

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Junior Fuiava (Applicant)
AND Air New Zealand Limited (Respondent)
REPRESENTATIVES Garry Pollak for the applicant
Andrew Caisley for the respondent
MEMBER OF AUTHORITY James Wilson
INVESTIGATION MEETING 21 September 2005
5 October 2005
DATE OF DETERMINATION 20 October 2005

DETERMINATION OF THE AUTHORITY

Junior Fuiava's employment relationship problem

[1] For just over two and a half years Mr Fuiava was employed as a cargo warehouseman by Air New Zealand (Air NZ). In June 2005 he was dismissed. Mr Fuiava says that his dismissal was unjustified because it was not *what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred*. He has requested that the Authority order that he be reinstated to his position and that Air New Zealand reimburse him the wages he has lost.

The events which led to Mr Fuiava's dismissal

[2] As an employee of Air NZ Mr Fuiava was entitled to send parcels at a heavily discounted rate. During the course of his employment with Air NZ he had on several occasions taken advantage of this discount to send parcels to his family in Samoa. In January 2005 a parcel he had sent was found, when x-rayed by Airport security, to contain two aerosol cans of brake cleaner. When he had submitted his parcel for dispatch Mr Fuiava had signed a formal declaration which, among other things, asserted that the parcel did not contain dangerous goods and specifically did not contain *Aerosols (of any type)*. Mr Fuiava also declared, on the same form, that he had packed the parcel himself and no one else could have placed items in the parcel without his knowledge.

[2] When asked to explain the two cans of brake cleaner Mr Fuiava stated that he was unaware that the cans were in the parcel. He acknowledged, however, that his wife had also placed items into the parcel and, in this instance had sealed the package before he delivered it to Air NZ. Mrs Fuiava subsequently acknowledged that she had placed the two cans in the parcel.

[3] During the course of the Air NZ investigation Mr Fuiava accepted that he had falsely signed the declaration. He acknowledged that he had made a serious mistake but said that he had no knowledge that the cans were in the parcel. He gave Air NZ a categorical assurance that, if he was allowed to keep his job, he would never make the same mistake again.

[4] Despite his impassioned pleas and several overtures from his Union, Air NZ dismissed Mr Fuiava. The Manager who made this decision, Mr Greg Sullivan, said that he had agonised over the decision before finally deciding that the Company could not continue to employ Mr Fuiava. Mr Sullivan says that, in reaching his decision he considered a number of factors including:

- (1) In the aviation industry issues of the safety and security are absolutely critical. The ramifications of not prioritising safety and security issues are extremely serious and can be catastrophic.
- (2) It is fundamentally incompatible with the company's values to view safety and/or security lapses as minor matters. The company would be negligent and irresponsible if it tolerated a casual approach to safety matters.
- (3) Mr Fuiava, as an ongoing requirement of his job, was familiar with the handling of dangerous goods. At the time of his employment he had received training in dangerous goods and, in June 2004, had received a special dangerous goods update.
- (4) The Cargo section must ensure the safe processing and presentation of loading dangerous goods. Because of the possible catastrophic consequences, Cargo must have a zero tolerance for any non-compliance with the dangerous goods requirements.
- (5) The declaration Mr Fuiava had signed was not a complex document.

Legal considerations

[5] The Employment Relations Act 2000 was amended in 2005 by the insertion of a new section 103A:

103A Test of 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 action, 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.

[6] The Authority must interpret the words of section 103A on their plain meaning. On an *objective basis* the Authority must consider the actions of the employer against those of a *fair and reasonable employer ...in all the circumstances ...at the time....* It is of note that the test is that of a fair and reasonable employer - not that of a disinterested bystander. In each case there will be a number of *circumstances* that the Authority should consider. These might include, but are by no means restricted to such issues as:

- Did the employer carry out a full and fair enquiry?
- Did the employer's enquiry confirm that, on the balance of probabilities, the employee had done (or omitted to do) what he/she was accused of doing?
- Could the actions (or omissions) of the employee reasonably be considered to be serious misconduct?
- In considering whether the actions of the employee amounted to serious misconduct, where there are particular policies and procedures in place, were these policies reasonable taking into account such things as the likely impact of any breach etc (e.g. did the safety issues require strict adherence to safe practice).

- Taking into account the possibly consequences of any breach on the Company, other staff or members of the public, were the consequences of any breach of the employer's policy, e.g. dismissal, reasonable?
- Was the employee aware of the employer's policies and aware of the consequences i.e. possible dismissal, of breaching those policies?
- Would there have been any adverse consequences to the employer of imposing some lesser sanction e.g. final warning rather than dismissal?
- Did the employer act consistently in imposing sanctions on different employees for similar misconduct?
- Were there any personal circumstances which should be taken into account by the employer in deciding what action should be taken e.g. length of service, previous employment record, likelihood of recurrence of misconduct, availability of alternative employment?

Discussion

[7] Mr Fuiava, through his representative Mr Pollak, does not argue that the investigation carried out by Air NZ was unfair or deficient. He does not deny signing the declaration. On the contrary, he says that he did sign the declaration but did not know that his wife had placed the brake cleaner in the parcel. He accepts that his declarations that there were *no items that (he) did not pack himself* and that *no one else could have placed items in the parcel* were false. However Mr Fuiava argues that his dismissal was not *what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred*.

[8] Mr Sullivan told the Authority that he *agonised* over whether to dismiss Mr Fuiava. His evidence as to the enquiries he had made and the issues he had taken into account was clear and credible. Mr Fuiava admitted his actions. The Company policy regarding the handling of dangerous goods is reasonable in the circumstances prevailing in the airline industry. Mr Fuiava not only knew the policy but signed a document (the declaration regarding the contents of the parcel) which was specifically designed to guard against the deliberate or unwitting shipment of dangerous goods. As recently as June 2005 he, along with all other Cargo staff had received a bulletin which, among other things said

The Company will regard any failure to comply with DG (dangerous goods) handling procedures as a very serious matter.

Mr Sullivan considered Mr Fuiava's excellent performance record, his remorse and promise not to re-offend. However Mr Sullivan came to the conclusion that not to dismiss Mr Fuiava would send the message to other employees that a breach of safety standards was not serious and would be tolerated.

[9] During the course of the Authority's investigation, Mr Pollak raised the possibility that the Company had treated other employee's differently in similar circumstances. He raised two particular examples:

(1) An employee who had been dismissed after two aerosol cans were found in a staff consignment and who had lied to the Company during the course of their investigation. Mr Pollak suggested that this employee's offending had been far more serious than Mr Fuiava's and that Mr Fuiava did not deserve the same level of sanction. I do not accept Mr Pollak's argument in this regard. While the other employee's offence was, at least on the evidence placed before the Authority, more serious than that of Mr Fuiava, that does not necessarily preclude the possibility that some "lesser" breach should receive the same level of sanction.

(2) An employee who was not dismissed for breaches of the dangerous goods policy. However AirNZ argued that this employee did not work in the Cargo division and did not have any responsibility for processing documentation or recognising dangerous goods. She had no training in dangerous goods and security issues or familiarity with the relevant documentation. I accept the Company's submission that this case was different than that of Mr Fuiava and did not amount to a disparity of treatment.

Determination

[10] Having objectively considered Air New Zealand's actions, I find that Mr Fuiava's dismissal was *what a fair and reasonable employer would have done in all the circumstances*. It follows that Mr Fuiava does not have personal grievance and is not entitled to the remedies he seeks.

Costs

[11] Costs are reserved and the parties are requested to attempt to settle this issue themselves in the first instance.

James Wilson
Member of Employment Relations Authority