Determination Number: AA 150/07
File Number: 5075572

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Stephen Howard (Applicant)
AND	Air Nelson Ltd (Respondent)
REPRESENTATIVES	Richard McCabe for Applicant Kevin Thompson for Respondent
MEMBER OF AUTHORITY	Robin Arthur
INVESTIGATION MEETING	3 May 2007
DATE OF DETERMINATION	16 May 2007

DETERMINATION OF THE AUTHORITY

[1] The applicant, a pilot since 1977 and with 11 years service for the respondent, seeks a declaration that a warning given to him on 22 August 2006 was unjustified and caused him disadvantage. He seeks remedies of compensation for hurt and humiliation and for the loss of benefit of a 'clean' employment record.

[2] The respondent says it was justified in giving a verbal warning because the applicant had referred to alcohol consumption in a discussion with a crew controller and that reference had left the crew controller in doubt about the applicant's ability to undertake a duty.

[3] The problem for resolution has became, to some extent, one of historical interest only. Between the lodging of the statements of problem and reply in January 2007 and the investigation meeting in May 2007, the respondent advised that it regarded the warning as having 'expired' after a six month period. In his witness statement, the respondent's Line Operations Manager Neil Kenny stated that the letter advising of the warning had been removed from the applicant's file and would not be relied on in the event of any future disciplinary inquiry.

[4] However the issue remains of importance to the applicant because of what he sees as a residual slur on his reputation. He believes that other staff of the respondent may be under the mistaken belief that he would not report for a standby duty when asked to do so because he was under the influence of alcohol. He feels so strongly about this matter that he decided to have the issue aired in the public forum of an Authority investigation and determination.

The investigation

[5] The matter was not resolved in mediation prior to the matter being lodged in the Authority. The Authority's investigation was assisted by witness statements from the applicant, his wife Susan Howard, Airline Pilots' Association ("ALPA") legal officer Dawn Handforth, and Mr Kenny. Each attended the investigation meeting. The applicant, Mrs Howard and Mr Kenny each answered questions. Ms Handforth was not questioned but her written evidence was useful because it included a copy of six pages of handwritten notes she took in a disciplinary meeting on 10 August 2006. Counsel provided helpful written synopses along with their oral closing submissions.

[6] The specific issue for resolution, as noted in submissions of both representatives, is whether the warning given was for a concern which was outside the scope of the disciplinary investigation notified to the applicant.

The facts

[8] On 10 June 2006 the applicant was on standby duty. The company's practice was for a pilot on standby to remain at home and contactable by telephone, rather than go to the airport and wait there to be assigned to any duties that arose.

[9] The standby duty started at 7am. At or shortly after 5.30am the crew controller telephoned the applicant at home. The applicant was asleep in bed and was woken by the call.

[10] The crew controller, who had started work himself only half an hour or so beforehand, had a problem. The pilot for a flight scheduled to leave at 6.35am had phoned in sick. Looking for a replacement pilot, and knowing that the applicant was on standby from 7am, he decided to call the applicant to ask him to fly the plane.

[11] The telephone conversation did not go well, although the exact order and content of comments exchanged are disputed. The applicant's evidence is to the effect that he said he should not be telephoned before 7am and he would not come in before then to fly the 6.35am flight. He says he attempted to explain the reason that he should not be called before 7am by referring to the company's alcohol policy which provided for pilots not to drink for a certain period before a flight so that they could comply with the "zero tolerance" requirement – that is that a pilot should have no alcohol in their blood stream when reporting for duty. A pilot called before their standby time might still be under the influence of some alcohol which they had drunk expecting to have plenty of time for it to clear their system before their standby duty began. The applicant referred to himself as having had two glasses of wine the night before but says that he stressed this was an example only.

[12] The crew controller's understanding of the telephone conversation was different. He later reported to Mr Kenny that the applicant suggested that he had something to drink the night before and did not want to be "*under scrutiny from the drug and alcohol tester*". The crew controller understood the applicant to be saying he could not even fly at 7am, far less at 6.35am, and would not be prepared to fly until around 9am. The effect, as the crew controller understood it, was that the applicant was not available for duty from his scheduled standby time of 7am.

