

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Catherine Kennedy (Applicant)
AND Air New Zealand Limited (Respondent)
REPRESENTATIVES Helen Thorpe, Advocate for Applicant
Peter Kiely, Counsel for Respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 19 July 2005
DATE OF DETERMINATION 20 September 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Ms Catherine Kennedy resigned from her senior management position with the respondent Air New Zealand (referred to as "Air NZ") on 30 September 2004. She complained that she did not freely choose to leave but was forced to go. In evidence she has claimed her resignation was induced in the following circumstances;

I reported to my manager Nick Mudge that I was being bullied. This was not investigated, leaving me in an unsafe workplace and which left me no option but to resign.

[2] Ms Kennedy has asked the Authority to investigate her employment relationship problem and determine that she was disadvantaged by unjustified actions of Air NZ, these being its failure to investigate at all or to investigate adequately, her complaint of bullying. Further, she asks for a determination that her resignation was in law a constructive dismissal and therefore was an unjustified dismissal. She also asks for a finding that in relation to her complaint of bullying and her employer's handling of that complaint, Air NZ failed to provide her with a safe working environment and therefore breached the Health and Safety in Employment Act 1992.

[3] To resolve her employment relationship problem Ms Kennedy asks for orders from the Authority against Air NZ, requiring the company to reimburse her for salary losses flowing from the termination of her job, and to compensate her for distress, humiliation and injury to her feelings suffered as a result of its breaches of duty.

[4] As a necessary step towards resolving the problem the parties attended mediation but were unable to settle their differences by that means.

The complaints made by Ms Kennedy

[5] The essential facts out of which the problem has arisen are not in dispute, although there are differences between the parties as to the construction to be placed on those facts. I find that on 14 July 2004, only about three weeks after commencing her employment, during a routine meeting Ms Kennedy reported to her manager, Mr Nick Mudge, that she felt some hostility had been displayed towards her by a colleague. She said that as she had already taken the matter up directly with her colleague, she hoped that would bring an end to the problem. She did not require Air NZ to become involved at that stage.

[6] Several weeks later, on 17 August, Ms Kennedy told Mr Mudge she felt bullied by her colleague, a woman holding a similar senior management position and with whom she was working on a particular project. I find that Ms Kennedy asked for his help to address the situation but that she did not wish to make a formal complaint. Instead she agreed to the suggestion of Mr Mudge that she and her colleague meet with a facilitator who would lead a structured discussion aimed at confirming the real nature of the problem and trying to resolve it.

[7] I find that Mr Mudge told Ms Kennedy that before the suggested meeting could proceed he would also need to get the consent of her colleague to take part in it. He obtained that consent.

[8] The meeting took place on 26 August, with Mr Brett Morris of Air NZ's Human Resources Department facilitating the discussion. Each woman expressed feelings of being undermined, humiliated, second guessed and challenged, by the other. Ms Kennedy's colleague, who was emotionally upset during most of the meeting, also identified "issues" she had with Ms Kennedy. These included an impression Ms Kennedy gave to her of being a "superior" person, Ms Kennedy seeming to have "fixed ideas" and Ms Kennedy seeming to be closing her out of the project they had together been working on.

[9] During the facilitated meeting Mr Morris carried out an exercise which enabled him to identify to Ms Kennedy and her colleague their personal learning and working styles. These were found to be opposites, a state Mr Morris analysed as creating barriers to communication between them.

[10] To increase the level of involvement and inclusion of her colleague, Ms Kennedy agreed at the end of the meeting that she would share information and consult with her before a major report on their project was released.

[11] Ms Kennedy told the Authority that despite being dissatisfied with the way the facilitated meeting had gone, she had left it with a commitment to move on from the problems she had experienced.

[12] However on 2 September she felt she was encountering more hostile behaviour at work, this time from a friend of the colleague she had first complained about. This hostility was in the form of a negative remark about Ms Kennedy's ability to organise enough food for a lunch being put on for staff during a training meeting. She told the Authority she received dirty looks from this person, who had apparently been annoyed to find no food had been left for her at the lunch. Later that day Ms Kennedy met with Mr Mudge and announced her intention to resign.

[13] Mr Mudge immediately tried hard to get Ms Kennedy to change her mind. He involved his own manager who reviewed with Ms Kennedy the way her team had been working. He suggested changes could be made to more clearly define the roles, responsibilities and accountabilities of team members and improve the way they combined in undertaking their project. I find that Mr Mudge

encouraged Ms Kennedy not to resign but to consider the proposed changes which he told her he was confident would improve the problems she had been finding.

[14] Ms Kennedy approved of the changes discussed by Mr Mudge and told him she thought they would help the team focus better on its project. However despite pleas by Mr Mudge for Ms Kennedy to reconsider her resignation she did not change her mind and gave formal notice on 15 September 2004.

[15] Although Ms Kennedy went on sick leave from 10 September it was not until Mr Mudge received the resignation letter that he learned the extent of her medical condition which was verified by a doctor's certificate. Her health had suffered to the point where her doctor advised her that she would be better off leaving her job.

[16] The Authority in its investigation has been required to focus on what Air NZ did in response to the complaint of bullying, and I therefore make no findings as to whether or not Ms Kennedy was bullied. That was a matter for the employer to determine, depending on how far the complaint was taken by Ms Kennedy and by Air NZ.

Bullying prevention

[17] As could be expected of it, Air NZ has a bullying prevention programme. It is a comprehensive one providing three methods for resolving bullying issues. They are;

1. *Self-help*
2. *Management intervention/mediation*
3. *Formal complaint procedure.*

[18] Ms Kennedy tried self-help and when that did not work agreed to management intervention in the form of the facilitated discussion with her colleague. I find that Ms Kennedy had available to her the formal complaint, as a means of having her employer address the behaviour of her colleague. She was aware of that from Mr Mudge and from researching on the Air NZ web-site. I find that when she confirmed her resignation she had not used that means. I consider that at the stage matters had reached when Ms Kennedy announced her intention to resign, there was no reasonable basis for the employer to initiate a disciplinary enquiry without waiting for a formal complaint first.

[19] Mr Mudge reasonably felt that the facilitated discussion had been constructive and productive, and had also avoided a premature escalation of the situation into a disciplinary enquiry. I accept that Mr Mudge and Mr Morris, from their participation in the meeting with Ms Kennedy and her colleague, were reasonably able to view the cause of the problems between the two being the way they communicated about the work they shared. Measures to help achieve better communication were agreed to be taken by Ms Kennedy following the meeting, giving the employer confidence that it was handling the problem appropriately.

[20] When Ms Kennedy decided to resign I am satisfied that Mr Mudge made considerable efforts to have her change of mind, including emphasising that she was a valued employee. Ms Kennedy acknowledged that Mr Mudge had made these efforts. He was also genuinely solicitous about the state of her health and welfare and presented plans to change aspects of her job to help overcome the problems.

[21] I find that for her part Ms Kennedy genuinely considered herself to be the victim of bullying behaviour by her colleague. This was her perception of verbal and non-verbal communications

from her colleague about their work and the way they were doing it. She received these communications as a challenge made to her and felt them as undermining and humiliating her.

[22] In the evidence of Ms Kennedy there was I find an element of reconstruction of the events relied on to support her claims that Air NZ acted in ways that breached her employment agreement and workplace health and safety laws.

[23] Ms Kennedy told the Authority that Mr Mudge had seemed perturbed at her making such a serious complaint, rather than empathising with her. She was critical of him because before the facilitated meeting took place he advised that her colleague had some “issues” with her. It seems to me preferable that Ms Kennedy was alerted before the meeting to the existence of her colleagues “issues”, rather than being surprised with this knowledge at the meeting.

[24] Ms Kennedy told the Authority that she had felt discouraged, frightened, shocked and intimidated by this advice from Mr Mudge of her colleague’s perception of their work relationship. Ms Kennedy says that although she accepted Mr Mudge’s suggestion of having the facilitated meeting, she had felt coerced to do so because of his raising the existence of a counter problem her colleague had with her.

[25] However, as drawn attention to by Mr Kiely for Air NZ, this was a departure from the views she had given when first raising her grievance. In a letter to Air NZ dated 11 November 2004, her advocate had written;

Catherine agreed that [the facilitation meeting] would be a good idea feeling that she could finally find out what was really behind the antagonism [her colleague] continued to show to her...

[26] I find that the facilitation meeting was the approach Ms Kennedy consented to take in preference to the formal complaint method which, I find, Ms Kennedy was aware she could take if she wanted to. It remained open to her after the meeting to make a formal complaint but instead Ms Kennedy decided to resign after receiving verbal and non-verbal communications from a friend of her colleague. It is possible Ms Kennedy misread this person’s demonstrated annoyance at missing out on lunch, for something more deeply personal.

Contractual and statutory duty

[27] It may be that other HR officers would have conducted the facilitation meeting differently to Mr Mudge and Mr Morris. However the concern of the Authority is not with seeing whether the employer achieved perfection in its handling of the situation but whether its acts amounted to a breach of the employment agreement or statute law.

[28] In relation to a claim of constructive dismissal it is not any breach at all that will be sufficient. It must be a breach of duty that is sufficiently serious enough to make it foreseeable to the employer that the employee would resign. That is the recognised legal test to be applied in cases of alleged constructive dismissal, as given by the Court of Appeal in *Auckland Power Board v Auckland Local Authorities Union* [1994] 1 ERNZ 168.

[29] I consider that there was no breach of duty owed to Ms Kennedy by her employer in the way Air NZ dealt with her complaint of bullying. In this regard there was no unjustified action creating a disadvantage for Ms Kennedy in her employment. Her wishes were taken into account in proceeding to hold the facilitation meeting, as were the wishes of her colleague about whom Ms Kennedy had complained. It seems that employer and both employees were understandably

hesitant to act precipitately through resorting to the formal complaint procedure without first trying a potentially less harmful way of resolving the problem. This consensual approach promoted and implemented by the employer was entirely a fair and reasonable one in the circumstances.

[30] Further, I consider that if there was a breach at all it was not one of sufficient seriousness to have caused a dismissal of Ms Kennedy constructively. It was not reasonably foreseeable, I find, that there was a risk of Ms Kennedy resigning. Air NZ had every reason to feel confident that the facilitated meeting had been helpful, and it also had cause to feel hopeful that proposals for change it made would lead Ms Kennedy to reconsider her resignation.

[31] Finally, I consider from the evidence that Air NZ did not fail in its duty to provide and maintain a safe place of work for Ms Kennedy, as required under the Health and Safety in Employment Act 1992.

[32] I agree with the comprehensive analysis of the factual circumstances and the applicable legal principles, supplied by Mr Kiely in his final submissions. In summary, under the HSE Act the obligation imposed upon an employer is to take all reasonably practicable steps to guard against potential hazards in the workplace. The obligation does not extend to guaranteeing complete protection against all potential hazards; see *Buchanans Foundry Ltd v Dept of Labour* [1996] 1 ERNZ 333.

[33] The employers obligation requires it to take reasonable steps which are proportionate to known and avoidable risks, and what is practicable must be measured against the circumstances of each case; see *Attorney-General v Gilbert* [2002] 1 ERNZ 31 (at para 83) and *Koia v Attorney-General*, unreported, 14 September 2004, AC 8A/04.

[34] In discharging its obligations under the HSE Act 1992, Air NZ has formulated and implemented a policy aimed at minimising the risk of harm caused by workplace bullying, which because of its nature is not a hazard that can be eliminated completely. I am satisfied that the policy was applied to Ms Kennedy's complaint fairly and sensitively. Most importantly, it was applied in accordance with her own wishes. Because the policy did not deliver the outcome both she and Air NZ desired, is not a reason for criticising the policy or its implementation with hindsight.

Determination

[36] For the reasons given above the conclusion of the Authority is that Air NZ has no legal responsibility for the resignation of Ms Kennedy or for the events that lead her to resign. Her employment relationship problem is not one that should be resolved by making orders against her former employer.

Costs

[37] Costs are reserved. If the question cannot be resolved between Mr Kiely and Ms Thorpe an application may be made in writing to have the Authority fix costs.