

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Greig Johnston (Applicant)  
**AND** Commercial Helicopters Limited T/A Mountain Air (Respondent)  
**REPRESENTATIVES** Stephen Langton, Counsel for Applicant  
Keith McKenzie & Robyn McKenzie, Advocates for Respondent  
**MEMBER OF AUTHORITY** Leon Robinson  
**INVESTIGATION MEETING** 30 May 2005  
31 May 2005  
**DATE OF DETERMINATION** 22 June 2005

DETERMINATION OF THE AUTHORITY

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**The Authority determines that this employment relationship problem shall be resolved by the following orders:-**

- A. Commercial Helicopters Limited trading as Mountain Air is ordered to pay to Greig Johnston the gross sum of \$3,493.14 as reimbursement.**
  - B. Commercial Helicopters Limited trading as Mountain Air is ordered to pay to Greig Johnston the gross sum of \$1,916.67 as wages in lieu of notice.**
  - C. Commercial Helicopters Limited trading as Mountain Air is ordered to pay to Greig Johnston the sum of \$8,000.00 as compensation.**
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## Employment Relationship Problem

[1] Mr Greig Johnston (“Mr Johnston”) asks the Authority to investigate his summary dismissal on 21 July 2004 from his employment as a Sales/Marketing and Pilot Officer with Commercial Helicopters Limited T/A Mountain Air (“Mountain Air”).

[2] A letter dated 23 July 2004 (‘the dismissal letter’) from Mountain Air’s Governing Director Mr Keith McKenzie (“Mr McKenzie”) confirms the dismissal on 21 July 2004 because of Mr Johnston’s “*seriously flawed flight performance*”.

[3] The parties were unable to resolve the differences between them by the use of mediation.

## The issues

[4] A number of issues fall to be determined:-

- (i) Whether there was a dismissal?
- (ii) Whether the dismissal was justified?
- (iii) Whether Mr Johnston contributed to the situation that led to the personal grievance for unjustifiable dismissal?
- (iv) What orders for remedies are appropriate to resolve the employment relationship problem.

These issues are dealt with in turn.

## A dismissal?

[5] A dismissal is a “sending away”. It is not in dispute that Mr Johnston was dismissed. That is evidenced by the dismissal letter.

[6] The dismissal letter confirms what Mr Johnston was told at a meeting on 21 July 2004. He was summarily dismissed because his performance on a flight on 19 July 2004 “*was of such seriously deficient standard to bring about your instant dismissal.*”

[7] As Mr Johnston was summarily dismissed, his dismissal cannot be justified because of earlier poor performance. Mountain Air summarily dismissed him for one instance of serious misconduct.

## A justified dismissal?

[8] Was the decision to summarily dismiss Mr Johnston justified?

[9] The Authority has regard to established legal principles in determining that question. It must be satisfied that it was open to Mountain Air, acting fairly and reasonably, to have seen summary dismissal as the appropriate response to Mr Johnston’s conduct.

[10] Mr McKenzie had not been pleased with Mr Johnston’s performance. Mr Johnston was a trainee pilot and Mountain Air was training him. Mr McKenzie wrote to Mr Johnston by letter dated 14 July 2004. Mr Johnston was advised of the following concerns:-

*The major areas of concern regarding your IFR flights are:-*

1. *Not landing the aircraft to the standard of a CPL. In fact, the standard achieved would not allow a student pilot to go solo.*
2. *Poor judgment of approach profiles to landing.*
3. *Pulling both mixture controls to cut off leading to a double engine failure on approach to land.*
4. *Inability to keep ahead of the aircraft in the IFR environment. This including the following major deficiencies:*
  - a) *Incorrect heights flown*
  - b) *descending below MDA*
  - c) *turning the wrong way in the hold*
  - d) *getting "the leans"*
  - e) *complete lack of situational awareness*

*This is not an exhaustive list of all the problems. You have a copy of all your flights with the deficiencies noted.*

[11] The letter continued in terms of future action with a clear warning to Mr Johnston:-

*As discussed on Tuesday 13th July, we will provide you with three more training flights prior to considering a flight check. These flights are to see if you can meet the required standards across all areas and do so consistently.*

*Should you not be able to show the required standard is achieved on any of these flights, dismissal from your position could result due to your ability to perform to the required flights standards necessary for the position you were employed to hold.*

[12] It is clear from this letter that Mr Johnston was to be given three more training flights. That is what he reasonably understood was to be the case. That is how the Authority interprets the plain wording of the letter too.

