IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 351/09
5153853

	BETWEEN	ANNA MacARTHUR Applicant
	AND	AIR NEW ZEALAND LTD Respondent

Member of Authority:	James Wilson
Representatives:	Lisa Keys for the applicant Kevin Thompson for the respondent
Investigation Meeting:	7 & 8 July 2009 at Auckland
Submissions received:	27 July 2009 from the applicant 28 July from the respondent
Determination:	5 October 2009

DETERMINATION OF THE AUTHORITY

Anna MacArthur's employment relationship problem

[1] Anna MacArthur was employed by Air New Zealand (Air NZ) as a flight attendant. She had first held this role, with the international airline, from 1983 until November 2000. She was reemployed by Air NZ domestic airline in September 2001 initially on a casual basis and then, from April 2003, as a permanent employee.

[2] In January 2007, following some concerns raised by her employer and before the conclusion of the resulting disciplinary process, Ms MacArthur disclosed to the company's medical officer, Dr. Sprott, that she was addicted to BZP party pills. With Dr Sprott's assistance Ms MacArthur, at her own expense, travelled to the United States to a treatment centre offering recovering and rehabilitation. On her return Ms MacArthur entered into a "recovery agreement". This agreement included the opening statement:

> *Air New Zealand agrees to facilitate Anna MacArthur's return to the workplace for three months on a full-time basis carrying out such ground duties determined by a New Zealand.*

The agreement set out a number of conditions relating to Ms MacArthur's return to full-time employment including that she continue to be abstinent from drugs, undertake strict rehabilitation and counselling and continue to be reviewed by the company's medical staff. It also outlined performance standards and procedures to be followed should she be absent from her assigned duties. The agreement concluded:

> *<u>Return to Flying</u>*
> *1. This agreement commences upon the date of signature and will be reviewed after three months when Air New Zealand will consider Anna's fitness to return to flying duties.*
> *2. Anna must successfully complete EP recurrent training before returning to flying. Her CCDM will provide coaching support for Anna prior to undertaking this training. The expectation is that Anna will successfully complete the training on her first attempt.*
>
> *Failure to comply with any of these conditions on any occasion may result in the commencement of disciplinary proceedings which may result in dismissal.*

This agreement was signed by Ms MacArthur on 1 May 2007

[3] In December 2008, after a series of meetings, discussions and assessments Ms MacArthur was dismissed: The letter of dismissal, dated 22 December 2008, said:

> *We sought confirmation from Dr Tim Sprott regarding your fitness to fly reassessment date, as you believed that you had made good progress and were ready to return to flying. Dr Tim Sprott confirmed that you were not fit to fly at present, but acknowledge that you have made good progress in your recovery and as a result would consider moving forward your reassessment date of May/June to possible late February/March. This however was not a confirmed return to flying date, but rather a date for reassessment.*

> *This left us in the position that we still did not have a definitive date whereby you could return to your contracted role of flying. Given that we still have no definitive date for your return to work and that it had been almost 2 years since you have performed your contracted role we informed you that we would be considering notice of termination and asked Stewart (King) and yourself if you would like to make comment to us for our consideration before we adjourned. At this point you made a personal commitment that you believed you would be fit to fly by the proposed in February/March reassessment date. While I appreciate your personal commitment this is still not a definitive return to flying date.*
>
> *Anna this was not a decision that was taken lightly by me and I believe that I considered both the comments from yourself and Stewart. After much consideration I advised you that I was giving you one month's notice of termination on the grounds of incapacity given that you are currently not fit to fulfil your contractual obligations, nor had been for almost 2 years. Your last day of employment will be 22nd January We will not require you to work out your notice period.*

[4] Ms MacArthur says that her dismissal was unjustified and she seeks reinstatement to her position.

