

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 150  
5367029

BETWEEN JENNIFER KILPATRICK  
Applicant

AND AIR NEW ZEALAND  
LIMITED  
Respondent

Member of Authority: R A Monaghan  
Representatives: J Kilpatrick in person  
D France, counsel for respondent  
Investigation meeting: On the papers  
Determination: 30 April 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Air New Zealand Limited (Air New Zealand) employed Jennifer Kilpatrick as a flight attendant – international. Ms Kilpatrick has raised personal grievances under s 103(1)(b) of the Employment Relations Act 2000 on the ground that unjustified actions of Air New Zealand’s have affected her employment to her disadvantage.

[2] It was not apparent from the statement of problem, and the attached correspondence, precisely which actions of Air New Zealand’s were being relied on in that context. This required clarification in order, among other things, to identify whether the associated grievances were raised within the 90-day period in s 114(1) of the Employment Relations Act 2000. After a teleconference between the Authority and the parties, the following actions were identified:

- the failure by a flight service manager, H, to arrange a de-brief or file a report after an abnormal event on a flight on 17 February 2010;

- the failure by another flight service manager, M, to properly manage the 17 February incident, and that manager's bullying of Ms Kilpatrick in an attempt to secure Ms Kilpatrick's withdrawal of the complaint about his management;
- an unjustified warning following a flight on 23 June 2010; and
- intimidation by Ms Kilpatrick's performance and development manager, Louise Griffiths.

[3] Air New Zealand says the grievances were raised outside the 90-day period. This determination addresses that matter.

### **Failure by H to arrange debrief or file report**

#### 1. The facts

[4] The abnormal event of 17 February 2010 occurred during a flight from Vancouver to Auckland. An intoxicated passenger became abusive and threatening on the flight, was detained by the New Zealand Police on arrival in Auckland, and was subsequently warned of the possibility of restrictions on his future travel with the airline. Ms Kilpatrick said some of the passenger's abuse was directed towards her, and was sexual in nature.

[5] Air New Zealand's Cabin Safety Manual includes procedures for handling unruly passengers, and the Cabin Crew General Operating Procedures (GOP) include procedures for dealing with abnormal events. The procedures include a requirement that crews file operational occurrence reports (OOR) as soon as possible through the airport duty manager. The GOP also provide that debriefing sessions should be facilitated at the earliest opportunity, and include guidelines for such sessions.

[6] Ms Kilpatrick did not directly address whether or how H breached any of these provisions. Rather she believes H did not assist her as she should have. That is because, when she expressed her concerns about the incident to H, she says H merely suggested that she obtain an apology from the passenger. Ms Kilpatrick found the response unacceptably dismissive.

## 2. Was the grievance raised in time

[7] In a message to M dated 22 February 2010 Ms Kilpatrick expressed disappointment with what she felt was a lack of support from both H and the inflight service co-ordinator on the Vancouver flight. She said in the message that she sought an apology from them.

[8] Ms Kilpatrick says the message amounted to the raising of a personal grievance. To amount to the raising of a personal grievance under the Act the message must meet the following tests:

*The raising of a grievance must be the bringing to the employer's notice of the employee's wish to challenge as unjustified one or more of the events defined in the statute as a grievance to a sufficient degree that the employer can comprehend that there is a grievance, the nature of it, and how the employee wishes that to be dealt with. These are what might be called the Creedy tests.<sup>1</sup>*

[9] In that the message expressed a complaint or concern, it expressed a grievance according to the dictionary meaning of the word. However a grievance is actionable as a 'personal grievance' under the Employment Relations Act 2000 only if it falls within the categories set out in s 103(1). It was clear from the message that Ms Kilpatrick was complaining. It was not clear how the complaint fell within s 103(1)(b) of the Act, or that the complaint was intended as a personal grievance under that provision.

[10] The message did not meet all of the *Creedy* tests and did not amount to the raising of a personal grievance. No personal grievance based on the 17 February incident has been raised in time.

### **Failure by M to manage February incident and bullying by M**

#### 1. The facts

[11] M replied to Ms Kilpatrick's 22 February message by saying he would discuss the best way to support her. Ms Griffiths then contacted Ms Kilpatrick in March 2010

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<sup>1</sup> *Turner v Talley's Group Limited* [2013] NZEmpC 31, referring to *Creedy v Commissioner of Police* [2006] ERNZ 517

seeking a meeting, but no date was arranged. Ms Kilpatrick took a period of leave from 12 April and was not at work again until 8 May. By then M was seeking a meeting to discuss the outcome of discussions held with H's performance and development manager, and H. To that end M had contacted Ms Kilpatrick on 23 April and 4 May.