[13] The first training flight was held on 19 July 2004 with Mr Mark Huxford ("Mr Huxford"). Mr Huxford worked for Mountain Air from March 2001 until April 2003. He continued to work on a part-time basis for Mountain Air after that time mainly involved in pilot training.

[14] Mr Huxford is adamant that Mr Johnston stalled the Aztec aircraft. He told Mr McKenzie after the training flight that Mr Johnston had caused the aircraft to stall twice during two separate approaches to land at Whangarei. At the Authority's investigation meeting, Mr Huxford continued to maintain this. He completed a training report on the same day of the training flight. He does not expressly note a "stall" but he does note a "buffet" apparently a situation which precedes a stall. He scored Mr Johnston's landings as a "5" which denotes "needs work". His initial scoring in the "Circuit and Landing" section is a "4" denoting "below average". That score of "4" does not accord with the seriousness of the situation Mr Huxford and Mountain Air later contend. Mr Huxford also told Mr McKenzie, Mr Johnston had asked about the vibrating noise which preceded the stall.

[15] Mr Alistair Marshall, Mountain Air's Chief Pilot at the time ("Mr Marshall"), was also informed of Mr Johnston's performance after the training flight. Mr Marshall tells the Authority he informed Mr McKenzie that Mr Johnston should be dismissed. Mr McKenzie told Mr Marshall that all training flights were then on hold and he would get back to Mr Marshall.

[16] There was a staff meeting on 21 July 2004. Mr McKenzie asked for Mr Johnston and Mr Marshall to stay behind. I prefer Mr Johnston's account of this meeting to Mr McKenzie's. I consider Mr Marshall's evidence corroborates Mr Johnston's account.

[17] Mr Johnston says that Mr McKenzie opened the meeting by stating that he had been looking at Mr Johnston's training reports and that they didn't make pleasant reading. Mr Johnston says he was asked to explain but before he could respond, Mr McKenzie immediately produced his letter of 14 July 2004 and said "*I wrote to you and said that dismissal from your position could result and that is what I'm going to invoke.*" Mr Johnston naturally enough apprehended he was immediately dismissed.

[18] I accept Mr Johnston's evidence that Mr McKenzie was agitated and began berating him. He referred to Mr Johnston stalling the Aztec aircraft on 19 July 2004 in the training flight with Mr Huxford. Mr McKenzie asked Mr Johnston whether he thought that was good flying, whether he would allow a student pilot to go solo when flying like that, and what the stall speed was. Mr Johnston was in complete shock. He was not composed sufficiently to respond to Mr McKenzie's tirade. Mr McKenzie kept asking Mr Johnston and eventually Mr Johnston said 60 to 70 knots. Mr McKenzie asked Mr Johnston why he was flying at that speed, and Mr Johnston denied that he was. Mr McKenzie asked him what speed he was flying at and he replied "75 knots."

[19] I accept Mr Johnston's account of how he was dismissed in the meeting of 21 July 2004. Having been dismissed, Mr Johnston sought to preserve his continued employment. He asked Mr McKenzie whether he (Mr McKenzie) had any problems with his (Mr Johnston's) VFR (Visual Flight Rules) flying. Mr McKenzie said he did not. Mr Johnston asked if he could continue flying the *Islander* aircraft. Mr McKenzie said "No". Mr Johnston asked if he could work from Mountain Air's Mt Ruapehu airfield. Mr McKenzie again said "No". Mr Johnston then suggested he would pay for his own private training to bring himself up to the level required. Mr McKenzie again said "No".

[20] At the conclusion of the meeting Mr Johnston was asked his postal address and arrangements were made for payment to him of his final pay.

[21] I conclude that Mr Johnston's dismissal was unjustifiable. It was unfair in two principal ways.

