

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 387/09
5157509

BETWEEN GLENDA MAREE JAMIESON
Applicant

AND AIR NEW ZEALAND
LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Aaron Lloyd and Isobel Foote, counsel for Applicant
Kevin Thompson, counsel for Respondent

Investigation Meeting: 18 June 2009

Submissions Received 7 and 15 July 2009

Determination: 4 November 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment dispute investigated by the Authority arose when Air New Zealand Limited (ANZ) terminated Ms Glenda Jamieson's employment after deciding to make her job as a flight attendant redundant.

[2] It has often been observed in decisions from cases such as this one that in a redundancy situation dismissal is not a response by the employer to any fault on the part of the employee. Not only was Ms Jamieson simply not at fault in any way, she had been a loyal and committed employee of ANZ who had an exemplary record of conduct and performance.

[3] The law is also clear that in a genuine redundancy situation an employer can decide to shed positions, even when employees occupying them have been faultless and blameless, provided the employer complies with any particular redundancy

provisions agreed to with the employees, or their union, and also complies with any statutory requirements such as the obligation of good faith under s 4 of the Employment Relations Act 2000.

[4] There is no dispute in this case that ANZ faced a genuine redundancy situation at the end of 2008 when it began taking steps to reduce its workforce by the jobs of 100 flight attendants, such as Ms Jamieson, employed on the airline's Longhaul international flights.

[5] Although 61 employees volunteered for redundancy, 39 still had to be chosen by ANZ to reach the level of 100 positions to be relinquished.

[6] The problem Ms Jamieson has with being one of those selected is why her particular skills and experience, attained over many years as a flight attendant on ANZ domestic services, were given no weight when the decision was made that her job would go.

[7] Through her personal grievance and penalty claims Ms Jamieson seeks orders from the Authority requiring ANZ to reinstate her to the position of flight attendant. She also seeks to be reimbursed for lost earnings since her termination in April 2009 and compensated for emotional distress resulting from her dismissal. Further, she seeks penalties for breach of the statutory duty to act in good faith and for breach of her employment agreement.

[8] Mediation held before the investigation meeting did not resolve this employment relationship problem.

[9] ANZ has contended that in selecting the additional 39 positions it complied with every term and condition of the employment agreement and with every statutory requirement, including s 4 of the Employment Relations Act 2000.

[10] ANZ's response to Ms Jamieson's claims is that the selection of her position for redundancy was made in accordance with a particular provision of her employment agreement which allowed for a variation of the selection criteria written in the agreement.

[11] I find that the applicable agreement was the collective employment agreement (CEA) negotiated between ANZ and the flight attendant's union FARSA.

[12] When Ms Jamieson transferred within ANZ from the domestic airline to Longhaul international operations she was a “*covered*” employee under the CEA, as her new position was that of a Longhaul flight attendant and she was, at that time, a member of FARSA. She had been a member of the union for many years and apparently remained so when her employment was terminated.

[13] By operation of law, s 56 of the Employment Relations Act, the CEA was binding on Ms Jamieson as a FARSA member from the moment she worked as a Longhaul flight attendant within coverage of the collective agreement. It is unlikely she did not know the CEA applied to her and thought that she was covered by an individual agreement.

[14] I find that FARSA concurred with ANZ in making a variation to the particular criteria that are expressed in the redundancy provisions of the CEA at clause 19.3.

[15] Had that not been so, Ms Jamieson’s case would have been a strong one that the particular criteria as expressed in the provision were applied to her in an arbitrary and unreasonable way, particularly with regard to any lack of weight given to her skills and experience as a flight attendant with ANZ, in both domestic as well as Longhaul international services.

[16] I find from the evidence that ANZ, from about the beginning of 2009, sought to reach agreement with FARSA on the criteria to be applied to select 39 employees for whom redundancy would be involuntary.

[17] An initial proposal by ANZ giving full protection to flight attendants having the skills and experience of Level 4 and 5 Language Speakers was rejected by FARSA. A further proposal was then made by ANZ giving only limited protection to the advanced level (4 and 5) Language Speakers, and then measuring skills and experience by using scores obtained from the employer’s Excelerator tool. A level of an average score to be attained was set, with a margin included to differentiate between employees depending on whether they had joined Longhaul international operations before or after 1 January 2008.

[18] Ms Jamieson did not join Longhaul operations until that date and was at a disadvantage because of that.

[19] It is clear from the variation to the selection criteria produced under clause 19.3 that Ms Jamieson was not given credit for her long service as a flight attendant in ANZ's domestic operations. At best her time in that role would have been reflected only indirectly through her Excelerator score, because her long experience should have assisted her to achieve higher scores.

[20] I accept the uncontradicted evidence given by Mr Alan Gaskin, General Manager of ANZ's International Airline Cabin Crew, about the selection process and criteria applied to the 39 enforced redundancies. His evidence was supported by an email sent on 9 January 2009 to him by the Acting President of FARSA, Ms Marja Lubeck, which said:

This email is to confirm that FARSA agrees that the selection process with regards to enforced redundancies, as per the presentation made to FARSA on 8 January 2009, is based on a fair and transparent system and in accordance with the Selection Criteria of Redundant Employees as per clause 19.3 of the Flight Attendant CEA.