[12] Ms Kilpatrick was rostered for a tour of duty to Brisbane and back on 17 May 2010. In material provided to the Authority she said that, knowing M was rostered for the same tour of duty, she emailed him suggesting they use that opportunity to meet. While the aircraft was on the ground in Brisbane Ms Kilpatrick was taking a rest period. She said M woke her, wishing to speak to her, so the two moved into the flight deck crew rest area for their meeting.

[13] Although she acknowledged M suggested that area because it was more private and that she went voluntarily, Ms Kilpatrick says the move was an attempt to isolate her.

[14] While in the flight crew rest area, M advised of his understanding that H had been through a disciplinary process in respect of the Vancouver flight. No disciplinary action was taken against H. M indicated Ms Griffiths' opinion was that Ms Kilpatrick's issues in respect of H had gone on for too long, and that H would never apologise to Ms Kilpatrick. Ms Kilpatrick was disturbed by what she considered to be an implication that she should abandon her concerns or there would be adverse consequences. She became upset and sought to leave the area. She says that, when she got up to leave, M told her to sit down. She felt vulnerable and her upset increased. She left the area and went to compose herself.

[15] By letter to M dated 18 May 2010 Ms Kilpatrick set out her account of the previous day's exchange. She said she: *'now [had] a number of points of concern around the procedure flowing from the initial substantive matter and the way it has been addressed'* and that the concerns arose in particular because of: *'the attempt to isolate me'* and: *'the apparent pressure being applied to abandon this matter'*. She was: *'seeking guidance about how to address the issue from a third party'*. She ended by saying: *'Contact will be made with you shortly so this matter can be progressed. In the meantime I ask that you do not contact me on this matter'*.

## 2. Was the grievance raised in time

[16] I refer to the requirements for raising a personal grievance discussed in the preceding section of this determination.

[17] I find the 18 May letter fell short of raising Ms Kilpatrick's concerns in a way that enabled Air New Zealand to comprehend she had a personal grievance under the Act. If, as now seems to be the case, she meant she was dissatisfied with M's response to her complaint about H, the letter did not say so as it referred only to generalised concerns about 'the procedure'. If Ms Kilpatrick was also concerned about bullying by H the letter did not say that either. I accept the letter expressed a concern about the incident of the previous day, but did not make it clear how the concern fell within s 103(1)(b) or that the concern was being raised under that provision. Finally, and importantly, the letter did not indicate how Ms Kilpatrick wanted the matter dealt with.

[18] For these reasons I find no personal grievance based on M's actions from the 17 February up to and including the 17 May incident has been raised in time.

### **Unjustified warning**

#### 1. The facts

[1] Ms Kilpatrick's warning followed incidents on a flight from Apia to Auckland on 23 June 2010. The warning was conveyed in a letter from Ms Griffiths dated 10 June 2011, and emailed on that date. The letter said Ms Kilpatrick had not performed duties as directed by the flight service manager on the flight. It said this amounted to misconduct, and Ms Kilpatrick was being issued with a written warning.

[19] After receiving a copy of the warning, Ms Kilpatrick's representative prepared a letter to Ms Griffiths dated 25 August 2011. The letter read in part:

*... a warning was sent by you ... on 30 June 2011. No meeting was held prior to the issue of the warning and no opportunity was provided for Ms Kilpatrick to be heard on the allegations raised. For that reason this letter is notification of a personal grievance for the disadvantage that flows from that warning and issues leading up to it ... Specifically the way in which the matter was managed up to the warning are*

*alleged to have been procedurally unfair and it is maintained that the warning itself was substantively unjustifiable.*

[20] As the warning was sent on 10 June 2011 (not 30 June), the 90 day period expired on 8 September 2011.

[21] The 25 August letter was directed to Ms Griffiths at the private bag used as Air New Zealand's postal address. The envelope was produced to the Authority. It was franked twice, once on 29 August 2011 and again on 8 September 2011. From this I accept that the letter was first posted on 29 August, which was inside the 90-day period in s 114(1).

[22] The address was correct and the postage was sufficient, but handwritten notations on the envelope read 'not AKL 60' and 'AKL 40.' The notations are internal Air New Zealand delivery codes. It is likely that there was an internal misdirection when Air New Zealand received the letter.