[22] Firstly, Mr Johnston was given clear warning his continued employment was in jeopardy and an ultimatum in the form of three more training flights to redeem himself. He was not however given those three training flights. He was denied therefore, the opportunity of showing a consistent performance. It was not fair to advise him he had three more training flights to only give him one. Mr Johnston was trainee pilot officer. He was in training and the three flights offered to him by way of clear warning were training flights – not test flights. It was not reasonable to expect optimal performance from a pilot officer in training. Acting fairly and reasonably, Mountain Air was obliged to allow Mr Johnston all three training flights. In the circumstances, dismissing him after one training flight (not a test flight) was not the actions of a fair and reasonable employer.

[23] Secondly, the minimum requirements of fair process were not accorded to Mr Johnston. He was not advised in advance of the meeting held on 21 July 2004 the nature or details of matters that were to be discussed. He was not extended the opportunity to have a representative or support person present with him. He was not told the meeting was serious and the outcome of it could have been his dismissal. He was dismissed at the commencement of the meeting and was denied any opportunity of offering an explanation or defending himself. Mr Johnston was dismissed in a peremptory fashion. I am particularly satisfied of that last cited matter, convinced as I am, that when Mr McKenzie asked for an explanation at the investigation meeting, it was the first occasion he had done so. Everything about the manner in which he asked that question suggested he had not asked before.

[24] All of the above matters were so unfair to Mr Johnston that it was not open to Mountain Air acting fairly and reasonably to dismiss Mr Johnston. It had not conducted a full and fair investigation which disclosed information capable of being regarded as serious misconduct.

## Determination

[25] I find that Mountain Air's decision to summarily dismiss Mr Johnston on 21 July 2004 was not a decision which a fair and reasonable employer could make in all the particular circumstances.

**[26] I determine that Mr Johnston has a personal grievance for unjustifiable dismissal and it is appropriate to resolve this employment relationship problem by making certain orders.**

## Remedies

[27] Having made that finding and in considering both the nature and the extent of the remedies to be provided, the Authority is bound by section 124 of the Employment Relations Act 2000 ("the Act") to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[28] However allegedly egregious his performance was in the training flight on 19 July 2004, Mr Johnston was a pilot officer in training. In relation to the incident for which he was summarily dismissed, I am not prepared to find that Mr Johnston's performance in the training flight was blameworthy conduct. He was being trained to be competent. He was expecting to have two more training flights. He could well have demonstrated consistent improvement had he been given the chance. His training was less than ideal and I say that because it appeared to me that his training pilots were not always entirely honest in their assessment of his performance. They did him no favours in recording his performance in more favourable terms than the reality. Having regard to all the equities of the matter, I consider it would be quite wrong and inequitable to find Mr Johnston's performance in that training flight amounts to blameworthy conduct.

[29] Mr Johnston's actions and conduct while in training cannot be described as blameworthy. Even were I to consider his behaviour blameworthy, I would similarly not be prepared to find that such conduct requires a reduction in remedies. There is therefore no basis for reducing the nature and extent of the remedies to be granted. I conclude that Mr Johnston did not contribute in any way to the situation that gave rise to the unjustifiable summary dismissal and there was no blameworthy conduct on his part which could constitute contributory fault.

## Reimbursement

[30] I am satisfied that Mr Johnston has lost remuneration as a result of the personal grievance. I am satisfied too that he took sufficient steps to mitigate his losses. **I order Commercial Helicopters Limited trading as Mountain Air to pay to Greig Johnston the gross sum of \$3,493.14 as reimbursement.**

[31] Mr Johnston further seeks liquidated damages of one month's wages being the notice period under his employment agreement. It is proper that he should have that sum which he would have received had his employment been lawfully terminated. **I order Commercial Helicopters Limited trading as Mountain Air to pay to Greig Johnston the gross sum of \$1,916.67 as wages in lieu of notice.**

## Compensation

[32] Mr Johnston gave evidence of the effect of the personal grievance on him.

[33] Mr Johnston tells the Authority that during the meeting at which he was summarily dismissed, Mr McKenzie told him he should think about changing careers. He says that after the meeting he drove home in total shock. He said he thought about Mr McKenzie's comment about changing careers and he wondered what else he could do. He resolved that his career in aviation was ruined by his summary dismissal.

[34] He says he telephoned his father to tell him what had happened. During that phone call he got upset and in anger threw the telephone. For the next few days he was upset, hurt and angry.

