

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Kevin Madsen (Applicant)
AND Air New Zealand Limited (Respondent)
REPRESENTATIVES Maurice Coughlan, Counsel for Applicant
Andrew Caisley, Counsel for Respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 27 July 2005
28 July 2005
SUBMISSIONS RECEIVED 3, 5 and 12 August 2005
DATE OF DETERMINATION 19 September 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kevin Madsen was employed by Air New Zealand (“Air NZ”) as a baggage handler for 36 years. He was summarily dismissed on 26 November 2005 following an investigation into allegations of serious misconduct. These allegations concern Mr Madsen removing customer property, namely 5 Sky City casino chips (total value \$125.00), from Air NZ’s premises and presenting them at Sky City casino.

[2] Mr Madsen says the decision to dismiss him was unreasonable and unfair given the following; his 36 years of service to Air NZ, his previously unblemished work record, the lack of any coherent policy regarding “found” property, the flawed investigation undertaken by Air NZ, that no actual damage has been incurred by Air NZ to the relationship with its customer, Sky City, as a result of his actions and he was unfairly treated differently to other employees in similar circumstances. Mr Madsen seeks reinstatement to the position he held at the time of his dismissal, reimbursement of wages lost as a consequence of his dismissal and compensatory damages for hurt and humiliation caused as a consequence of his dismissal.

[3] Air New Zealand says Mr Madsen’s dismissal was justified in all the circumstances; the policy as to “found” property was clear and well known, Air NZ conducted a full and fair investigation and reached a decision which was open to it that Mr Madsen’s conduct amounted to a fundamental breach of trust which went to the heart of the employment relationship and fair consideration was given to alternatives to dismissal.

[4] The parties have attended mediation in an attempt to resolve this employment relationship

problem.

Background

[5] In his role as a baggage handler Mr Madsen transported freight wagons between landed aircraft and the cargo ramp. On Saturday 25 September 2004, Mr Madsen was moving an empty freight wagon when he found five casino chips lodged in the corrugations of the wagon's tray. The chips were each stamped to the value of \$25.00 and marked as the property of Sky City casino. Mr Madsen put the chips in his overall pocket. Mr Madsen was working alone at the time and he did not subsequently tell anyone he had found the chips.

[6] Mr Madsen said he frequently found items during the course of his duties. He said it is part of a bag handler's duties to remove all items found on the tarmac and that these items may be rubbish or have some value. During his employment at Air NZ Mr Madsen had occasion to find items of considerable value which he had handed in.

[7] On 28 September 2004 Mr Madsen made a trip to Sky City casino to see if the chips he had found were worth anything. He presented the chips to a cashier who recognised the chips as uncommissioned (ie, not yet in circulation) and alerted Sky City security. Mr Madsen was detained and arrested later that evening on a related charge of theft of finding for which he has been discharged without conviction.

[8] That evening the Sky City night shift manager contacted Richard Oliphant, Air NZ human resource advisor, to advise an Air NZ employee had been detained while presenting uncommissioned casino chips. The Sky City manager advised Mr Oliphant the chips had come from a damaged consignment of chips. Mr Oliphant reported this information to his manager, Rachel Mason, general manager of human resources airport services, who instructed him to discuss the matter with Ron Henderson, acting duty manager ramp services, and begin a preliminary investigation.

[9] Mr Oliphant's subsequent inquiries revealed the consignment had been damaged on 25 September 2005 and had occurred on the ramp, a secure area where cargo is received from planes landed on the tarmac. As it had been thought all the spilt chips had been recovered no notice of missing property was posted. It was now apparent all the chips had not been recovered; Mr Madsen had found five and an employee of Mobile Oil, also located airside at the international terminal, had also found a number which he had presented at Sky City with similar consequences to Mr Madsen.

[10] On 30 October 2004 Mr Madsen was presented with a letter inviting him to attend a disciplinary meeting regarding the actions he took with respect to the chips. He was invited to bring a support person with him. The letter advised the possible disciplinary consequences of an investigation could include dismissal.

[11] Mr Madsen attended the meeting with his EPMU delegate, Shane Edmonds. Mr Madsen described the meeting as informal and said this led him to believe the matter would be treated as a minor incident. Minutes of the first disciplinary meeting were provided to the Authority and were accepted by the parties as generally accurate. They do not support Mr Madsen's view that the manner in which the meeting was conducted led him to believe the matter was minor in the eyes of the employer. The minutes record Mr Madsen was advised the possible disciplinary outcome could include dismissal, advised of the allegation, the investigation process was outlined to him and he was given a preliminary opportunity to respond. He was also asked if he had any comment to make on the appropriateness of suspension and the meeting adjourned while a decision as to suspension was considered, of which he was advised when the meeting reconvened.