[13] Mr Kenny called the applicant to a disciplinary meeting to discuss what he called "*potential serious concerns that have been raised about you not presenting for work on Saturday 10 June 2006.*" The letter notifying him of the meeting continued:

> *I have received information from crew control that they called you early on Saturday to cover a 6.35am duty caused by crew sickness. You refused to cover this duty, informing the crew controller that you would not be safe to fly until 9.00am due to your alcohol consumption.*
>
> *The purpose of this meeting is to hear what you say in response to this concern. You may wish to bring a support person to this meeting. Please note this could include formal disciplinary action up to and including dismissal.*

[14] The applicant and his ALPA legal advisor Ms Handforth met with Mr Kenny and the respondent's human resources manager Gavin Carter on 12 July 2006. The meeting adjourned for the applicant to reply to the concerns raised by the respondent. His reply comprised an eight page letter from Ms Handforth which also attached an affidavit from Mrs Howard and a typed copy of notes said to have been made by the applicant shortly after his telephone conversation with the crew controller.

[15] On 10 August 2006 the parties met again. From notes taken by Mr Carter and Ms Handforth it appears they talked for around an hour, took a break and then talked for a further

quarter hour. Both sets of notes show an extended discussion about the applicant's understanding of the operation of the contractual provisions for standby duty.

[16] Ms Handforth's notes record Mr Carter saying early in the meeting that the company no longer had concerns about the applicant's fitness for duty on 10 July but still had some concerns which may have disciplinary consequences. She noted the issue as "*around being on standby and not being available for duty*".

[17] Mr Carter's notes record him stating that

> *… concerns surrounding [the applicant] being fit to fly on the date in question have also been addressed and therefore we do not view the matter as seriously as we did […] … That is dismissal is off the table. Having said that there are still important concerns that we need to resolve that may have a formal disciplinary outcome.*

[18] After notes recording parts of the discussion about the requiremens of an officer on standby, Mr Carter recorded two questions which the applicant refused to answer. I was told that the refusual was on Ms Handforth's advice. The questions were:

> *Can you understand that they (sic) airline would have concerns if an employee was called to work close to the time they are required to be available for active duty and they start discussing their alcohol consumption as a potential reason for why they might not be available?*
>
> *Can you understand that the use of alcohol consumption prior to commencing work even as an example would raise concern for the crew controller?*

[19] He then noted a break was taken in the meeting, and then the following exchange:

> *GC – Today you said words to the effect that being accussed of alcoholism or impaired when on duty is one of the worst things an airline pilot can be accused of so therefore why did you use it as an example before 6.00 am in the morning to [the crew controller], can't you see the issue here?*
> *SH – No I just used it as an example.*

[20] Ms Handforth's notes are similar on this exchange with the following two comments:

> *GC: think it was a good example?*
> *SH: think it was a very good example.*

[21] The following day Ms Handforth sent a letter protesting that discussion of "*the issue of standby duties and availability for duty*" was outside the scope of the disciplinary investigation that the applicant was advised of in the company's letter of 23 June.

[22] The company responded with a letter dated 22 August 2006 which included advice of what was described as a verbal warning. It noted there were different accounts between the crew controller and the applicant over the content of their phone conversation on 10 June and concluded that it was unlikely that the respondent would "*ever be able to objectively verify who said what on that morning*". It continued:

> *However the outcome of the phone conversation between you raised a question in [the crew controller's] mind over it being prudent to use you for a start at your standby time on time of 0700 hrs as he expected to be able to.*
>
> *We believe that the reference you made to the use of alcohol, even as an example, on the morning in question was inappropriate in the circumstances for a pilot who was on standby duty that morning. Pilots and alcohol consumption is a matter that the Company, Government, CAA and the travelling public view as very serious. You acknowledged yourself that to accuse an airline pilot of having a drinking problem was one of the worst accusations one could make of a pilot. Yet when the crew controller was trying to ascertain whether you would do a duty starting at 0635 hrs and was looking for a straight answer you raised the issue of alcohol as a subject in support of declining coming into work and then expected this to pass without mention.*

> *Even if we are to give you the benefit of any doubt as to the context of alcohol being mentioned, this is not the type of behaviour or judgement we expect of an Air Nelson Captain and as such you are given a verbal warning for your actions.*

The law

[25] In determining whether the respondent was justified in issuing a verbal warning to the applicant, the Authority must consider, on an objective basis, whether the respondent's actions, and how the respondent acted, were what a fair and reasonable employer would have done in all the circumstances at the time of issuing the warning: s103A Employment Relations Act 2000.

[26] Explaining the application of this test of justifiability, the Employment Court in *Air New Zealand v Hudson* (unreported, EC Auckland, AC 30/06, 30 May 2006, Shaw J) stated that:

> *The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which it characterised as serious misconduct happened. It must, however, show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The employer is not required to conduct a trial or even a judicial process but there are some fundamental requirements of natural justice which are appropriate and which, in this case, are reinforced by the company's policies. As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her".* (my emphasis)

[27] The Court noted that the objects of the Act including the obligation of good faith must inform any objective assessment of what a fair and reasonable employer would do in the circumstances.

[28] Neither party provided me with the applicable collective employment agreement or any policy or procedure guideline of the respondent which might apply. From what I was told by counsel, there appears to be nothing in the agreement, or any policy or procedure, which need be referred to in considering application of the relevant law to the specific circumstances.

Discussion

[29] In the Authority investigation meeting the applicant acknowledged that the allegations referred to in the respondent's letter of 23 June were serious and it was proper for the respondent to investigate them. His argument is that having done so, and effectively having accepted his responses to those allegations, the respondent nonetheless considered and took disciplinary action on an issue that the applicant did not have an opportunity to respond to or understand was part of the disciplinary inquiry.

[23] In his witness statement the applicant says he was relieved that the respondent's investigation made no finding of misconduct on matters investigated but that he was very angry that the respondent had "*nonetheless give[n] me a warning for a matter that had not been part of the investigation*".

[30] He also says the warning was deficient because it lacked necessary detail on what steps he would need to take to meet the company's expectations of his behaviour and what would happen in the future if he did not.

[31] The respondent, in oral submissions, agreed that the "nub" of the grievance was whether the company's conclusion on the applicant's behaviour, and its decision on a disciplinary outcome, were within the scope of what he was told in the 23 June letter would be investigated or whether he was given inadequate notice of the concern which resulted in the so-called verbal warning.

[32] Mr Kenny's written evidence was that before the 10 August disciplinary meeting he had come to the view that "*there would be no basis to conclude that [the applicant] had refused to*

cover a duty in breach of contractual obligations to do so or that he was affected by alcohol to the point where he would not be safe to fly for a couple of hours after being called". He understood that the applicant had refused to fly a 6.35am flight "*but contractually he was able to do so*".

[33] His evidence was that, following the 10 August meeting, his concern was with what he described as "*the manner of engagement*" by the applicant in the conversation with the crew controller. Specifically he was concerned that it was not appropriate to refer to alcohol in such a conversation because of "*the potential to cause the crew controller to question whether the pilot was suitable for any duties at that time or shortly thereafter*".

[34] It appears that by 10 August Mr Kenny and Mr Carter were satisfied that the serious allegations of refusing duty and not being safe to fly – as referred to in the letter of 23 June – were not founded. And they made that clear at the start of the 10 August meeting.

[35] They also made it clear that they still had some "important concerns" to resolve which may have a formal disciplinary outcome. Howver the scope of those concerns were not clearly stated. From the notes made by Mr Carter and Ms Handforth, the focus of the discussion appeared to be on how the contractual provisions for standby duty worked and the applicant's view of how they should work.

[36] Mr Carter did put two questions about reference to alcohol – one about the concern that would cause for the airline and one about the concern that might cause a crew controller. The applicant refused to answer both questions as being outside the scope of the disciplinary inquiry. If the company had a clear view that those questions were within the scope of the inquiry, it does not appear to have made any attempt to correct what it should have seen as a misapprehension by the applicant.

[37] I assess the respondent's actions – that is how Mr Carter and Mr Kenny conducted the 10 August disciplinary meeting and the subsequent decision to issue a warning – against what the notional fair and reasonable employer would have done in the circumstances.

[38] The notional employer having satified itself that the applicant's conduct was not of the serious nature alleged, but having some concerns about matters raised or identified during its inquiries, would clearly identify those concerns and provide the employee with an opportunity to respond to those concerns. That does not require a disciplinary inquiry to start again, but it must involve a clear allegation and an opportunity to refute the allegation or explain or mitigate the conduct.

[39] That standard was not met, I find, in the particular circumstances of this case. After clearing up the serious concerns, a residual concern was identified about the content and tone of the applicant's conversation with the crew controller.

[40] However I am not satisfied that the respondent has established that this concern was clearly put to the applicant in the meeting of 10 August or that he was given an opportunity to respond specifically to it or even that Mr Carter and Mr Kenny were clear in the meeting about the exact nature of their residual concern.

[41] In reaching this view I do not say it was unreasonable for the respondent to have such a concern or to want to put it to the applicant or to want to hold the applicant to a standard of conduct for his interactions with other staff of the respondent.

[42] But the employee in such a situation must be told the concern to which he is required to respond. And the evidence on the discussion in the 10 August disciplinary meeting – both as recalled in witness statements and recorded in notes taken at the time – suggest there was much discussion on the applicant's interpretation of the contractual provisions for standby duty. It created the impression that this was the company's outstanding concern. As noted earlier the questions about referring to alcohol in the 10 June telephone call were not answered, nor was the reason for them, including potential disciplinary action, made clear.

That falls within the respondent's broad good faith obligations, because to leave the point unclear was likely to mislead the applicant.

[43] A fair and reasonable employer squarely addressing the content and manner of the telephone call would then also have the benefit of the employee's explanation, and possible contrition, to take into account. The employer would also take into account the circumstances of the telephone call – both its very early morning time and the state of both participants.

[44] As Mr Kenny fairly observed in the Authority investigation, the applicant was woken suddenly by a phone call at an early hour and rapidly involved in a phone conversation with a crew controller under the stress of urgently needing to find a pilot for a flight scheduled to leave in an hour.

[45] With the serious allegations put aside, if the respondent had clearly identified the residual concern in the 10 August meeting, the applicant may have been more open and less defensive about admitting that the conversation could have been better handled – both in terms of its content and tone. However the employer's actions denied itself the benefit of that possibility. Consequently its conclusion that the applicant's behaviour was unsatisfactory was, I find, unfair. It follows that the warning issued was unjustified.

Determination

[46] For the reasons discussed above I find that the warning issued to the applicant by the respondent's letter of 22 August resulted from a process that was unfair and was, accordingly, unjustified. Because of that finding I do not need address the applicant's other contention that the content of the warning was itself deficient. The applicant has a personal grievance which requires remedies.

Remedies

[47] I am not satisfied that an award of compensation for the loss of benefit of a 'clean' employment record is warranted. That is partly because the applicant is already restored to the position of a 'clean' record by the respondent's removal of the warning from his file. Further the applicant was required to take reasonable steps to mitigate his loss. Mr Kenny offered prior to the hearing to effectively 'purge' the applicant's file of all record of the investigation. Although the applicant submitted this was a cynical gesture, I prefer Mr Kenny's evidence that it was a genuine attempt to resolve the issue and appropriate in the circumstances of making best endeavours to restore an ongoing employment relationship. The applicant chose not to accept that offer or explore its prospects. Instead he preferred to seek public vindication of his position, which he was entitled to do, and has achieved that to some degree by way of this determination. His loss was said to include the prospect that if he were to seek a new job and was asked whether he had ever been subject to disciplinary action, he would have to say yes even though his personnel file with the respondent had been 'cleansed'. That is so but he is ever in the position of answering that question he can now answer that he had a warning which was found to be unjustified. That, in the particular circumstances of this case, I consider to be sufficient remedy with no compensation required under this head.

[48] I accept that the applicant has suffered some distress, hurt and humiliation and injury to feelings in respect of the respondent's actions and decision in issuing him with a warning criticising his "behaviour or judgement" as a captain. It was clear from his evidence how sharply he felt the sting of that criticism and how it offended his professional and personal pride in an aviation career stretching back some thirty years.

[49] The disadvantage suffered is the effect on the applicant's enjoyment of his employment, and lessened regard of the respondent for him. Three factors limit the level of the distress compensation required to remedy that disadvantage.

[50] Firstly, the applicant alleged that crew controllers and other pilots were aware that he

was under investigation for allegations involving alcohol. Because of the well-known 'zero tolerance' policy on alcohol, staff take such matters very seriously and the applicant was concerned about the effect on his reputation among what he called "the no-smoke-without-fire brigade". Through his union's letter of 24 June the applicant raised his concern about what he regarded as defamatory comments by unidentified crew control staff. He asked for an inquiry into those comments and was told in the 10 August meeting that Mr Kenny had addressed the issue through the crew control manager. If the applicant was not satisfied with that assurance and had further details on the alleged comments made about him, he should have provided those details at that time. He did not. Neither did he provide the Authority with any specific evidence on what crew controllers or other pilots were allegedly saying about him.

[51] Secondly, the applicant's own evidence was that other stressful factors have impacted on his working life in the period between the time of the respondent's inquiry and the Authority investigation. He changed from flying one type of aircraft to another which is a very demanding adjustment in a pilot's work, but is not a stress arising from the disadvantage suffered. The applicant's family had also suffered some bereavements which understandably made them emotionally fragile but this cannot be attributed to the respondent's actions. The applicant was also upset by a perceived slight to his wife and some supporting information she provided during the respondent's inquiry. However I am not satisfied that there was sufficient evidence to establish that the alleged insult was in fact made.

[52] Thirdly, the period of disadvantage was limited in the sense that the warning has now 'expired' and been removed from the applicant's file, with undertakings made by Mr Kenny on behalf of the respondent that it would not be relied on in the event of any future disciplinary inquiry of the applicant.

[53] Weighing these factors, along with the vindication to the applicant provided by this determination, I consider that an award of $1500 is the appropriate compensation under s123(1)(c)(i) of the Act. The respondent is ordered to pay that amount to the applicant.

[54] As required by s124 of the Act I have considered whether any actions of the applicant contributing towards the situation that gave rise to the personal grievance were so blameworthy as to require a reduction of the remedies. In this respect I accept Mr Kenny's evidence that it was not appropriate for the applicant, as an officer of the respondent's airline, to engage in an extended debate with a crew controller about the contractual interpretation of standby provisions or the operation of the zero tolerance alcohol policy at 5.30am in the morning when that controller had an urgent task to complete. However I also take into account the respondent's acceptance that the applicant's contractual argument was not incorrect and that the applicant was woken suddenly and launched into an unexpected discussion. Some of his comments may, with the benefit of hindsight, have been ill advised, but did not go so far, in the circumstances, as being blameworthy. I also take account here of Mr Kenny's evidence that but for the more serious allegations made initially, the "misinterpretation" about alcohol made in the telephone discussion between the applicant and the crew controller was the sort of event that would normally have been dealt with by the applicant being asked to have "a conversation" with Mr Kenny in his office. That suggests to me that the respondent too would not normally see such actions as blameworthy.

Costs

[55] Costs are reserved. The parties are encouraged to resolve this matter between themselves. If they are unable to do so, the applicant may lodge and serve an application within 28 days of this determination for the Authority to determine costs. The respondent will have 14 days from that latter date to reply before costs are set by the Authority. No application will be considered outside these dates.

Robin Arthur
Member of Employment Relations Authority