[35] Mr Johnston was sent a letter from Mountain Air dated 23 July 2004. I accept that advice referred to a number of matters and apparent concerns that were not in fact discussed with Mr Johnston in the meeting on 21 July 2004.

[36] Mr Johnston says that he experienced financial hardship after his dismissal. He had no savings having invested all his earnings in his flying training. Mountain Air paid him only his wages to the date of his dismissal and his holiday pay. He had to borrow money from his parents to meet his living expenses and he has found that situation humiliating.

[37] He says also that he has found it difficult finding alternative employment whether in aviation or otherwise because he has not known what to say about his experience at Mountain Air. Eventually he found alternative work working at a Bar in Newmarket. He now flies with Great Barrier Airlines.

[38] He says that he has spent a considerable period re-thinking his career choice. He has had much self-doubt and indecision about whether he should stay in aviation.

[39] He says his dismissal affected him deeply and because the aviation industry is small, the news of his summary dismissal spread quickly. He says he was embarrassed and humiliated in front of the whole aviation community and that his reputation has been ruined.

[40] He is concerned that the label "serious misconduct" could affect his ability to progress further within the aviation field and that he says is a very daunting prospect. He says that he has also been distressed by Mountain Air's claim against him for payment of \$10,000.00 in respect of his training. I deal with that claim later.

[41] I accept Mr Johnston has suffered loss of dignity, hurt and humiliation, and injury to his feelings as a result of Mountain Air's decision to summarily dismiss him. He is entitled to be compensated for that proved loss. Having regard to his evidence, the nature of the personal grievance and the length of his service, **I order Commercial Helicopters Limited trading as Mountain Air to pay to Greig Johnston the sum of \$8,000.00 as compensation.**

## Training fee

[42] Mountain Air seeks to recover a fee of \$10,000.00 from Mr Johnston. It brings that claim under clause 12(e) of its employment agreement with Mr Johnston. That clause is as follows:-

*A ten thousand dollar (\$10,000) fee inclusive of GST for training, type rating and training a replacement pilot will be charged and become payable by the employee on the employee's termination date if employment is terminated for any reason prior to completing two years of full time employment. The fee reduces to five thousand five hundred dollars (\$5,500) inclusive of GST after completing one year of paid employment and zero at two years.*

[43] The basis for this claim is that Mr Johnston did not complete two years full time service with Mountain Air. I am not disposed to allow this claim for two reasons.

[44] Firstly, I consider the provision is akin to a penalty. I am not persuaded that the sum of \$10,000.00 now sought is actually an accurate or true measure of Mountain Air's loss as alleged. If that sum is out of all proportion to its actual loss, then it operates as a penalty. In this equity and good conscience jurisdiction, I will not enforce such a penalty or punitive provision against Mr Johnston<sup>1</sup>.

[45] Secondly, I consider that as a matter of legal principle, once a party acts to fundamentally breach a contract, the innocent party is free from all contractual obligations binding on them<sup>2</sup>. Mountain Air unlawfully terminated Mr Johnston's employment. Having acted that way, I consider it equitable and just that Mr Johnston is relieved of further performance under the employment agreement. The fee of \$10,000.00 is not then recoverable from him in the circumstances in which his employment was summarily terminated. **There will be no orders in relation to this claim.**

## **Costs**

[46] In the event that Mr Johnston seeks costs, the parties are encouraged to resolve that question between them, but failing such agreement, Mr Langton is to file and serve a memorandum as to costs within 14 days of the date of this Determination. Mr McKenzie is to file a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson  
**Member of Employment Relations Authority**

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<sup>1</sup> See the Chief Judge's comments in *Ozturk -v- Hamit Gultekin t/a Halikarnas Restaurant*, unreported, Employment Court Wellington, WC6/04, 11 June 2004, Goddard CJ at paragraph 5.

<sup>2</sup> *General Billposting Co Limited -v- Atkinson* [1909] AC 118 and *Rock Refrigeration Limited -v- Jones & Anor* [1997] 1 All ER 1. This principle of law has been applied in the High Court in *A G & S Building Systems PTY Ltd v G & J Holdings Ltd*, unreported, HC Auckland, CIV-2004-404-2565, 8 October 2004, Allan J.