenport's statement and the meeting adjourned for Mr Callesen to further investigate the issues raised.

[17] Mr Macfarlane provided a written response to Mr Callesen on 4 March 2005.

[18] Mr Callesen and Ms Saba interviewed Mr Macfarlane on 4 March regarding the discrepancies between his and Mr Davenport's statements. Mr Callesen said Mr Macfarlane's comments were consistent with his statement and that he remained upset and concerned for his safety.

[19] On 7 March Mr Callesen and Ms Saba meet with Mr Hunter and Mr Sharp separately. Their statements also remained consistent.

[20] The next disciplinary meeting was held on 9 March 2005. The same attendees were present. Mr Callesen presented his response to Mr Davenport which he called a "composite document". It goes through each of the issues raised in Mr Davenport's statement and summarises the information received and the investigation findings to date:

Unfair treatment in M&I

(i) Mr Davenport had received appropriate training, both on the job and classroom based during his employment with M&I;
(ii) May 2000 Mr Davenport was put on a three month performance review with monthly report from his leading hand. At the end of this period it was decided Mr Davenport would remain working on the stator case module;
(iii) M&I management had not labelled Mr Davenport "thick and dumb" and steps had been taken to raise Mr Davenport's skill level; and
(iv) Mr Davenport had a record of technical and interpersonal problems since joining M&I in 1999. He had received disciplinary warnings for unacceptable behaviour involving abusive language directed at co-workers and been referred to EAP services.

6 February 2005, 7.30am

(v) Mr Macfarlane making disparaging comments about Mr Davenport's deceased father would be out of character; Mr Macfarlane had worked as a 2IC and was well respected by employees and management as a union representative. Mr Macfarlane denied becoming abusive and said he was trying to keep Mr Davenport calm;
(vi) the investigation established the death of Mr Davenport's father was not well known in the work place and Mr Macfarlane had little opportunity to become aware of Mr Davenport's bereavement because he was away from work for most of this period;
(vii) Mr Macfarlane denied making any disparaging remark about Mr Davenport's father and denied any knowledge of his father's death until reading Mr Davenport's statement;
(viii) Mr Macfarlane denied saying to Mr Davenport he did not fit in and Air NZ wanted to

get rid of him;

(ix) Mr Macfarlane said he felt threatened by Mr Davenport's actions and sat seated during the discussion and Mr Hunter said as he approached Mr Davenport appeared agitated and Mr Macfarlane did not have his fists up.

6 February 2005, 1pm

(x) Mr Macfarlane's responses are recorded; that Mr Davenport was not conciliatory and he directed the comments about "arseholes" and their treatment at Mr Macfarlane. Mr Hunter and Mr Sharp confirmed they heard Mr Davenport use threatening and inappropriate language towards Mr Macfarlane; Mr Hunter is certain he heard Mr Davenport call Mr Macfarlane a "f******arsehole" and Mr Sharp confirmed he witnessed and heard Mr Davenport direct abusive language to Mr Macfarlane; and

(xi) the response records Mr Macfarlane's explanation for the delay in raising his complaint; Sunday, 6 February was the last day of his rostered week, the next rostered day was Wednesday, 9 February when he sought advice from his union delegate and organiser about how to handle the situation and raised his complaint first thing on Thursday, 10 February.

Investigation summary

(xii) Mr Davenport has been treated fairly by Air NZ, he has been provided with training opportunities and not labelled "thick and dumb";

(xiii) Mr Davenport has struggled to meet the technical skill level necessary to move beyond the stator case module;

(xiv) Mr Davenport has serious interpersonal and communication problems for which he has been counselled, disciplined and offered EAP counselling services, which he has attended;

(xv) Mr Davenport has been involved in three incidents of abusive and inappropriate behaviour over the preceding 15 months;

(xvi) a number of Mr Davenport's statements are fabricated and untrue;

(xvii) Mr Macfarlane has a high degree of credibility and trust among co-workers and management;

(xviii) most of Mr Macfarlane's account is supported by Mr Hunter and Mr Sharp's statements; and

(xix) the investigation concludes Mr Davenport's statement of his treatment since 1999 is unfounded and his version of events on 6 February is inaccurate, fabricated and largely untrue.