[23] Both Ms Kilpatrick and her representative said the letter was returned, stamped 'return to sender'. They said the returned letter was received on 5 September. Both asserted Ms Griffiths was responsible for the return. There were no grounds for that assertion, and I do not accept that information Ms Kilpatrick has subsequently provided amounts to evidence of who affixed the 'return to sender' stamp.

[24] The letter was re-posted on 8 September, in the original envelope already franked 29 August 2011 and now also stamped 'return to sender'. This time the letter found its way to the returned letter office at NZ Post. On 13 September 2011 that office returned the letter and its envelope to Ms Kilpatrick's representative, in a further envelope identifying the reason for the return as either an insufficient address or insufficient postage.

[25] Ms Kilpatrick's representative re-sent the letter by an emailed message dated 20 September 2011.

2. Was the grievance raised in time

[26] Section 114(2) reads:

*... a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer aware that that the employee alleges a personal grievance that the employer wants the employer to address.*

[27] The question is whether the preparation, signing and posting of the grievance letter amounted to taking ‘reasonable steps’ to make Air New Zealand aware of the grievance.

[28] Delays or failures in delivery by post were discussed under legislation preceding the Employment Relations Act<sup>2</sup> in the context of whether exceptional circumstances existed, and whether leave to raise a grievance out of time could be granted. In one case where it was proved that a grievance letter was properly posted to the employer, the Employment Court found the employee and her representative were entitled to assume the employer had received the letter in the ordinary course of the post. This assumption caused the delay in submitting the grievance to the employer, and the circumstances were exceptional<sup>3</sup>. In another case the Court reached a different conclusion, being influenced by its view that the grievance letter was posted relatively late. Personal service would have been safer, or there should have been a follow-up to ensure receipt.<sup>4</sup>

[29] The inclusion of the ‘reasonable steps’ provision in s 114(2) of the Employment Relations Act must have been intended to address circumstances like those just described. However there has been little discussion of the present question since then, although the Authority determined in *Taylor v Jones*<sup>5</sup> that in drafting, signing and posting her grievance letter the affected employee took reasonable steps to raise her grievance. There the correct address was used on the envelope, and the parties accepted that the letter was posted.

[30] The statutory test is concerned with whether the steps taken to raise the grievance were reasonable – not with whether all reasonable steps were taken. If the issue here was solely whether posting the letter on 29 August amounted to taking reasonable steps to raise the grievance, I would have found in favour of Ms Kilpatrick.

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<sup>2</sup> That is under s 33(2) of the Employment Contracts Act 1991, which was similar to s 114(2) but did not contain a ‘reasonable steps’ provision.

<sup>3</sup> *Stott v Ministry of Agriculture* [1999] 1 ERNZ 448

<sup>4</sup> *Newfield Supermarket (1999) v Bogle* [1999] 1 ERNZ 788

<sup>5</sup> Employment Relations Authority Christchurch, CA 61/09, 8 May 2009

[31] However on their accounts both she and her representative were aware of the failure in delivery three days before the 90 day period ended. If that is so, there was an unexplained delay of three days before they took further action, as the letter was consigned to the post again on the day the 90-day period expired.

[32] Further, Ms Kilpatrick and her representative were not entitled to assume the letter would reach the intended recipient if it was re-posted as it was. They should have appreciated that the state of the envelope meant there was a high likelihood of a further delivery failure. If the letter was to be re-posted, a fresh envelope should have been used. Moreover, NZ Post does not promise same day delivery for items consigned to the ordinary post, as the letter was. Accordingly, in the circumstances on 8 September, it was not reasonable to rely on the post alone to ensure the grievance was raised in time. Air New Zealand should at least have been alerted that the letter had been placed in the mail that day, or email or personal service should have been used.

[33] For these reasons I find the steps taken to raise the grievance within the required 90 did not amount to reasonable steps. The grievance was not raised in time.

## **Intimidation**

### 1. The facts

[34] On 14 December 2010 Ms Kilpatrick was scheduled to sit an examination on emergency procedures for the 777 aircraft. Ms Griffiths entered the classroom where the preparation for the examination was being conducted, and sat next to Ms Kilpatrick. There was no conversation other than a greeting.

[35] At the time Ms Griffiths was still investigating the incident of 23 June 2010. Ms Kilpatrick found Ms Griffiths' presence upsetting and believes the distraction it caused led to her failing the examination.

[36] For her part, Ms Griffiths deposed that she was rostered to be present as part of her own duties and in relation to the introduction of the 777 aircraft. In other words, her presence was for genuine reasons and was unrelated to Ms Kilpatrick.