The issues for determination

[5] The primary issue for determination is whether or not Ms MacArthur's dismissal was justifiable. The Employment Relations Act (the Act) at s. 103A provides that:

> *… the question of whether a dismissal… was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

If I find that Ms MacArthur's dismissal was unjustifiable i.e. she has a personal grievance, the Act provides, at s.125 that:

> *…where--*
>
> *(a) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(a)); and*
>
> *(b) it is determined that the employee did have a personal grievance.*
>
> *(2)…… the Authority must, whether or not it provides for any of the other remedies provided for in section 123, provide, wherever practicable, for reinstatement…*

[6] Although not requested in her original statement of problem (which was an application for interim reinstatement) during the course of my investigation Ms MacArthur has also requested that whether or not I reinstate her to her position, she be awarded compensation for lost wages and compensation for hurt and humiliation. Air New Zealand have opposed these remedies. At this point, however, it is not necessary to address the issue of remedies.

[7] Also during the course of my investigation Ms MacArthur's representative's placed great weight on what they considered to be the inappropriate release of medical information to Air NZ management by its medical staff. The implication raised by Ms Keys seems to be that the provision of this information to Air NZ management appears to have unfairly prejudiced them against Ms MacArthur and contributed to her dismissal. Although raised as a *concern* it is not clear what if any remedies Ms MacArthur is seeking in this regard. However it is subsidiary issue which I will address later in this determination.

The events leading to Ms MacArthur's dismissal

[8] Although it is not necessary, to determine whether or not Ms MacArthur's dismissal was justifiable, to set out in detail the extensive evidence presented to me, it is helpful to understand the events of the 18 months or so preceding the final decision to dismiss.

[9] As mentioned above Ms MacArthur signed her rehabilitation agreement in May 2007. In July 2007, and contrary to one of the conditions of that agreement, Ms MacArthur failed to inform a manager or the company doctor that she was sick. As a result of this failure Ms MacArthur received a final written warning at the end of July 2007. Throughout the second half of 2007 and much of 2008 Ms MacArthur was employed on ground duties in a temporary capacity, firstly at the Air NZ Contact Centre and subsequently at the Training School. In early 2008 Ms Jacqueline Beaver became responsible for managing Ms MacArthur.

[10] Shortly after becoming Ms MacArthur's manager Ms Beaver says, as it was a little over a year since Ms MacArthur had declared her addiction, she was keen to obtain details on Ms MacArthur's medical status and fitness to fly and the likely timeframes involved. She says that she reviewed Ms MacArthur's file, met with Ms MacArthur and, with her permission, received a full briefing on her health circumstances and rehabilitation from Dr Sprott. In an e-mail on 9 April 2008 Dr Sprott confirmed to Ms Beaver that Ms MacArthur remained medically unfit to return to flying duties but was fit to continue with ground-based duties. On 22 April 2008, having met with Ms MacArthur, Dr Sprott again advised Ms Beaver that Ms MacArthur remained unfit to return to flying duties.

[11] On 29 April 2008 Ms Beaver convened a meeting with Ms MacArthur and her representative, Mr Stuart King, to review Ms MacArthur's status in the light of Dr Sprott's assessment. At that meeting Ms MacArthur apparently disputed that Dr Sprott had said she was not medically fit to fly. While there is some dispute regarding what took place at this meeting there is no doubt that following the meeting Ms Beaver wrote to Ms MacArthur agreeing to Mr King's request that Ms MacArthur be given time to seek a second medical opinion on her ability to fulfil flying duties. This letter requested that any further information be supplied to Dr Sprott no later than 30 June 2008 and concluded:

> *Ultimately Dr Sprott has responsibility for determining the fitness of crew to return to work and he will make final decisions about your ability to return to your role as a flight attendant.*
> *Following receipt of any further information that you submit, and a review of this by Dr Sprott, we will meet with you further.*

[12] On 16 May 2008 Ms MacArthur was assessed by Prof Ross McCormack. In a report dated 23 May 2008 Prof McCormick said:

> ***Summary and recommendations:*** *If Ms MacArthur can maintain her commitment to recovery and her sobriety over the next year, in my view it would then be appropriate for Air New Zealand to consider allowing her to return to flying.*

[13] Despite being prepared in late May, and a reminder being sent to Ms MacArthur in mid-July, Prof McCormick's report did not reach Dr Sprott until late July. As agreed, following receipt of Prof McCormick's report Dr Sprott again reviewed Ms MacArthur's fitness to fly and on 5 August 2008 advised Ms Beaver that:

> *(Ms MacArthur) remains unfit for flying duties and a review of this decision would not be appropriate until May or June 2009. This is also the view of the specialist advice that Anna sought independently of the company.*
> *Anna is fit to work ground-based duties including safety-sensitive areas. She has made some further progress in her recovery……..*

[14] On 18 August 2008 Ms Beaver wrote to Ms MacArthur, advising her of Dr Sprott's opinion and inviting her to meet to discuss Dr Sprott's report in more detail. In this letter she said:

> *… I would like to also discuss our next steps in exploring options regarding any possible vacancies in the company that may be available and may be suited to your current status. I need to advise however that there are no guarantees when it comes to finding another position. If, after a reasonable period, you not able to find a suitable alternative position we need to advise that regrettably we will need to consider termination of your employment.*

[15] The scheduled meeting eventually took place on 26 August and in a letter to Ms MacArthur dated 29 August 2008 Ms Beaver outlined New Zealand's expectation that Ms MacArthur should *look for alternative ground duties* and that the company would *provide you with support to assist you in doing so*. The letter also set out what other assistance the company would provide and advised that a further meeting would be scheduled in approximately 4 weeks.

[16] A further meeting was held on 2 October 2008 at which the various efforts made to find Ms MacArthur alternative employment within the company were canvassed. At the conclusion of the meeting it was agreed that the company would continue to provide assistance to Ms MacArthur in finding an alternative role until 26 October 2008 when a further meeting would be scheduled. A letter dated 6 October confirmed these arrangements and said:

> *If you are not able to secure an alternative position within the company by that time, the company will have to consider terminating your employment on grounds of incapacity.*

[17] Unfortunately before the scheduled meeting at the end October, Ms MacArthur was diagnosed with a serious illness which required surgical intervention. On 19 November 2008 Ms Beaver wrote to Ms MacArthur advising her of her outstanding sick leave entitlements and postponing the scheduled meeting until Ms MacArthur's health had improved. On 5 December 2008, having been advised that Ms MacArthur was now well enough to meet, Ms Beaver again wrote to Ms MacArthur scheduling a meeting for 8 December 2008 and confirming the purpose of the meeting was to discuss Ms MacArthur's progress to date and the progress she had made in applying for suitable ground roles prior to her operation. The letter concluded:

> *As we have advised you previously however if you have not had success in securing an alternative position the company will have to consider its options. If there are no alternative options available, the company will need to consider terminating your employment given that you are unable to undertake the job you were employed to do for a considerable period of time.*

[18] In the early hours of 8 December 2008 (the date of the scheduled meeting) Ms MacArthur emailed Ms Beaver saying that Ms Beaver's letter had made her feel anxious and that she did not feel comfortable attending the meeting until after she had seen Dr Sprott on 18 December. After a communication from Ms Beaver, Dr Sprott advised that he would be seeing Ms MacArthur on December 18 and in the meantime his recommendation, that Ms MacArthur should be reassessed regarding her fitness to fly in May/June 2009, still stood.

[19] The postponed meeting was finally convened on 22 December 2008. Although Dr Sprott was not initially in attendance he did attend during the meeting to clarify his recommendation regarding Ms MacArthur's reassessment. After some discussion Dr Sprott agreed that this assessment could be brought forward from May/June to February/March. He also explained, however, that Ms MacArthur would *need to demonstrate a period of stability* and that the February/March date was simply a reassessment and was by no means a guarantee that Ms MacArthur would be assessed as fit to fly.

[20] After an adjournment of approximately an hour and a half the meeting was reconvened and Ms Beaver advised Ms MacArthur of the company's decision to dismiss her. This was subsequently set out in the letter quoted at paragraph 3 above.

[21] I must emphasise that the outline set out above does not set out in detail all of the evidence to which I have had access. By way of example, I have been provided with full notes of several of the meetings and copies of various correspondence and e-mails between the parties.

Ms MacArthur's rehabilitation agreement

[22] The rehabilitation agreement signed by Ms MacArthur is based on the company's alcohol and other drugs policy. This policy provides that a rehabilitation agreement may be offered to an employee where a medical review officer considers it appropriate. The policy sets out in some detail the rehabilitation process to be followed and the employees entitlements. A key clause, relied on by Air New Zealand in dismissing Ms MacArthur, says:

> *If the employee continues to be medically unfit, after a reasonable time, and is unable to return to his/her normal duties, the company will investigate whether there are other options available for the employee, including alternative work. Where other options are not reasonably available the company will need to consider termination of employment.*

Legal considerations

[23] In determining whether or not Ms MacArthur's dismissal was justifiable a *fair and reasonable employer* would take into account previous Court judgements dealing with long-term absence. Both parties have drawn my attention to various cases which I have reviewed. I note that in most cases dealt with in both the Employment Court and the Court of Appeal the period of absence has usually been measured in weeks or months rather than the two years (and potentially at least several further months) that Ms MacArthur had been unable to undertake her contracted duties.

[24] Although the case addressed an application for leave to file a challenge out of time, in 2003 Judge Colgan in the Employment Court in *Barnett v. Northern Regional Trust Board of The Order of St John* (2 ERNZ [2003] 730 at p. 738) summarised the law at that point in respect to dismissal in the event of long term incapacity. He said:

> *It is always unfortunate when prolonged and debilitating illness precludes an employee from returning to work or even from being able to provide an estimate when that can take place. The interests of both parties, employer and employee, must be balanced in the circumstances. The law is that after a fair investigation, an employer may dismiss an employee justifiably where its reasonable needs cannot be met by an employee who is not fit and able to perform the work required and is not in a position to be able to do so within a reasonable time in all the circumstances. The test is encapsulated in the typical and admirable style of the former Chief Judge of the Arbitration Court in Hoskin v Coastal Fish Supplies Ltd [1985] ACJ 124, at p. 127 when he wrote: "There can come a point at which an employer… can freely cry halt".*

[25] Over the past few years, since the Arbitration Court judgement in *Hoskin,* the Employment Court has identified a number of factors which an employer should take into account when considering dismissing an employee for medical incapacity. These include the terms of the relevant employment agreement, the prospect of long-term employment if the incapacity had not occurred, the nature of the illness and its duration and prognosis and the length of the employment relationship. Other factors which might be weighed in this consideration include the effect on employer's business including its clients and other employees and the availability of alternative work (if the employee is capable of performing alternate duties).

[26] Section 103A of the Act requires that the actions of the employer in dismissing an employee *are to be assessed against the test of what a fair and reasonable employer would have done in all the circumstances.* (*Air New Zealand Limited v. V.*, AC15/09 2 March 2009, in the Employment Court, unpublished). As pointed out by Mr Thompson, on behalf of Air New Zealand, this assessment must be based on the actions of the employee *at the time the dismissal … occurred* (s 103A of the Act).

[27] As the Judge said in *Barnett, it is always unfortunate when prolonged and debilitating illness precludes an employee from returning to work.* However the law clearly allows that there will be circumstances in which, the employer having carried out a fair investigation and weighed up the interests both of the company and the employee, a dismissal on the grounds of incapacity is justifiable. What is clear both from the test provided at s.103A and from the various cases, is that the question of what is *fair and reasonable* is dependent upon the particular facts and circumstances of a particular dismissal.

The submissions

[28] Ms Keys, on behalf of Ms MacArthur, argues that Ms MacArthur's rehabilitation plan was not given a definitive endpoint and no proper closure process was applied. She says that Ms MacArthur's termination for "medical incapacity" was unjustifiable taking into account what a fair and reasonable employer would have done in all circumstances. In her submission she outlines a number of areas that she says Air New Zealand either did not consider or did not give sufficient weight to. She argues that Ms MacArthur could not be said to have occupied a key role, that Air New

Zealand is a large employer and should have made more effort to find her alternate duties or, if these were not available, placed her on leave without pay until she was reassessed.

[29] Also in her submissions Ms Key argues that Ms beaver predetermined her decision to dismiss and quotes several of Ms Beavers comments, from as early as August 2008, in support of this proposition.

[30] Another area dealt with in Ms Keys submissions is the suggestion that the Company breached its obligation to maintain medical confidentiality, that this caused unjustifiable disadvantage to Ms MacArthur and that I should award a *significant separate penalty* for this breach. In support of this allegation Ms Keys quotes what she suggests is Dr Sprott's "admission" of this breach when he indicated that perhaps the rehabilitation agreement had been adhered to in spirit but not to the letter. Ms Keys argues that it was not necessary for the medical unit (Dr Sprott) to disclose detailed information to Air NZ management and that in doing so he breached the Air New Zealand *alcohol and other drugs policy* in respect to *records management storage and confidentiality* and the New Zealand Medical Association's code of ethics.

[31] Mr Thompson, for Air New Zealand summarises the company's position as being *benevolent to a level well beyond most other employers and well beyond what established legal principles require.* He says that that benevolence was extended to Ms MacArthur to a level far beyond what was initially agreed as fair and reasonable (as set out in the rehabilitation agreement). He goes on to suggest that the decision to offer rehabilitation agreement is a decision at management discretion (and not a medical one) and so too is the decision on when it is appropriate to consider termination. Mr Thompson says that the key to Ms MacArthur protecting her employment was securing ground duties on a long-term basis. Ms MacArthur was told that if she failed to achieve this within a reasonable timeframe consideration would be given to terminating her employment. He says that, despite Ms MacArthur's optimism, it was very clear that she remained medically unfit to perform a flight attendant duties as at December 2008 and there was no certainty as to if and when she would be medically fit to do so.

[32] Mr Thompson says that Ms MacArthur places a misguided and wrong focus on the possibility of reassessment whenever that may have occurred. He points out that the reassessment date sometime in 2009 only appeared "on the edge of the radar", in late 2008, because of the delay in providing Prof McCormick's report, the extended period allowed to Ms MacArthur to secure other work and her unrelated illness. He suggests that had Ms MacArthur been open and communicative the time that Air New Zealand could *fairly cry halt* would have been sometime around August-September 2008. Mr Thomson points out that Air New Zealand waited for two years from when Ms MacArthur had been unable to perform her duties before making a decision to end her employment - at a time when any likely return to duties remained uncertain and problematic and some four months after Ms MacArthur had been unable to secure ongoing alternative duties. He says that it is hard to imagine a more *fair and reasonable employer in all circumstances.*

[33] In his submissions in reply Mr Thompson has pointed out that Ms MacArthur's submissions sought to raise for the first time issues which had not covered by claims previously made. In particular he points to claims of breach of medical confidentiality, predetermination and remedies that had not previously been raised and had not therefore been addressed as part of the Authority's investigation. Mr Thompson suggests that the allegation against Dr Sprott, regarding the inappropriate disclosure of confidential medical information, is a significant factor against the practicability of reinstatement of Ms MacArthur. In any event, he says, the complaint has no basis. He points out that Ms MacArthur requested that she take part in the company's rehabilitation programme and in order to achieve that participation, and avoid the imminent conclusion of the outstanding disciplinary investigation, some information had to be communicated to her manager and Ms MacArthur was fully aware of that. He says it is also clear that in the later discussions involving Ms Beaver Ms MacArthur clearly verbally consented, in Dr Sprott's presence, to Dr Sprott sharing detailed medical information with Ms Beaver.

[34] In respect to Ms MacArthur's allegation of predetermination Mr Thompson argues that, even if it had previously been alleged, the totality of the evidence and documentation, as opposed to brief excerpts, clearly demonstrate that no predetermination existed.

Discussion

[35] There can be no doubt as to Ms MacArthur's commitment to her rehabilitation or her strong desire to return to her position as a member of the Air New Zealand cabin crew. However, in assessing *what a fair and reasonable employer would have done* it is necessary to consider not simply what is fair to the employee. An employer must of course take the employee's circumstances into account including the length of service and the adverse effects of the decision to dismiss on the individual's career and future prospects. They are untitled however to weigh the employee's circumstances against a range of other considerations: How long has the employee been unable to perform their duties? Is it necessary to fill the position? What are the applicable provisions of the employee's employment agreement and any relevant company policy? What are the costs to the employer of maintaining the employees employment? Are alternate duties or leave without pay possible alternatives to dismissal? Has the employee being given proper notice of the consequences of their inability to return to the contracted position and to suggest alternatives?

[36] As can be seen from the above there can be no simple formula. It is a matter firstly for the employer to weigh up these competing circumstances and to reach a fair and reasonable conclusion. The Authority must then review *all of the actions of the employer up to and including the decision to dismiss. (AirNZ v. V)*

[37] Although somewhat artificial I will firstly address Air New Zealand's actions leading up to the decision to dismiss Ms MacArthur and will then turn to the actual decision to dismiss.

The actions of the employer

[38] It is difficult to fault the actions of Air New Zealand in respect to Ms MacArthur's lengthy rehabilitation. Despite her somewhat chequered career Air New Zealand were prepared to accept Ms MacArthur's self referral and offered her a rehabilitation agreement. (To be fair to Ms MacArthur she showed an admirable commitment and demonstrated this by travelling to the United States at her own expense.) As part of a rehabilitation agreement Air New Zealand provided her with alternative duties and continued to maintain her employment well beyond the initial three months indicated for review. Ms MacArthur must have been aware (it was

clearly spelt out in the company policy) that *if other options or were not available the company would consider dismissal.*

[39] Only after more than 12 months did Ms Beaver begin to indicate to Ms MacArthur that her rehabilitation, and ongoing employment, could not continue indefinitely. In April 2008 Ms Beaver indicated to Ms MacArthur that her ongoing employment would be contingent upon her finding alternate duties. The company then, tolerantly in my assessment, allowed Ms MacArthur time to seek independent medical advice as to her prognosis. This independent advice confirmed Dr Sprott's opinion and recommended a timeframe for reassessment (although not necessarily return to flying duties) as mid-2009. Perhaps understandably this somewhat negative assessment by Prof McCormick was not immediately conveyed to Dr Sprott and Ms Beaver again postponed the review process to accommodate the delay. When Prof McCormick's assessment was available, the company again met with Ms MacArthur and the message conveyed was unambiguous: in the light of the two medical opinions now available (from Dr Sprott and Prof McCormick) Ms MacArthur's ongoing employment was contingent upon finding alternative duties. Ms Beaver went further and arranged for specialist HR support and counselling to be provided to Ms MacArthur to assist her in this process.

[40] I do not accept Ms MacArthur's assertion that Ms Beaver’s emphasis on her finding ongoing employment was an indication that Ms Beaver had predetermined that Ms MacArthur would not return to flying duties. Quite the opposite; if Ms Beaver had not made these alternatives clear to she would have failed in her duty to be open and communicative. A review of Ms Beavers evidence and her recorded statements (as set out in various letters to Ms MacArthur and the minutes of various meetings with her), make it clear that Ms Beaver had not predetermined the issue or the eventual decision to dismiss.

[41] When Ms MacArthur had the misfortune to be diagnosed with an unrelated serious illness Ms Beaver, appropriately, once again postponed the review process. Even when Ms MacArthur, at very short notice, elected not to attend a prearranged meeting in early December, Ms Beaver once again delayed making any decision.

The decision to dismiss

[42] I turn now to Ms Beaver's final decision to dismiss Ms MacArthur. Certainly it can be argued that Ms MacArthur could have been placed on leave without pay at least until the next proposed reassessment. However I have carefully considered Dr Sprott's evidence that this reassessment was simply that - a reassessment. There was no guarantee that that assessment would clear Ms MacArthur to return to flying duties and even if it did that return to duty would still be contingent on successful retraining. It is clear that Dr Sprott's opinion weighed heavily in Ms Beaver's decision-making.

[43] Could Air New Zealand have continued to employ Ms MacArthur by, for example, placing her on leave without pay? Yes. Would a fair and reasonable employer have continued to employ Ms MacArthur in all of the circumstances? In my assessment and on balance, no!

Determination

[44] Having considered all the evidence and reviewed the actions of Air New Zealand leading up to and including the dismissal of Ms MacArthur I have concluded that those actions, and the decision to dismiss, *were what a fair and reasonable employer would have done in all circumstances at the time.* **Ms MacArthur's dismissal was justified and she is therefore not entitled to the remedies she is seeking.**

The release of confidential medical record

[45] Ms MacArthur has (belatedly) claimed that Dr. Sprott inappropriately provided confidential medical information to her managers. Ms MacArthur has suggested that this provision of information was unjustified and to her disadvantage and that the release of information was a breach of her conditions of employment. In addition to taking this alleged disadvantage into account in awarding any remedies Ms MacArthur requested that I impose a penalty on Air New Zealand for this breach.

[46] I do not accept that Dr Sprott inappropriately provided confidential information as alleged by Ms MacArthur. Ms MacArthur was seeking to maintain her employment and asking Air New Zealand to accept a rehabilitation agreement which required a New Zealand to continue that employment under circumstances of which many employers would have been much less tolerant. Air New Zealand was entitled to have at least sufficient medical information to reassure themselves that the commitment they were making was reasonable in all the circumstances. In entering into that agreement Ms MacArthur was in effect giving her medical adviser(s) a general permission to share the appropriate level of information. As it happens Dr Sprott on most occasions took the added and conservative step of seeking her specific approval in writing whenever it was necessary to pass information to Ms MacArthur's manager. It is clear that in early 2008 Ms MacArthur explicitly, although verbally, gave Dr Sprott authority to discuss her medical conditions with Ms Beaver.

[47] Even if the release of medical information to Ms MacArthur's managers was in breach of her conditions of employment (and I do not find that it was) this could not be said to be to her disadvantage. If she had been requested to release the information she would almost certainly, as she did on a number of occasions, have given her approval. If she had declined the request it is unlikely that her employer would have entered into the rehabilitation agreement in the first place and certainly would not have continued to employ Ms MacArthur for the lengthy period that they did.

[48] For the reasons set out above I find that Air New Zealand did not disadvantage Ms MacArthur by the sharing of confidential medical information nor did they breach her employment conditions by doing so. She is not entitled to remedies in respect to any alleged disadvantage and neither is it appropriate to impose a penalty on Air New Zealand.

Costs

[49] Costs are reserved and the parties are urged to settle this issue between themselves. If they are unable to do so Air New Zealand may file and serve a submission in respect to costs within 28 days of the date of this determination. Ms MacArthur will then have 14 days in which to file and serve a response.

James Wilson
Member of the Employment Relations Authority