



[3] Air New Zealand discovered that Mr Foai had been over paid. The overpayment of wages has not been repaid. Air New Zealand is seeking recovery of the sum involved. Air New Zealand has withheld Mr Foai's final pay to off set the debt. Mr Foai claims this is unlawful.

### **The issues**

[4] Has Air New Zealand met the test to justify Mr Foai's dismissal under s 103A of the Employment Relations Act? S 103A reads:

#### **103A Test of justification**

*For the purposes of section 103 (1) (a) and (b), the question of whether a dismissal or any 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.*

[5] Has there been any disparity of treatment towards Mr Foai?

[6] If Mr Foai has a personal grievance should he be reinstated?

[7] If there is a personal grievance what other remedies apply?

[8] Does the Authority have jurisdiction to recover overpayments? Is Air New Zealand lawfully able to with hold a sum of final wages and holiday pay to help off set the counter claim for the repayment of the overpayment?

[9] S 6 of the Wages Protection Act reads as follows:

#### **6. Employer may recover overpayments in certain circumstances**

(1) *In this section, –*

*“Next pay-day”, in relation to any overpayment, means the day next following the day on which that overpayment was made upon which the worker to whom it was made would, in the normal course of events, be paid:*

*“Overpayment”, means any wages paid to a worker in respect of a recoverable period:*

*“Recoverable period”, in respect of any employer and any worker, means a period in respect of which that employer is not required by law to pay any wages to that worker, by virtue of that worker’s having –*

- (a) *Been absent from work without that employer’s authority; or*
  - (b) *Been on strike (within the meaning of section 81 of the Employment Relations Act 2000); or*
  - (c) *Been locked out (within the meaning of that section); or*
  - (d) *Been suspended.*
- (2) *Notwithstanding anything to the contrary in any collective agreement within the meaning of the Employment Relations Act 2000 but subject to subsection (3) of this section, an employer who has made an overpayment to any worker may recover the amount of that overpayment from any wages to the payment of which by that employer that worker subsequently becomes entitled.*
- (3) *No employer shall recover an overpayment under subsection (2) of this section unless –*
- (a) *By virtue of the methods or equipment normally used by that employer in arranging the payment of, or paying, wages to the worker concerned, it was not reasonably practicable for that employer to avoid making that overpayment; and*
  - (b) *Before recovering that overpayment, that employer gives that worker notice of that employer’s intention to recover it; and*
  - (c) *That notice is given –*
    - (i) *Not later than 10 days after the next pay-day, in the case of a worker who has no fixed workplace;*
    - (ii) *Not later than the first day upon which that worker attends that worker’s workplace after the next pay-day during normal working hours, in the case of a worker with one fixed workplace who did not attend that workplace during normal working hours on the next pay-day:*
    - (iii) *Not later than the first day upon which that worker attends one of that worker’s workplaces after the next pay-day during*

*normal working hours, in the case of a worker with 2 or more fixed workplaces who did not attend any of them during normal working hours on the next pay-day:*

- (iv) *Not later than the next pay-day, in every other case; and*
- (d) *That overpayment is recovered not later than 2 months after that notice is given.*
- (4) *The validity of a notice purportedly given under subsection (3)(b) of this section shall not be affected by the fact that –*
  - (a) *It does not specify the amount of the overpayment concerned but specifies only the day on which that overpayment was made and the actions that led to its being an overpayment:*
  - (b) *It is one of a number of identical notices given to a group of workers to only some of whom an overpayment has been made, and provides that it applies to the worker to whom it has been given only if an overpayment has been made to that worker.*

## **The facts**

[10] Mr Foai commenced working for Air New Zealand on 20 March 2002 as a casual loader. He was subsequently accepted for a permanent part time loader position on 24 June 2002. He unsuccessfully applied for a permanent full time position (14 March 2003 and January 2005).

[11] Mr Foai commenced an assignment as a temporary Time and Attendance Administrator (T and A) in mid June 2007. There were specific and different terms of employment concerning his hours of work and pay for the role. The assignment was extended. At first no job description and hourly rate was provided for the assignment, but a rate was provided in the latter period of the assignment (\$25.30 per hour as his average earnings for the role). There is an issue about what Mr Foai understood was meant in regard to how he was paid with a reference to average earnings. There were no performance issues with Mr Foai doing the job. He was supervised by Mr Keri Fiu, T and A Administrator.