[37] A letter from Ms Kilpatrick to the general manager inflight services, dated 22 December 2010, began by saying Ms Kilpatrick had a complaint ‘*around my employment as a result of the harassment and bullying I have been subjected to over 2010 and the disadvantage that has flowed from that.*’ According to the letter the actions amounting to harassment and bullying were: the 17 May incident; aspects of the 23 June 2010 incident and its immediate aftermath; generalised complaints about M’s attempts to contact her; and the concern about Ms Griffiths’ presence at the examination on 14 December. Ms Kilpatrick said Ms Griffiths’ presence was the principal contributing factor to her failing the examination.

[38] The letter also said Ms Kilpatrick now needed counselling and medical advice. Towards the end, it said:

*... I am sending this letter as Notice of a Grievance I have over the way the Company has been managing my employment relationship because of the resulting harm that I now have had to manage ...*

[39] Ms Kilpatrick’s representative also wrote a letter dated 10 January 2011 to Vanessa Stoddart, then the Group General Manager - People and Technical Operations. That letter was expressly concerned with alleged breaches of the Privacy Act 1993, and associated breaches of good faith. It set out as background to the breaches the incidents discussed in this determination, before returning to the concern about breach of privacy and requesting mediation. For that reason I do not read the letter as an attempt to raise a personal grievance, and it has not been relied on in that context.

[40] The General Manager – Inflight Services responded to Ms Kilpatrick’s 22 December letter by letter dated 7 February 2011. The letter was headed ‘re: personal grievance received 22 December 2010’. It answered certain questions posed at the end of the 22 December letter, and commented on aspects of the continuing investigation into the Apia-Auckland flight in June. It went on to give Air New Zealand’s account of the reason for Ms Griffiths’ presence at the examination, and of the parties’ conversations after the examination.

[41] The response prompted Ms Kilpatrick's representative to write a further letter dated 21 March 2011 to the HR manager, Jacky McManus. Under the heading 'background' the letter detailed Ms Kilpatrick's concerns about: the 17 February 2010 incident; the 17 May 2010 incident; the June 23 incident and its immediate aftermath; and the 14 December incident. Again I do not read the 21 March letter as an attempt to raise any of these matters as personal grievances, and such an attempt would be well out of time. Rather the matters were repeated as background to an attempt to raise a further personal grievance 'for breach of good faith,' in that exception was taken to an unspecified passage on page 2 of the 7 February response.

[42] The Authority has not been asked to investigate any grievance based on breach of good faith in terms of the 21 March letter. In any event the letter does not identify the breach of good faith in question and it is not possible to discern the nature of the breach from the correspondence. Nor is any form of remedy sought in respect of the breach. As a result I do not take that matter any further.

## 2. Was the grievance raised in time

[43] I characterise the 22 December letter as an attempt to raise a personal grievance on the ground of bullying and harassment. However no such grievance could be raised in respect of events occurring outside the preceding 90 days<sup>6</sup>. The only identified event occurring within the preceding 90 days was Ms Griffiths' attendance at the examination.

[44] There was enough in the letter to indicate Ms Kilpatrick felt this was an unjustifiable action, and how the action disadvantaged her in her employment. There was enough to allow Air New Zealand to comprehend that there was a personal grievance, and the nature of the grievance.

[45] It is difficult to discern how Ms Kilpatrick wished her grievance to be dealt with. Although the letter said she wanted the grievance resolved, it did not indicate how. This is an important omission because the disadvantage being alleged seemed to be that Ms Kilpatrick failed the examination, and that she suffered stress. Air New

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<sup>6</sup> *Gates v Air New Zealand Limited* Employment Court Auckland, AC 33/09, 11 September 2009

Zealand was not in a position to identify for itself how Ms Kilpatrick wanted that disadvantage to be corrected, or how the grievance could be resolved.

[46] For these reasons I find no personal grievance based on alleged intimidation by Ms Griffiths was raised in the 22 December letter, and that no grievance in that respect has been raised in time.

### **Conclusion**

[47] No separate personal grievance was raised within the necessary 90 day period in respect of:

- alleged failures by H following the 17 February 2010 incident;
- alleged failures by M, and his alleged bullying on 17 May 2010;
- the warning; or
- alleged intimidation by Ms Griffiths.

### **Costs**

[48] Costs are reserved.

[49] Any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a written request, giving reasons. The other party shall have 14 days from the date of receipt of the request to file and serve a written reply.

R A Monaghan

Member of the Employment Relations Authority