[12] The meeting was conducted by Mr Henderson, with whom Mr Madsen had a long association, and I accept what Mr Madsen says that there was some joking in the meeting. However, I find Mr Madsen's view that the meeting led him to believe the matter would be treated as a minor incident by the employer is not an accurate reflection of the meeting and is more consistent with Mr Madsen attempting to cast a most serious situation in the best possible light.

[13] The next disciplinary meeting was held on 26 October 2005. The delay was caused by Air NZ and the EPMU's involvement in negotiations for the ground staff collective employment agreement. Mr Madsen has not raised any issue regarding the delay. He told me he could not recall if the delay was an issue at the time. Present were Mr Madsen, Mr Edmonds, Rex Jones, a consultant with the EPMU, Ms Mason and Richard Griffiths, manager New Zealand airports, who had taken over the responsibility for the disciplinary process from Mr Oliphant.

[14] During the investigation meeting Dr Coughlan sought a copy of Mr Griffiths' authorisation to dismiss. No written authorisation has been provided. Dr Coughlan submits that this failure to provide a properly executed delegation is fundamental to the exercise of the power to dismiss and must be discharged as a matter of proof.

[15] Air NZ's disciplinary policy requires that as dismissal is the highest sanction it should be used only after consideration of the alternatives and that the authority to dismiss lies with the division group general manager which may be delegated to the appropriate manager. Mr Griffiths told me he was the decision-maker in this situation with the appropriate delegated authority. Ms Mason confirmed this. No challenge to Mr Griffiths' authority was raised during the disciplinary process. I am satisfied on the evidence received Mr Griffiths had the appropriate delegated authority to dismiss Mr Madsen.

[16] Minutes of the 26 October 2004 disciplinary meeting have been provided to me. The parties accepted the minutes as generally accurate. The process to date was discussed. It was accepted on Mr Madsen's behalf that his behaviour was wrong but should be seen as an error of judgement and submissions were made on Mr Madsen's behalf and questions put to him regarding the allegations.

[17] The next disciplinary meeting occurred on 26 November 2004. Again the delay was occasioned by the ground staff collective employment agreement negotiations. The allegations were restated and Mr Madsen was invited to provide further explanation regarding the allegations and to make representations regarding penalty. The meeting adjourned for Mr Griffiths to consider the issues raised by Mr Madsen's representatives. On reconvening the meeting Mr Griffiths advised Mr Madsen he was dismissed.

[18] Mr Griffiths wrote to Mr Madsen on 2 December confirming his dismissal in writing and setting out the reasons for his dismissal. The letter set out the issues investigated and the areas which had been reviewed in that investigation. The letter went on to respond to representations made on Mr Madsen's behalf including the representations regarding alternatives to dismissal.

Issues

(i) Policy as to "found" property

[19] During the investigation Mr Madsen told Mr Griffiths he did not hand the chips in because he thought they were rubbish. When Mr Griffiths asked Mr Madsen why he went to the Casino with the chips if he thought they were rubbish Mr Madsen replied he wanted to find out what their value was. Mr Griffiths did not accept Mr Madsen's explanation that he thought the chips were rubbish

given Mr Madsen's deliberate steps to visit the casino to assess their value. I find this conclusion was open to Mr Griffiths.

[20] Mr Griffiths' further concluded that Mr Madsen had taken the chips to Sky City with a view to cashing them in for his personal gain. I find this also was a conclusion open to Mr Griffiths. Mr Madsen had not disclosed to anyone at Air NZ he had found the chips, he was not a frequenter of the Sky City casino and said he had visited with the purpose of assessing the value of the chips, the police summary sheet provided to Air NZ by Mr Madsen records that he told Sky City security he thought it was his "lucky day".

[21] Did Mr Madsen know that removing customer property could constitute serious misconduct?

[22] The criticism of Air NZ's policy as it relates to the investigation into the allegations against Mr Madsen concern the following areas:

- there was no written policy for what to do with objects found in the ramp area; and
- the policy had changed over the years which had caused confusion.

[23] Mr Edmonds said the policy around found objects had changed and this change had not been notified to staff. He said the day after Mr Madsen's dismissal a notice had been posted advising all found items were to be placed in a holding bin where they would then be transferred to the Baggage Tracing Unit ("BTU"). He said this was the first clear advice staff had received on the found property policy.

[24] Air NZ does not have a written policy regarding property found in the ramp area. The evidence received was clear that baggage handlers are required to exercise judgement in assessing found property as either rubbish or of value. If it is rubbish it is binned if it is of value it is handed in. Items which are handed in are given to the supervisor who passes them on to the baggage tracing unit ("BTU") or if they are assessed of little value such as pens, books or newspapers they are placed in the staff common room where they are available to all staff for use. No witnesses said it was acceptable to remove property found during the course of their duties without authorisation. Mr Madsen did not say he had authorisation to remove the chips either express or implied.

[25] The decision not to notify staff of the compromised consignment was not criticised by the applicant's witnesses. Mr Madsen said he would have handed the casino chips in if notice had been posted that they were being looked for. He did not say because no notice had been posted he was entitled to retain the casino chips.