[12] During the assignment Air New Zealand commenced an investigation into:

- (a) Mr Foai's alleged breach of the code of conduct policy in regard to an overpayment of \$70,428.04 salary that had been discovered. In this regard Air New Zealand says Mr Foai did not do enough to raise the problem earlier, although it accepts Air New Zealand had some responsibility for the overpayment. Mr Foai says he did take some steps to identify if there was a problem with his pay, but Air New Zealand say that his steps were not enough. Air New Zealand later decided his action amounted to misconduct for not doing enough. Mr Foai claims this cannot give rise to misconduct if he did not do enough to find out what any problem was when the overpayment was not of his making: he says he raised the matter with various people including Tania Budny, ramp services manager, and Mr Fiu.
- (b) Mr Foai's alleged use of other employees' initials to authorise his own overtime. Air New Zealand found no records of him on site at the relevant times and Mr Fiu said that Mr Foai was not at work and that they did not work together on weekends.
- (c) Mr Foai's alleged failure to swipe in and out of work. Mr Foai claimed that Mr Fiu was treated differently following a separate investigation of Mr Fiu's conduct. Air New Zealand says that there was a clear difference between both employees' actions. There have been common problems with swiping in and out.
- (d) Mr Foai's alleged gaining access airside without the required personal Airline ID authorisation card. Mr Foai claimed that Air New Zealand can not have it both ways when it says he was not at work on the four occasions and failed to use his card identification to gain access when he was at work. In this regard Mr Foai claims that the allegation of misconduct cannot stand when Air New Zealand claims he was not at work on the four days it says he was airside without the required ID.

[13] The four allegations were put to Mr Foai and his representative and additional information was given to them. The company's findings, made by Ms Budny were conveyed to Mr Foai; first orally, and secondly in writing. Ms Budny concluded that

Mr Foai's approval of his overtime using another employee's initials and probably not working was serious misconduct. Indeed she put it in her evidence as that he "*most likely had paid himself for days he most likely did not work*" [para 42 of her statement]. This led Air New Zealand deciding it could no longer have any trust and confidence in Mr Foai as an employee. The company concluded that the other three allegations (paragraph 12(a), (c) and (d) above) amounted to misconduct as a backdrop. Since they were not relied upon it is not necessary for me to deal with them separately.

[14] Mr Foai's claim that he had Mr Fiu's approval to work overtime was not backed up by Mr Fiu. Mr Fiu told Air New Zealand that he never worked with Mr Foai on Sundays. Air New Zealand concluded that Mr Foai did not work on the four days in question. He claims that the conclusion reached by Air New Zealand did not reach the required threshold for a decision of serious misconduct.

[15] Mr Foai's claims resulted in Air New Zealand conducting an investigation into Mr Fiu's actions separately. Findings were reached on similar offences and were considered as misconduct which did not result in the same disciplinary measures because the difference was that Mr Fiu was at work. Mr Foai complains now that he has been treated differently to Mr Fiu. Also Mr Foai claimed during the Authority's investigation meeting that he requested Air New Zealand to get Mr Fiu when the credibility issues between the two of them became apparent. Air New Zealand declined. Mr Foai says this was unfair.

[16] Following its enquiry Ms Budny made her findings known to Mr Foai and gave him and his representative time to comment on the outcome envisaged involving dismissal for serious misconduct in respect of her findings (para 12 (b) above), and which took into account other findings of misconduct.

[17] Mr Foai was required in his T and A role to monitor ramp employees' attendance through a swipe card system, process overtime claims, and resolve working time enquiries with payroll, process sick leave claims and monitor rosters with the actual attendance of employees. There were no performance issues about him carrying out his role.

[18] On 4 days: 2 March, 16 March, 30 March and 25 May 2008 plus 2 other dates; Mr Foai says he was at work, and had used another employee's initials to authorise overtime on each day. He says he worked on manual sheets and sports day matters. Air New Zealand accepted that Mr Foai had swiped in and or out on 2 other days, but not on the above days. He says he was entitled to authorise his own overtime because he had permission from Mr Fiu and Tania Budny, the manager. He says they did the same as he had done, and their action condoned his own actions. Also, he relied on other employees seeing him at work, and he believed that he could rely on Mr Fiu too. However, Mr Fiu did not support him and claimed they did not work on Sundays together. Mr Fiu denied approving overtime. Mr Foai accepted he had not swiped in/out and had used other people's initials authorising overtime, but in such instances he was at work, and working. Also he claimed others had done the same. He also says it was him that raised the airside access issue because others had gained access without their security cards too and he wanted to explain the circumstances why he was at work.