[21] Mr Davenport was invited to make a further response regarding the investigation findings as set out in the composite document. Mr Davenport confirmed his own statement and said he did not accept Mr Macfarlane, Mr Hunter and Mr Sharp's version of events.

[22] Mr Callesen then advised the next stage was to confirm whether Mr Davenport's conduct amounted to serious misconduct and to consider the issue of penalty.

[23] Mr France and Mr Davenport said the incidents did not warrant dismissal and Mr Davenport pledged his loyalty to Air NZ, said he wished to remain an employee and heal the relationship and that he was apologetic for what had happened. Mr Callesen acknowledged these responses and said these were serious issues to deal with. Mr Davenport then said the investigation was part of a plan to get rid of him. The meeting ended shortly thereafter.

[24] The final disciplinary meeting was convened on 6 April to receive Mr Davenport's response to the investigation summary. The same attendees were present. Mr Callesen told Mr Davenport he

believed, based on the information received from the investigation, that Mr Davenport's conduct amounted to serious misconduct and that he was in a position to dismiss Mr Davenport. Mr Callesen then asked Mr Davenport if there was anything further he wished to say which might change his mind. Mr Davenport said there was nothing further he wished to say. Mr Callesen then advised Mr Davenport he was dismissed. Mr Callesen wrote to Mr Davenport later that day confirming his dismissal which includes:

> "The incident on 6 February 2005 is serious in its own right. In addition, on balance, the Company accepts the accounts of Mr Macfarlane and the two witnesses, and concludes that you have not been truthful in your explanation. This, combined with the threatening behaviour displayed, means that you have breached the trust and confidence that we need to have in you as an employee. We believe your behaviour in the circumstances constitutes serious misconduct. Given the seriousness of the above issues, the appropriate disciplinary action is dismissal.
>
> Arrangements will be made in regards to your final pay, and clearing up any administrative matters. We are prepared to terminate your employment on the contractual period of notice."

Test for justification

[25] Section 103A Employment Relations Act provides the applicable test for justification:

> "103A Test for justification
> For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred."

[26] Mr France submits Mr Davenport's dismissal was unjustified because:

(i) Air NZ was obliged to follow its disciplinary procedure and treat the conduct complained of as poor performance which warranted a final written warning in the event the complaint was upheld;
(ii) the conduct complained of was not serious misconduct give the nature of the workplace and the fact the alleged comments were directed at a co-worker;
(iii) one of the grounds of serious misconduct, providing untruthful explanations during the investigation, was not put to Mr Davenport to comment on.

(i) Disciplinary procedure not followed

[27] Mr France submits that the written verbal warning issued to Mr Davenport on 14 May, and in force at the time of his dismissal, triggered the disciplinary procedure for poor performance. The 14 May warning categorised Mr Davenport's use of insulting language to another employee as "unacceptable behaviour". Under the heading "Disciplinary procedure for poor performance" the Air NZ disciplinary policy provides that another incident of unacceptable behaviour could result in a final written warning being issued.

[28] Mr France submits that if it is accepted that Mr Davenport behaved in the way complained of the behaviour could not amount to serious misconduct under the disciplinary policy but rather poor performance, under that same policy, because Air NZ characterised the conduct complained of as unacceptable behaviour and that in such circumstances the appropriate disciplinary action, applying the disciplinary policy, would be a final written warning.

[29] Air New Zealand has a disciplinary policy which Mr Callesen, the decision-maker, referred to in his deliberations. The disciplinary policy is explicit that it provides guidelines for managers and employees as to how disciplinary investigations should be conducted and disciplinary action taken

in the appropriate circumstances.

[30] Mr Davenport was advised from the outset of Mr Callesen's disciplinary enquiry that the allegations being investigated concerned two aspects - verbal abuse and threatening behaviour (refer letter 16 February). Mr Davenport was also advised from the outset that the alleged conduct potentially amounted to misconduct and that the outcome could be dismissal.

[31] I do not accept that the decision to issue Mr Davenport with a warning for unacceptable behaviour involving threatening language locked Air NZ into a disciplinary course of performance management for any future similar conduct. Mr Davenport was not on a performance management programme regarding unacceptable behaviour. There was no evidence Mr Davenport had been advised using abusive language in the workplace was a performance management issue. Mr Davenport told me he was aware using abusive language in the workplace was unacceptable. Mr Davenport's alleged conduct on 6 February was characterised from the start as potentially amounting to misconduct, with a potential outcome of dismissal. This placed the investigation within the "Disciplinary procedure for misconduct" section of the disciplinary policy. Whether the ultimate disciplinary outcome was fair and reasonable is a question of justification not the application of the disciplinary policy.

(ii) Conduct could not amount to serious misconduct

[32] Mr France also submits that, if it is accepted the behaviour complained of occurred, then that behaviour cannot amount to serious misconduct warranting dismissal because it did not involve direct disobedience or language directed at a supervisor or manager. He submits given the nature of the workplace and Mr Davenport's known propensity to swear these factors weighed against a finding of serious misconduct.

[33] Mr Davenport told me he was aware that inappropriate language was unacceptable in the workplace. There was no evidence received that swearing was accepted in the workplace. There was no evidence received that threatening language or conduct was acceptable in the workplace.

[34] The conclusions reached by Mr Callesen where open to him having conducted a fair investigation; the allegations and the basis of those allegations were put to Mr Davenport to comment on, the issues raised by Mr Davenport were investigated, tentative conclusions were put to Mr Davenport to provide further comment, Mr Davenport was invited to make submissions as to penalty and Mr Callesen considered alternatives to dismissal.

[35] I am satisfied Mr Callesen had the requisite delegated authority to dismiss Mr Davenport. He said he had delegated authority from the relevant group general manager to conduct and conclude the investigation. This group general manager and general manager were kept up dated as to the progress of the investigation and Mr Callesen was assisted in his investigation by a human resource advisor.

(iii) No opportunity to comment on allegations

[36] Mr France submits that at no time during the disciplinary process was Mr Davenport advised his responses to the disciplinary action could constitute possible serious misconduct and a further reason for his dismissal. He submits that it is fundamental to a fair process that all allegations are put to an employee to comment on.

[37] The allegations investigated by Mr Callesen are set out in the first paragraph of the letter of dismissal:

"…your verbal abuse and threatening behaviour of a work colleague on Sunday 6 February 2005."

[38] The factual basis of the allegations were upheld and the reasons set out in the response document dated 6 March 2005. The penultimate paragraph of the dismissal letter deals with whether that factual basis amounts to serious misconduct warranting dismissal. The conclusion is that it does for the following reasons:

(i) on balance Air NZ accepted the accounts of the complainant and the two witnesses over that of Mr Davenport;
(ii) Mr Davenport was not truthful in his account of events;
(iii) the conduct complained of was threatening;
(iv) the upholding of the allegation of threatening conduct and untruthful explanations given during the investigation of those allegations combine to a loss of trust and confidence; and
(v) that behaviour constitutes serious misconduct serious enough to warrant dismissal

[39] Was it justifiable for Air NZ to use its findings as to Mr Davenport's conduct during the investigation as grounds to conclude it had lost trust and confidence to the degree that his conduct amounted to serious misconduct warranting dismissal?

[40] The allegations of verbal abuse and threatening behaviour and the investigation into those allegations were necessarily intertwined. Mr Callesen said he expected Mr Davenport to participate in the disciplinary process in good faith and not mislead the investigation. This was a reasonable expectation. Mr Callesen found Mr Davenport's account of the incidents on 6 February was untrue. I find that was a decision open to him; the complainant's account was supported by two witnesses and the conduct complained of was consistent with Mr Davenport's history of using abusive language in the work place and poor interpersonal skills. This finding and its basis were put to Mr Davenport to comment on.

[41] I do not accept the finding of untruthfulness was a separate allegation. It was an element of Mr Davenport's conduct, determined following a full and fair investigation process, including an inquiry into the appropriate disciplinary outcome, which was properly weighed in the decision-maker's consideration as to whether the allegation constituted serious misconduct and if so what sanction it should attract.

Determination

[42] For the reasons set out above, I find the decision to dismiss Mr Davenport for serious misconduct for verbal abuse and threatening behaviour was one open to the employer, having conducted a fair investigation into the allegations and taken into account Mr Davenport's responses to those allegations and submissions as to penalty.

Costs

[43] The issue of costs is reserved. I invite the parties to attempt to resolve this issue themselves. If they are unable to do so the parties may apply to the Authority to determine costs.

Marija Urlich
Member of Employment Relations Authority