New Zealand Employment Relations Authority Decisions

Dee v Air New Zealand Limited CA197/10 (Christchurch) [2010] NZERA 825 (20 October 2010)

Last Updated: 19 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 197/10 5316789

BETWEEN DOUGLAS DEE

Applicant

A N D AIR NEW ZEALAND

LIMITED

Respondent

Member of Authority: James Crichton

Representatives: Andrew McKenzie, Counsel for Applicant

Tim Cleary, Counsel for Respondent
Investigation Meeting: 8 October 2010 at Christchurch
Date of Determination: 20 October 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Dee) applies to the Authority for a determination that he was unjustifiably dismissed from his employment and that he suffered disadvantage by the unjustified action of the respondent (Air New Zealand) in its suspension of him prior to that dismissal.

[2] Air New Zealand resists those claims and denies all of the remedies sought including, in particular, Mr Dee's claim for reinstatement.

[3] Mr Dee had been employed by Air New Zealand as a Boiler Operator at Christchurch Airport since 2004. In the early morning of 24 May 2010, while Mr Dee was on nightshift, Mr Dee's supervisor, Jack Cassidy, visited Mr Dee's workplace at just after 1.35am.

[4] Mr Cassidy alleged that he found Mr Dee asleep and at the end of Mr Dee's shift, at around 7.45am the same morning, Mr Cassidy stood Mr Dee down. That suspension was confirmed at a meeting at around midday on the same day when Mr Dee's Manager, Mr Nigel Chivers, met with Mr Dee and Mr Cassidy to progress the matter.

[5] A disciplinary process followed. There were eventually three allegations that Mr Dee faced of which the most significant were the allegation that he had been found asleep on duty by Mr Cassidy and that he had left his workplace on two occasions thus leaving the boiler that he was supervising, unattended.

[6] There were a large number of meetings between the parties culminating in a final meeting on 11 August 2010 at which Mr Chivers presented his report into the allegations. Mr Chivers' investigation determined that Mr Dee had been guilty of serious misconduct in sleeping or intending to sleep when he was supposed to be on duty and was guilty of ordinary misconduct in leaving the boiler unattended on two occasions.

[7] The parties attended mediation but were unable to resolve the employment relationship problem. Mr Dee's application to the Authority includes an application for interim reinstatement. The parties helpfully agreed, when the matter came before the Authority, that the application for interim relief could be dealt with together with the substantive issues, assuming the Authority was able to give the matter some urgency. Accordingly, an early fixture was arranged and I undertook to produce the determination on the matter urgently.

[8] It has been agreed between the parties that if Mr Dee is successful and the Authority's is minded to use its discretion to reinstate him to his former position, the practical effect of that decision will be that Mr Dee returns to the payroll with effect from the date of his dismissal taking effect, but his actual start date will be a matter for negotiation between the parties' representatives.

Issues

[9] It will be convenient for the Authority to consider first whether the suspension of Mr Dee was lawful and secondly whether the dismissal was the dismissal that a fair and reasonable employer would make in the circumstances that existed at that time, once a proper investigation had been conducted.

Was the suspension lawful?

[10] I accept there may be force in the submission for Mr Dee that the suspension was an unjustified action. It is clear that Air New Zealand did not follow its own disciplinary procedures and guidelines which set out a policy for suspending employees. It is clear on the facts that Mr Dee had no opportunity to be heard on the possible suspension before it was enforced, nor did he have any opportunity to take advice from his Union during the suspension process. Furthermore, the facts are clear that there was no subsequent attempt by Air New Zealand to remedy the initial default.

[11] However, it is difficult to see how those actions by Air New Zealand, albeit actions which did not comply with their own policy, caused Mr Dee disadvantage. He remained on pay throughout the lengthy suspension process (some ten weeks). Despite Mr McKenzie's artful submission that the suspension prevented Mr Dee from *putting his best foot forward*, I am not persuaded that the errors contained in Air New Zealand's process produced a disadvantage to Mr Dee which should sound in compensation. There is an entitlement to suspend to facilitate a disciplinary investigation. Mr Dee cooperated throughout the process and at no stage protested the suspension or sought to raise arguments in respect to it.

[12] I conclude that the suspension was a reasonable exercise of the employer's discretion, was lawful and critically, did not result in a disadvantage to Mr Dee even although Air New Zealand's actions were not in conformity with its own disciplinary policy.

Was Mr Dee unjustifiably dismissed?

[13] By the time Mr Dee was dismissed, he was facing only two allegations, that he was found to be asleep on the job and that he had left the workplace during his shift to purchase food. The employer's process needs to be reviewed for each allegation.

[14] As to the first and most serious allegation, it is a truism sleeping on the job in a safety sensitive environment (sole charge of an attended boiler) is a behaviour which is capable of constituting serious misconduct. The question is whether a fair and reasonable employer could have concluded that Mr Dee's behaviour constituted serious misconduct in the particular circumstances of the case after a proper investigative process. A particular "circumstance" of the present case is Mr Dee's contention that Air New Zealand could not prove that he was sleeping and thus its finding of serious misconduct was misconceived. Conversely, Air New Zealand contend that proof is not required and that all it need have is a "reasonable belief: *Airline Stewards and Hostesses of New Zealand IOUW v. Air New Zealand Limited* [1990] 3NZILR 584, relied upon.

[15] Mr Dee was found by his supervisor Jack Cassidy on the floor of the boiler room control office shortly after 1.30am on 24 May 2010. Mr Cassidy though Mr Dee was sleeping and always maintained that that was his view. However, he fairly conceded that he did not see Mr Dee actually sleeping in the sense that he did not observe Mr Dee's eyes shut, for example. The reason that was impossible was simply that the lights were off in the control room when Mr Cassidy found Mr Dee. Accordingly it was too dark to see even though the boiler room lights were on and the light in the ablution facility attached to the control room was also on and the door between the ablutions and the control room was ajar. The short point is that the lights in the control room were off and although other light was able to enter the control room from the boiler room itself (through the extensive observation glass between the two rooms) and from the adjourning toilet area, the floor of the control room would have been dark or near enough to dark when Mr Cassidy came upon Mr Dee.

[16] There are other relevant circumstances about the way in which Mr Dee was found. I have already referred to the control room lights being off. That would have taken a conscious decision by Mr Dee to turn them off. He said he did that because he was watching a television replay of a Warriors game (which was allowed) and it was easier to see the screen with the lights off. However, it is common ground that by the time Mr Cassidy found Mr Dee, the Warriors game had been over for some 20 or so minutes.

[17] Mr Dee was found with his boots off. He was also found with a pillow although there is dispute about exactly where that pillow was physically placed in relation to Mr Dee's body. Mr Cassidy gave evidence to the employer and to me at my investigation meeting and he struck me as a straightforward, decent and truthful man. He said that when he found Mr Dee, there was initially no movement from the other man. Mr Cassidy described entering the control room and he told me in his brief of evidence:

I could not see Doug (Mr Dee) anywhere in the room which was quite dim ...then all of the sudden there was a movement from the floor on my left and Doug sprang up from underneath the bench. He said something like 'shit shit' and then quickly sat on the chair near the computer screen, putting what I saw was a pillow behind him so that he sat on it. I said something like 'what on earth are you doing down there?' to which Doug said nothing. It was as if we had both got a

big fright.

[18] Apart entirely from the fact that this account has the ring of truth about it, especially when it is articulated by the witness himself in person, it is illustrative of a number of aspects to the factual matrix. Some of those aspects I have already alluded to, for instance the existence of the pillow and the fact that the light was off. In other evidence, Mr Cassidy made it clear that operationally the light should be on at all times. He also referred elsewhere in his evidence to the fact that Mr Dee's working boots were off when he found him. However, I was particularly struck by the absence of any attempt at explanation by Mr Dee when he was found and by Mr Cassidy's recollection of Mr Dee's double expletive when the latter became conscious that Mr Cassidy was in the room. As Mr Cassidy himself opined, those two facts, the double expletive and the failure to explain are significant and somehow suggest impropriety. Mr Dee denied the double expletive but accepted that no explanation was offered at that point.

[19] When Mr Dee was suspended at the end of that nightshift (around 7.40am later the same morning) there was again no attempt at explanation but critically, Mr Cassidy remembers Mr Dee saying:

If I promise not to do it again would that be okay?

[20] Such an observation can only be seen as redolent of guilt and the employer took it as such. For his part, Mr Dee vehemently denied making the observation but Mr Cassidy was equally certain that the observation had been made although Mr Dee pointed to the fact that in the very first statement made on the matter by Mr Cassidy, that sentence was omitted. I return to the general question of Mr Cassidy's evidence shortly.

[21] There was a meeting about 12.30pm later that same day, Monday 24 May, which involved the facilities manager for Air New Zealand Mr Nigel Chivers, whose job it would be to investigate the disciplinary issue on behalf of the respondent employer. Air New Zealand's evidence is that at this meeting Mr Dee gave no explanation about what he was doing on the floor. It was not until the meeting between the parties on 3 June 2010 fully nine days after the incident that Mr Dee first offered his explanation that he was doing back exercises on the floor which were prescribed for him by his physiotherapist for a persistent lower back problem. The evidence before the employer (and provided to the Authority too) disclosed medical reports from a General Practitioner and a physiotherapist, both of whom confirmed the diagnosis of the ailment, and, so far as the physiotherapist was concerned, the requirement for Mr Dee to do a set of stretching exercises on a regular basis, including at work. The evidence from the medical professionals was clear that at the time that the events complained of happened, Mr Dee ought to have been doing his exercises from a medical standpoint. That of course does not prove that he was doing the exercises required of him when he was found by Mr Cassidy.

[22] Indeed, while Mr Dee went to great trouble to provide medical evidence about his back ailment, and the requirement that he exercise regularly, his claim, made to me in the investigation meeting, that Mr Cassidy knew about his back problem and knew that he did his exercises at work was not borne out by evidence from Mr Cassidy (or indeed anybody else from Air New Zealand). Even Mr Dee acknowledged under cross examination that he did not know if Mr Cassidy had ever seen him doing exercises at work. Mr Cassidy's evidence, which I much prefer, was that he certainly knew that Mr Dee had a back problem but had no idea that Mr Dee had to do exercises for it and certainly had never seen Mr Dee exercising at work.

[23] In his cross examination of Mr Dee, Mr Cleary suggested that *all the planets would have to be in alignment* for the Authority to believe that Mr Dee did all the exercises prescribed by his physiotherapist when he was required to do them and did them in circumstances when no independent witness was able to come forward to say they had seen Mr Dee exercising during work.

[24] One would have thought that if Mr Dee was required to do exercises during the working day and was determined to perform those exercises at work as he was apparently required to do, he would have made a point of telling his supervisor and/or other work mates of that obligation, but he clearly did not. No one gave me evidence of having seen Mr Dee exercising in the work place and I believed Mr Cassidy's evidence on the matter that he knew about Mr Dee's back injury but had no idea he was required to exercise at work.

[25] Counsel for Mr Dee sought to interest me in the proposition that, put loosely, Mr Cassidy's evidence was unreliable. It was suggested to me that Mr Cassidy had changed his story in material respects while Air New Zealand's investigation continued

and that the effect of those changes was to create doubt about the truthfulness of his testimony. While I agree that Mr Cassidy did add to his recollection of events as time progressed, I do not accept that that makes his evidence unreliable.

[26] There are effectively three statements attributed to Mr Cassidy. The first is not his at all; it is a note made by Mr Chivers of a discussion that Mr Chivers had with Mr Cassidy on the morning of 24 May 2010. It became clear at the investigation meeting that in two material respects, those notes do not accurate record Mr Cassidy's view of what he saw earlier that morning. His brief of evidence corrects that misapprehension and while the misrepresentation of Mr Cassidy's position is, I accept, both innocent and inadvertent, even if blame were to be apportioned, it certainly could not be apportioned to Mr Cassidy because the document in question is not his statement.

[27] There are two statements made by Mr Cassidy himself, the first supplied under cover of an email dated 23 June 2010 and the second dated 7 July 2010. Those two statements are in all respects materially consistent save that the second refers to the remark Mr Cassidy alleges Mr Dee made at the end of the relevant shift, namely:

If I promise not to do it again would that be okay?

[28] Mr Cassidy quite properly accepted that this remark of Mr Dee was important in the context of the overall investigation but the fact that he only remembered to record it sometime after the events complained of, does not make his recollection untruthful. As I noted above, I formed the view that Mr Cassidy was an honest and straightforward man and I accept his evidence at face value. Where there is conflict between Mr Cassidy's recollection of events and Mr Dee's I have preferred Mr Cassidy's.

[29] Mr Dee also contended (and in this regard he was ably supported by the evidence of sensible Union officials) that he understood the employer to have accepted, during the course of the investigation, that the allegation about his sleeping on the job had been dealt with, in the sense that it had been dropped by the employer. I think this impression was gained because the employer through Mr Chivers made a proper concession during the course of the investigation that it could not prove that Mr Dee was actually sleeping. But it is absolutely plain from the transcripts of the various disciplinary meetings (and there were a number) that at no stage did Air New Zealand take that allegation off the table. What Air New Zealand did accept was that it could not prove that Mr Dee was actually sleeping. My assessment of the position, having looked carefully at the minutes of the various disciplinary meetings, is that each time the matter was raised by Mr Dee or his Union advisers, the employer accepted that sleeping could not be proved but did not concede that that allegation was removed from consideration.

[30] Mr Dee was fortunate in the support that he received from his Union and it was clear to me at the investigation meeting that not only was I impressed by the sensible and level headed approach taken by the Union's officials, but that the employer had good relationships with those Union officials as well. Notwithstanding that, and despite my conviction that the delegates and officials of the Union who gave evidence before me were honest and straightforward in their evidence, I am not satisfied that Air New Zealand ever gave up the allegation of sleeping on the job (expressed loosely) and so when a finding against Mr Dee was made at the final meeting on 11 August 2010 that he was *sleeping or at least lying down intending to sleep,* it was available to Air New Zealand to reach that conclusion on the basis of the evidence before it.

[31] I do not accept Mr Dee's submission that because Air New Zealand had accepted it could not prove he was sleeping that the allegation of impropriety was itself gone. Clearly, there must be a relationship between the allegation an employer makes against an employee and the final outcome of the employer's investigation but I am satisfied that a fair and reasonable employer can conclude that serious misconduct has occurred in a particular factual situation, even where the specific allegation made against the employee cannot, of itself, be proved. This was just such a case. Air New Zealand could not prove that Mr Dee was sleeping but their careful investigation report, written by Mr Chivers, found, after a careful weighing of all of the factors that I have referred to in this determination, that Mr Dee was *sleeping or at least lying down intending to sleep.*

[32] That conclusion is available to Air New Zealand on the basis of it being more rather than less likely, and they are entitled to prefer Mr Cassidy's view of what he saw, to the ex-post facto explanation provided by Mr Dee. Mr Cassidy told me (while accepting that he could not prove this) *I still think he was asleep. He took a few seconds to come to, when I was standing there.*

[33] From a believable and long-serving supervisor, it is available to an employer to conclude that such evidence is to be preferred over the explanations of another.

[34] The final aspect that needs to be considered is the allegation that there were procedural infelicities which might have led to unfairness. A major criticism directed at Air New Zealand by Mr Dee in this regard is the contention that the employer gave no proper opportunity for Mr Dee to comment on the question of penalty once a finding of serious misconduct was communicated. The evidence is clear that what the Union representing Mr Dee concentrated on was continuing to argue the substantive issue and the alleged impropriety of Air New Zealand concluding that Mr Dee had been sleeping when Air New Zealand had previously acknowledged that it could not prove that contention.

[35] I am not persuaded that, even if the Union had pushed for an alternative penalty, which they might well have done, it would have changed the outcome. On the facts before Air New Zealand at the time, it seems to me inevitable that a

disciplinary response of dismissal would be the result of a finding of serious misconduct in the circumstances Air New Zealand had determined. Furthermore, it was clear from the evidence of John Kaye the Union organiser who dealt with this particular matter, that had he asked for more time from Air New Zealand to review the issue of the appropriate penalty once the substantive finding had been made, such a request would have been granted. Certainly, the good working relationship between the Union and Air New Zealand was evident across the table at my investigation meeting and it seems to me to follow that had there been such a request made, then Air New Zealand would certainly have allowed it. My conclusion however is that nothing that the Union could have said would have deflected Air New Zealand from reaching the inevitable conclusion that Mr Dee be dismissed from his employment.

[36] In looking at the matter in the round, I am satisfied on the balance of probabilities that Air New Zealand's decision to find serious misconduct and to conclude that the only viable response to that finding was by way of dismissal is the decision that a fair and reasonable employer would have made in all the circumstances of the case. I think the reliance that Air New Zealand places on the decision of the Court of Appeal in the *Airline Stewards'* case (supra) is astute. That case is authority for the proposition that what the employer must prove after a full and fair inquiry is that it is justified in having a belief that serious misconduct has occurred.

[37] Furthermore the Court of Appeal makes clear that there is no onus on an employer to keep on investigating *ad infinitum;* a reasonable and fair employer will reach a view that is considered and balanced and then make its decision, and provided that that decision can be supported by what might be called the *reasonable belief* test, then the employer is entitled to succeed.

[38] By way almost of a post-script, the other allegation which Mr Dee faced, namely that he had left the work place during his shifts to purchase food was also found to have been made out but that was considered to be an example of ordinary misconduct rather than serious misconduct and that finding was effectively not called in aid by Air New Zealand in any aggregation sense in justifying the decision to dismiss.

[39] It follows that it is not relevant to the decision of the Authority. However I note in passing that Air New Zealand have quite properly reviewed their procedures in relation to the provision of food for workers in this situation so that the apparent difficulties Mr Dee may have faced in this regard are no longer likely to be problematic.

Determination

[40] Mr Dee's claim fails for the reasons enunciated in this determination.

Costs

[41] Costs are reserved.

James Crichton

Member of the Employment Relations Authority