[19] There was an investigation and Mr Foai was represented at the investigation and disciplinary process. He was given time to respond and reply including on the outcome the employer signalled it envisaged to take.

[20] Air New Zealand reached the conclusion that Mr Foai's explanation and replies were not credible and that his action of approving overtime when he probably was not at work breached the trust and confidence the company had in him. He was dismissed. His final pay has been withheld purportedly under s 6 of the Wages Protection Act to off set the overpayment of wages. He has been requested to pay back the overpayment.

[21] The sum withheld by Air New Zealand is \$9,363.04. The amount of the overpayment is \$43,453.78 nett. Mr Foai has accepted that he was overpaid.

## **Determination**

### **The reason for the dismissal**

[22] Air New Zealand came to an honestly held belief that Mr Foai was probably not at work because he had not swiped in and or out and did not log in on the 4 days. It did not accept his explanations of working on the sports day and working on manual sheets as plausible. It relied on documents that show he had not swiped in and out and that he had not logged in on the computer system. Ms Budny's research of the company logs went back about a year. In the absence at the time of any request from Mr Foai and his representative for Ms Budny to do more, a fair and reasonable employer did enough, I hold.

[23] Also, Air New Zealand relied upon Mr Fiu's word that Mr Foai had not been at work and denied approving him overtime. I am satisfied that Ms Budny made some findings on credibility and that Mr Foai's evidence is not entirely reliable because:

- (a) There were days when Mr Foai was found to have self authorised, claiming and approving overtime when there was no electronic record of any work ( 2, 16 and 30 March 2008 and 25 May 2008). On the same days Mr Fiu had swiped his own card.
- (b) Mr Foai's denial of being able to self authorise was not borne out by the information from the computer that was put to Mr Foai on 30 January 2009.
- (c) Other people also attested to not seeing Mr Foai on those days and in circumstances not consistent with being at work: (names set out in a letter 18 June 2009 "SOP: C").
- (d) No logging on and or swiping in records.
- (e) There was evidence of Mr Fiu working on the T and A system.
- (f) Mr Foai failed to swipe in and out despite repeated requests to comply with the requirement and despite the repeated requests to all staff and the inconsistent compliance of the requirement. Mr Foai was aware of the requirement (letter 2 May 2006 Air New Zealand document 36).

- (g) Mr Foai changed his explanation and added to his reasoning during the company's investigation and disciplinary meetings. He at first could not remember if he had logged on or if other people had seen him or if Mr Fiu was there at the same time.
- (h) Mr Foai's claim that he was organising the sports day and working on work sheets and appears as a cover for the lack of any work by him and not logging on the computer system. There has been no evidence to support the claim.
- (i) A signed written statement of employees witnessing Mr Foai working was challenged in regard to its independence and validity because it was prepared by Mr Foai and it lacked the required details to confirm dates and times that the allegations involved.
- (j) During the Authority's investigation Mr Foai said that he demanded Ms Budny to bring Mr Fiu into the meeting. There was never any mention of this before. There was no record of it in any of the notes. Also, Mr Foai says that Ms Budny should have widened her enquiry beyond the year that she says she checked the records. What she was checking was whether or not there was any electronic evidence putting either of them at work on the days they had paid themselves overtime. What she found was Mr Foai was not at work but Mr Fiu was. She was not determining credibility on that information.
- (k) I accept that Mr Foai's evidence has been incremental and has evolved with the difficulties he faced trying to explain the situation and to establish he was at work.

[24] I now turn to Mr Foai's point that Air New Zealand has claimed he was not at work on the four days, yet it says he was airside without the required ID. Being airside without the identification card was raised by Mr Foai during the company's investigation as the way he would gain access if he did not have his ID. There was evidence provided about how this happened in practice but no details involving Mr Foai on the four days. Air New Zealand has been challenged by Mr Foai in regard to

explaining its conclusion that there was no evidence of him being at work and claiming overtime, but at the same time, accusing him of being at work without his identification to get airside and get in. Ms Budny says that Air New Zealand never alleged that Mr Foai was at work without his identification. He raised the matter and did not say what he did was on the 4 days.

[25] I conclude that since Mr Foai raised the matter as an explanation it has no causative link to the decision relating to him self approving payment of overtime and not working. This is because there was no record and no witnesses of him being at work and people had denied letting him in. Thus, the matter was entirely separate and it was open to Air New Zealand to treat it as such, irrespective of whether or not it reached the right or wrong conclusion.