[26] While I accept Air NZ had an obligation to properly train and inform their employees I do not accept that there was confusion regarding the found property policy which contributed to Mr Madsen's decision to remove the chips from Air New Zealand premises and visit the casino to assess their value. Mr Madsen did not say he was confused about the policy regarding found items and he did not say he understood his removal of the casino chips was authorised.

(ii) Was the investigation fair and reasonable?

[27] At the second disciplinary meeting the following representations were made on Mr Madsen's behalf as to why he should not be dismissed:

- the chips were of no value because they had not yet been commissioned;
- Mr Madsen had received a discharge without conviction;
- the policy regarding handing in property had changed;

- the failure to report the missing chips had allowed Mr Madsen's error of judgement to occur;
- Mr Madsen's conduct did not bring Air NZ into disrepute; and
- Mr Madsen's 36 years of exemplary service to Air NZ should be taken into account.

[28] Mr Griffith said he considered all these issues in reaching the decision to dismiss Mr Madsen which was advised at the meeting on 26 November. Further representations were then made on Mr Madsen's behalf following notice of termination regarding alternatives to dismissal; a final written warning, forfeiture of a month's pay and/or relocation to another role outside airport services.

[29] A fair opportunity was given to Mr Madsen to respond to the allegations and to make submissions as to penalty. From the outset of the disciplinary process he was advised dismissal could be a consequence of the process. The representations made on his behalf are best described as a plea in mitigation; at the second disciplinary meeting Air NZ was advised Mr Madsen accepted his behaviour was wrong but that the conduct should be characterised as an error of judgement and given Mr Madsen's exemplary work record and the lack of clarity around the policy the penalty should not be the harshest.

[30] Mr Griffiths gave lengthy evidence of the decision making process he undertook in reaching the decision that Mr Madsen's alleged conduct amounted to serious misconduct warranting dismissal. I am satisfied the factors weighed were relevant and the issues raised on Mr Madsen's behalf were considered by Mr Griffiths.

[31] I find the investigation was conducted fairly and reasonably and in accordance with Air NZ's disciplinary policy.

(iii) Disparity of treatment

[32] Mr Madsen says his dismissal was unjustified because Air NZ has treated him differently from employees in similar situations who it did not dismiss. This issue was raised subsequent to his dismissal. To establish disparity of treatment Mr Madsen must first show the circumstances occasioning the disciplinary action were similar, second that he has been treated differently and third that that difference is unfair to the extent that it renders his dismissal unreasonable in all the circumstances. An explanation for the disparity of treatment, if accepted, will defeat the claim of disparity¹.

• Charlie Maru

[33] Mr Madsen told me that in about 1990, Mr Maru, along with a number of other Air NZ employees, was suspended for taking radios from a cargo consignment. Mr Madsen said he was a good friend of Mr Maru's, had offered to pay his legal fees and that Mr Maru had been reinstated to his position at Air NZ following a personal grievance hearing. This indicates Mr Maru was dismissed. Mr Edmonds said Mr Maru was not dismissed because he was extremely remorseful.

[34] Air NZ was unable to find any records of Mr Maru's circumstances and none of the decision-makers involved in the investigation into the allegations against Mr Madsen were employed by Air NZ at the time.

[35] The evidence in support of the claim of disparity with the treatment of Mr Maru is insufficient to make any findings as to what treatment Mr Maru received let alone whether that was

¹ *Samu v Air New Zealand* [1995] 1 ERNZ 636

unjustifiably different to Mr Madsen's circumstances.

- **Adam Holm**

[36] Adam Holm was employed in the BTU. Mr Holm on-sold a mobile phone from the BTU without authorisation. The conduct was revealed and a disciplinary investigation was conducted. Mr Griffiths was the decision maker. After consultation with the company solicitor Mr Holm was issued with a final written warning. Mr Griffiths said he did this because there had been procedural flaws in the investigation and the investigation showed a range of practises regarding use of lost property in the BTU.

[37] An explanation has been provided as to why Mr Holm was not dismissed. The explanation has not been challenged and it is accepted. There are no grounds on which to find the disparity of treatment between Mr Holm and Mr Madsen was unjustified.

Determination

[38] While I accept the casino chips found by Mr Madsen had little intrinsic value they were clearly the property of Sky City, which Air NZ was charged with the responsibility of safely transporting and which Mr Madsen took deliberate steps to remove from his employer's premises to assess their value. The consequences of those steps have been personally devastating to Mr Madsen. However, for the reasons set out above I find the decision to dismiss Mr Madsen was one open to Air NZ having fairly and reasonably investigated the allegations against Mr Madsen, considered his responses with an open mind and considered alternatives to dismissal.

Costs

[39] The issue of costs is reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to do so an application should be made to the Authority to determine costs.

Marija Urlich
Member of Employment Relations Authority