Upon receiving the final list of candidates for enforced redundancies, FARSA will be able to confirm that the list complies with the above criteria.

[21] The consent of the union to the change in the selection criteria is also confirmed by a notice FARSA sent out to its members about the redundancy in early 2009. It is clear from the notice that FARSA gave at least tacit consent to the proposals ANZ had consulted the union about.

[22] Even if not expressed in the notice, the agreement of FARSA can be inferred from the way the union described in writing its participation in the consultation process. It is understandable why the union in its newsletters to members might not have wanted to say outright that it had agreed to a variation, but this is clearly the effect of its involvement and the statement by it of the selection criteria settled upon following consultation by ANZ. That statement was:

Below is the selection criteria the Company have used to identify those potentially affected by the enforced redundancy.

- *Level 4 and 5 Language Speakers with an Excelerator score 3.18 and below.*
- *All other FAPCs with an Excelerator score less than 3.35.*
- *All other things being equal – Date of Joining International.*

*This results in redundancy being imposed **on a last on first off basis**; with language skilled **being exempt** from redundancy unless they*

*have a score of 3.18 or below; all other crew are **included** unless they have a score of 3.35 or above (four individuals only).*

[23] FARSA, through Ms Lubeck's email of 9 January, had confirmed to ANZ that those criteria were in accordance with the CEA. The criteria were subsequently applied by ANZ to Ms Jamieson, with the result that her position was selected for redundancy. She was advised in writing by Mr Gaskin of this on 19 January 2009, although the selection was described as provisional because she was offered an opportunity to comment on the relevant information, including both the selection criteria used and the way they had been applied, before any decision concerning redundancy was confirmed.

[24] Ms Jamieson took up that opportunity and wrote back to Mr Gaskin on 26 January. In a lengthy letter she objected that no account appeared to have been taken of her long and successful period of 11 years continuous current (and 15 years broken) service with ANZ and that the only attempt to assess her skills and experience against others had been through the Excelerator system, but measured over the period of only four months she had worked as a Longhaul flight attendant.

[25] In her letter Ms Jamieson commented at length on the selection criteria used by ANZ and raised concerns about the fairness and relevance of them. She requested ANZ to adhere strictly to the terms of her employment agreement, withdraw the notice of provisional selection and issue her with an apology.

[26] Mr Gaskin wrote back to Ms Jamieson on 3 February confirming the selection of her position for redundancy. Notice was given that her employment would end on 7 April 2009.

[27] I do not consider that there is any basis for the claim to recover penalties for breach of the employment agreement or for and breach of the statutory requirement of good faith. The selection criteria applied to Ms Jamieson were decided upon after consultation with her union, FARSA, and with the union's consent. Clause 19.3.5 had expressly permitted the determination of the criteria in that way.

[28] In addition, the requirements of s 4(1A) of the Employment Relations Act in particular were satisfied by ANZ when it notified Ms Jamieson of her provisional selection for redundancy and then gave her a reasonable opportunity to consider and

comment upon the selection criteria and the provisional decision, before finally deciding on selection.

[29] There is also no evidence that the scores attributed to Ms Jamieson through the use of Excelerator were incorrect in any way or had been arrived at through a mistake. Undoubtedly those scores were to be reached on the basis of the assessment of many individuals but in my view the system itself overall is sufficiently objective as a means of measurement to allow a reasonable employer to adopt it in making comparisons between employees about skills and experience.

[30] I do not consider that ANZ had designed (with FARSA's involvement) the selection criteria to target personally Ms Jamieson or any other flight attendant. The criteria were designed to rank employees according to their attributes or properties considered relevant to meet the objective of retaining staff that had, as expressed by clause 19.3.1 of the CEA;

.....the necessary skills, knowledge and experience to provide the Airline with an efficient and effective workforce.

[31] I therefore must find that ANZ acted in accordance with the terms and conditions of the CEA as they related to a redundancy situation, particularly the proviso that enabled the employer and the union to vary the selection criteria by agreement. No issue can arise about the existence of that agreement being in writing, as the email from the Acting President of FARSA to Mr Gaskin on 9 January evidences the acceptance by the union of ANZ's modified proposal made the day before.

[32] How the airline employer would have proceeded in selecting employees for redundancy in the absence of any variation of the clause is not an issue that arises in the circumstances of this case. How in that situation it would have treated Ms Jamieson's substantial experience and skills acquired over many years as a flight attendant for ANZ, does not fall to be decided.

Determination

[33] I therefore find that viewed objectively ANZ acted in the circumstances in the way that a fair and reasonable employer would have acted at the time it made its decision, and that therefore its actions were in accordance with s 103A and met the test of justification for a dismissal or other action. I find that Ms Jamieson does not

have a sustainable personal grievance of any kind. I have also found that there is no basis for the claims for penalty in relation to a breach of her employment agreement or the alleged breach of good faith.

[34] Accordingly, no orders are required to be made against ANZ.

Costs

[35] Costs are reserved. Counsel are to try and resolve any issue about costs themselves on behalf of the parties. If that cannot be done, ANZ may file a memorandum in the Authority and serve a copy on counsel for Ms Jamieson, who will have 14 days in which to reply from the date of service of that.

A Dumbleton
Member of the Employment Relations Authority