### **Disparity**

[26] The two cases involving Mr Foai and Mr Fiu are capable of being treated separately and do not amount to a disparity of treatment. This is because the other employee was found to be at work and working because he had logged in. There was insufficient evidence that Mr Foai was at work on the four days or any allegation that they were complicit in any conduct.

[27] Also, I accept that Mr Fiu was being separately investigated and it was not fatal that Mr Foai's request to bring Mr Fiu into the investigation was declined. Mr Foai was informed of Mr Fiu's position and response to enable him to reply. Air New Zealand was open about the information involved and deciding on whom to believe.

### **Other considerations**

[28] Other circumstances such as Mr Foai's relationships and work background were taken into account by Air New Zealand. I conclude that a fair and reasonable employer would have come to the conclusion that Mr Foai's actions were serious misconduct and that it was open to Air New Zealand to dismiss him as the allegation and findings did relate to trust and confidence.

[29] Air New Zealand can not be criticised for the timing of its investigation given the information that was required and the requirement to interview other people. Mr Foai had to be given the opportunity to comment and respond. It is better that an investigation is done in a timely way, but it is not fatal when it takes longer because of the extent of the information and research required. In this case Mr Foai has not been able to show he was prejudiced in any way because of the time taken. No details were provided.

### **Conclusion**

[30] Finally, I am satisfied that the evidence relied upon by Air New Zealand was sufficient to meet the gravity of the allegation on the balance of probabilities. Ms Budny was particularly clear about her findings and distinguishing the misconduct allegations from the serious misconduct allegation that Mr Foai self authorised overtime and that it was likely he did not work overtime on 2, 16 and 30 March 2008 and 25 May 2008. Ms Budny had no direct evidence Mr Foai was at work on the overtime days he was paid and had self authorised. There was no swipe card record of him being in attendance. No one actually vouched for him on the days in question. Ms Budny concluded that Mr Foai's explanation and comments that he was actually at work was not plausible when there were no keystrokes on the computer system and no proof of any work that he says he undertook.

[31] I am satisfied that a fair and reasonable employer would conclude that this action amounted to dishonesty leading to a breach of loss of trust and confidence, about which Mr Foai had been put on notice. Also the extent of such behaviour comes within the Code of Conduct that requires employees to act ethically with integrity, mutual trust and respect. Self authorisation and not working overtime would seriously breach these requirements, I hold. In regard to the disciplinary process it is open to Air New Zealand to conclude that behaviour can undermine trust and confidence in the employment relationship. Thus, it was open to Air New Zealand to conclude that the disciplinary action could include dismissal.

[32] I also hold that Mr Foai's claims that the other allegations relating to misconduct failed to meet the required test as to what a fair and reasonable employer would have found, is not the issue. This is because Air New Zealand was clear about

its focus as to the reason why it decided to dismiss Mr Foai and the personal grievance claim filed in the Authority only relates to the claim for unjustified dismissal (SOP). Finally even if Air New Zealand's conclusions on the three other allegations were to be found wanting that does not impact on the substantive issue relating to the reason why Air New Zealand dismissed Mr Foai, I hold. Thus as circumstances they do not impact on Air New Zealand's decision, I hold.

### **Final pay and overpayment**

[33] I now turn to the withholding of the final pay to off set an overpayment. There was no contractual term between the parties that applied to make deductions and withhold pay. Air New Zealand has relied on s 6 of the Wages Protection Act to withhold the sum of \$9,363.04 when notice was given under a letter dated 2 July 2009. The withholding of the final pay was made as an outcome of the disciplinary process without any prior action when Air New Zealand was certainly aware of the overpayment before 2 July 2009. The notice did not purport to have been made under s 6 of the Wages Protection Act. There was no written authorization to make any deduction from the pay and or to recover any sum properly under the requirements of the Act, I hold. Mr Foai has agreed that there has been an overpayment. In the circumstances I grant leave for any further submissions and orders if required.

[34] Air New Zealand has asked for orders to recover the overpayment. This issue is reserved by agreement. Leave is granted to further address this if it is necessary.

### **Orders of the Authority**

[35] Mr Foai's claim for unjustified dismissal is dismissed.

[36] Leave is granted for any further submissions and orders on the withholding of the final pay if an order and or orders are required.

[37] Air New Zealand's request for the recovery of the overpayment is reserved. Leave is granted to further address this if it is necessary.

**Costs**

[38] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority