IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 45
5242829

	BETWEEN	KATHLEEN ANN MILNE Applicant
	AND	AIR NEW ZEALAND LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	R Harrison, counsel for applicant K Thompson, counsel for respondent
Investigation Meeting:	1 and 2 September 2010
Additional information provided:	20 and 28 September 2010 11 October 2010
Determination:	3 February 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kathleen Ann Milne (known as Ann) was employed as a flight attendant by Air New Zealand Limited (Air New Zealand). She says Air New Zealand dismissed her unjustifiably at the end of a period of long term sick leave, following findings that for medical reasons she was unfit to fly and that no alternative positions were available in the company.

[2] Reinstatement is sought in the form of a return to the training and vocational opportunities Ms Milne believes would have been available to her but for the termination of her employment. In particular she would like to obtain work in Australia. Ms Milne does not wish to resume flying duties and does not seek reinstatement to flying duties.

[3] Air New Zealand says the dismissal was justified.

Background

[4] Ms Milne began her employment as a flight hostess in 1972. By the relevant period, she had attained the position of inflight service director (ISD).

1. The commencement of Ms Milne's absence on leave

[5] The medical history underlying the termination of Ms Milne's employment is complex. Over a lengthy period Ms Milne experienced a number of medical conditions and symptoms, some of which were addressed through the accident compensation regime, and she also began to experience stress-related difficulties.

[6] In or about July 2003 Ms Milne began experiencing symptoms of a new and unrelated medical complaint, and which were of concern to her. There was no diagnosis at the time, although the medical information filed indicates attempts at a diagnosis were made during 2003 and 2004, and treatment was also attempted. In November 2003 Ms Milne reported to her GP that the symptoms were continuing, and she raised stress as a possibly relevant factor.

[7] As to possible stressors, there were serious adverse events in Ms Milne's personal life in 2000 and 2001. Ms Milne also believed she had been bullied and harassed at work as a result of a number of incidents occurring from the late 1990s in particular, and these matters caused her to suffer from stress. A substantial majority of the incidents concerned her views of whether safety procedures had been followed on particular flights, her actual or intended filing of formal reports in respect of her safety concerns, and her view of the reactions to her concerns and intentions of members of the flight crews involved. The most recent of the incidents occurred in mid-September 2003, and in mid-October 2003 Ms Milne raised what she termed a personal grievance in respect of the pilots' conduct towards her during the incident.

[8] On or about 11 October 2003 Ms Milne began a period of leave described as 'work injury leave'. This period of leave was initially treated as being associated with work-related stress, and at the time it was submitted as an ACC claim.

[9] By the end of October Ms Milne had not returned to work. Air New Zealand's chief medical officer at the time, Dr David Powell, and Paul McCloskey, the HR manager cabin crew at the time, had discussions with Ms Milne's union representative in an attempt to arrange a meeting to discuss Ms Milne's fitness to fly and a method of resolving her difficulties.

[10] According to information provided at the time in email messages from Ms Milne's union representative, Heather Stanley, Ms Milne continued to have concerns about bullying in the workplace and wanted the company to introduce a bullying policy as well as obtain outside assistance in the investigation of bullying claims. Ms Stanley advised that the medical complaint identified in July was also being investigated, and a possible relationship between that condition and Ms Milne's concern about bullying incidents was being investigated. Ms Stanley advised further that Ms Milne believed she had a fear of flying because of her fear of flying with people involved in the matters raised as safety concerns. Finally Ms Stanley indicated Ms Milne was concerned about sharing medical information, and suggested the information be handled with strict confidence.

[11] Ms Milne's leave continued. From about 27 October it ceased to be classified as 'work injury leave' or to be treated as an ACC matter, and was classified as sick leave.

2. Company policies on long term sick leave

[12] The 'Cabin Crew Line Operations and Administration Manual' provided for long term sickness as follows:

> *If a cabin crew member is off work for an extended period of time, the Long Term Sickness Procedures outlined in the flowchart will be adopted unless the company advisees the cabin crew member otherwise. Long Term Sickness procedures will commence any time after 5 days' absence.*
>
> *During long term absence ongoing communication is expected between the crew member, Cabin Crew Department and the Company's medical department and a return to work rehabilitation plan will be established.*
>
> *Company policy is to keep positions open for a reasonable period of time and generally this is not extended beyond six months. However every situation will be treated on an individual basis. Depending on the prognosis of a return to work or if one is not able to be made, consideration will be given as to how long a position can be kept open. This will be done in association with the Rehabilitation Plan.*

> *Once a crew member's absence has reached 14 consecutive days, they must contact the Company's Medical Centre to provide details of their absence.*
>
> *A crew member who has been absent for over 14 days needs to be cleared fit to return to work by a registered medical practitioner and the Company Medical Department will need to provide a clearance to return to operational duties.*

[13] The flow chart incorporated in the policy set out what in effect was a timetable for meetings between the cabin crew manager and the cabin crew member for the purpose of reviewing the return to work prognosis and fitness to work, linked with input and monitoring by the health professional and the company's medical unit. According to the flowchart, after 30 days absence the cabin crew manager and the crew member would meet to review the return to work prognosis and address a 'fit for work trial'. If the crew member was ready for such a trial, it would be planned and monitored by the company and have health professional support. Further monthly reviews of the return to work prognosis would follow. If at one of these reviews the parties agreed the trial was successful, the medical unit would issue a fit to fly clearance. If after 6 months no return to work was imminent, continued employment would be reviewed.

3. Provisions in the applicable collective employment agreement

[14] The applicable FARSA Inflight Service Directors collective employment agreement (cea) provided:

> *10. Sick leave/absence from duty*
>
> *10.1 It is the responsibility of every inflight service director to report for duty fully fit and able to complete all duties and requirements of Air New Zealand during the subsequent period of duty*
> …
> *10. 3 An inflight service director who is absent from duty by reason of sickness not caused his/her own wilful action or neglect shall be entitled to remain on full pay for the duration of each such sickness.*
> …
> *10.4 The company may investigate any situation where an inflight service director's level of sick leave/absence is considered to be unsatisfactory …*
>
> *10.5 Inflight service directors who*
> *(a) fail to maintain a satisfactory attendance record; or*
> *(b) are found to have patterns of sick leave/absence; or*
> *(c) are found to have taken sick leave or are absent unjustifiably*
> *May be subject to disciplinary procedures and/or termination of employment*

> *10.6 Frequency and length of sick leave/absence will be monitored and as a general rule the following standard will be applied when identifying sick leave/absence which may require individual follow up*
>
> *Five or more occasions or 13 or more consecutive days over any period of 12 consecutive months, or a pattern of sick leave/absence.*
>
> *10.7 If after a period of sickness/absence or injury an inflight service director is cleared fit for temporary ground duties by the company's medical department, then subject to the approval of cabin crew management duties may be assigned within cabin crew/airport services departments in that priority or elsewhere within the company as appropriate.*

The claims of bullying and harassment

[15] Although Ms Milne's allegations of bullying and harassment are not directly the subject of the present employment relations problem, I address them because they provide a context for the conclusions about Ms Milne's fitness to fly and the availability of suitable alternative positions.

[16] Ms Milne was still on sick leave when on 13 February 2004 she met with the inflight service co-ordinator, Mr McCloskey, and Theo Thomas, then the cabin crew manager. The meeting was to discuss the September 2003 incident as well as an earlier incident when Ms Milne complained that a senior member of the cabin crew had harassed her. The complaint concerned a perception that the person had made disparaging remarks about Ms Milne's leadership style. Ms Milne felt these matters were unresolved and was concerned about the procedure that was being followed.

[17] A more detailed discussion resumed on 16 February. It included a discussion about what process could be used to address Ms Milne's relationship concerns. Her attendance at a training course on dealing with difficult people was approved, she had access to an employee assistance programme (EAP), and Air New Zealand was prepared to manage her rosters so she would not be working with the individuals causing her concern.

[18] There were further meetings in 2004 during which incidents of concern to Ms Milne were discussed, including at least one Crew Relationship Management (CRM) meeting, but Ms Milne still considered that matters remained unresolved. She sought mediation, which went ahead in September 2004.

[19] Ms Milne also raised her concerns with the company's OSH division. Her complaint was passed to the Civil Aviation Authority (CAA) and a meeting to discuss it went ahead on 25 March 2004. The CAA issued its report later in the year.

A managed return to work under policy on long term absence

[20] As Ms Milne's absence continued it was supported by medical certificates from her GP which made the bare assertion she was medically unfit for work. In December 2003 and January 2004 a concern developed about the lack of any other information in support of the reason for the continuing absence, and in particular the lack of a diagnosis. In January 2004 attention turned to the possibility of a managed return to work for Ms Milne under the long term sick leave policy, although Dr Powell was advising that she was not fit to fly.

[21] By letter dated 11 March 2004 Mr McCloskey advised Ms Milne of the company's increasing concern about her level of absenteeism. In doing so he invoked clause 10 of the cea. He sought a meeting on 15 March.

[22] There was no note of the meeting, but Mr McCloskey's evidence was that during this and subsequent meetings he was unable to obtain insight as to when Ms Milne may be able to return to work and Ms Milne did not provide any detail of her medical condition. However Mr McCloskey said his approach during the meetings was to focus on the impediments to Ms Milne's return to work and attempt to remove them. He acknowledged that on unspecified occasions Ms Milne expressed reservations about returning to flying at all, and said he told her that if she did not return to those duties the company would attempt to redeploy her although a recruitment process would be required.

[23] Ms Milne accepted that a number of suggestions were made to her regarding her return to work. She said in evidence that she 'just listened'. She said that of more interest to her was getting a job on the ground.

[24] Ms Milne also said in evidence that she did not want to 'go back flying' at all. Although she did not advise Mr McCloskey of her wish as unequivocally as that, she said she advised the ACC of it in association with an approach she made regarding her

work-related tinnitus condition. A file note of her interactions with the ACC on that matter indicates she approached the ACC on 2 February 2004 to advise that she wished to work on the ground rather than in the air. The response was that it would be best to discuss the matter with a specialist as the ACC would have no say in asking the employer to do this. There were further approaches to similar effect in March and April, with a note dated 16 April recording Ms Milne's belief that she had solved her problem. According to the note she did, however, seek to discuss the matter with the ACC again in July 2004 and subsequently.

[25] I digress to say that, after the investigation meeting, Ms Milne instructed counsel to assert a personal grievance in respect of the tinnitus. The condition was first reported to the ACC in or about 1983. On the information available the issue remained dormant for many years after the initial action taken on it, and in particular Ms Milne continued to fly. The condition was mentioned again at or about the time Ms Milne commenced the absence with which this problem is concerned, was the subject of the approach to the ACC just set out, was commented on when Air New Zealand was attempting to address the future of Ms Milne's employment later in 2004, and was the subject of specialist medical advice after Ms Milne's employment had ended.

[26] Nothing in the material indicated the matter was raised as a personal grievance with Air New Zealand, as a 'personal grievance' is defined in the Employment Relations Act 2000, and the matter was not part of the employment relationship problem in the Authority. Further any claim Ms Milne may have in respect of the condition is an accident compensation matter. Almost certainly the statutory bar on bringing any other form of claim applies here. No doubt Ms Milne was given that advice.

[27] Returning to the narrative, Ms Milne's clearance to return to work on a limited basis was given on 14 April 2004. She was cleared as fit for alternative duties but not as fit to fly until she had completed ground work to reintegrate her into the work environment. Her GP recommended an evaluation for flying after three months.

[28] On 27 April Ms Milne signed a rehabilitation agreement in respect of a fit for work trial arrangement that she undertake computer and administration work at Air

New Zealand's Auckland City office. To start with, she would be working for 4 hours per day. The agreement was entered into in accordance with the long term sick leave policy to assist in her return to what the agreement referred to as her primary employment following her illness, and Mr McCloskey explained this. To that end the position was supernumerary, not a vacancy.

[29] In late May 2004 Dr Tim Sprott, then a contracted aviation medicine specialist who had taken over from Dr Powell, recommended that Ms Milne's hours of work be increased to 7 hours per day, and expected that she would be able to increase her hours to 8 per day after he saw her on 10 June. He intended to provide a recommendation regarding fitness to fly at that time.

[30] Unfortunately, in May 2004 Ms Milne began experiencing pins and needles and numbness in her arm in association with her computer work. She was diagnosed with a condition related to OOS. Her hours of work were again restricted, and it was necessary to find other alternative ground based work. The OOS-related condition fell to be addressed, and was addressed, under the ACC regime. Specialist occupational assessments were carried out accordingly.

[31] On 9 July 2004 Ms Milne signed another rehabilitation agreement. That, too, was an agreement intended to assist in achieving an eventual return to flying duties under the long term sick leave policy, although the immediate cause of the entry into the second agreement was the new work-related injury Ms Milne had suffered. Under the second agreement Ms Milne was to work at Auckland airport on filing and administration work at the crew desk for inflight services. Again the position was supernumerary and was not a vacancy.

[32] Mr McCloskey left his employment in late 2004, and in August 2004 Siobhan Cohen commenced employment as acting HR manager for international cabin crew. Ms Cohen sought to familiarise herself with Ms Milne's progress, and had a number of informal discussions with Ms Milne to that end.

[33] During the discussions Ms Cohen explained that if progress towards a return to flying duties was not made, then it would be necessary to seek alternative positions or consider the termination of employment. Ms Milne's response was to maintain that

her medical information was confidential, and that she was not prepared to change her terms and conditions of employment. Ms Cohen advised Ms Milne that this approach significantly limited the options available to her.

Conclusions of medical practitioners on Ms Milne's fitness to fly

[34] At a meeting in November 2003 Ms Milne advised Dr Powell of her medical issues, and sought to discuss the September 2003 incident. She also expressed discomfort at having her GP contact Dr Powell. Dr Powell considered it apparent Ms Milne was not ready to return to work.

[35] In January 2004 Dr Powell was concerned about a lack of contact with Ms Milne's GP concerning Ms Milne's condition. In addition Ms Milne did not attend a review scheduled with him in January because she did not feel ready to return to work.

[36] Dr Powell met with Ms Milne again on 3 March 2004. There was a discussion about her access to further EAP counselling, the bullying incidents, and Ms Milne's symptoms. Ms Milne said she had been told she was suffering from post traumatic stress disorder (PTSD), but Dr Powell did not believe that was the correct diagnosis under the relevant diagnostic criteria. The meeting ended with Ms Milne expressing discomfort with Dr Powell himself. After the reason for this was explained in April as being the result of the offence Ms Milne had taken in an incident 5 years earlier Dr Sprott took over Dr Powell's role.

[37] An arrangement was also made at the March meeting for Dr Powell to have a discussion with Ms Milne's GP. This went ahead in or about mid-March. The consensus was that the GP would refer Ms Milne to a psychiatrist for a diagnosis and to a clinical psychologist for further counselling, at Air New Zealand's expense. The referral to the psychiatrist was formalised in a letter dated 23 March 2004.

[38] On 31 March 2004 Ms Milne had a consultation with the psychiatrist. In a written report to Ms Milne's GP, dated 1 May 2004, the psychiatrist referred to the conflict Ms Milne had been experiencing at work and commented on Ms Milne's approach and reaction to the conflict. The report noted that Ms Milne was working

with a psychologist on these matters. The psychiatrist's diagnosis was adjustment disorder with anxious and depressed mood. She did not believe Ms Milne was suffering from PTSD.

[39] Dr Sprott had met with Ms Milne in April and May, and met with her again on 10 June. There was a discussion about the psychiatrist's report, Ms Milne's perception of barriers to her return to flying duties, and strategies for dealing with the conflicts she was experiencing. A further consultation with the psychologist was to be arranged in order to update Dr Sprott. Dr Sprott did not make the recommendation regarding fitness to fly which he had planned to make, as he was not in possession of the expected update from the psychologist.

[40] Dr Sprott said he and the psychologist subsequently agreed that Ms Milne was not fit to fly. However Dr Sprott was unable to obtain any further information from the psychologist following advice from the psychologist that Ms Milne declined to authorise the release of details of their consultation.

[41] On 12 July 2004 Ms Milne had another meeting with Dr Sprott. Dr Sprott told her he was to make a decision about her fitness to fly based on the reports of the psychiatrist and psychologist and his own discussions with Ms Milne. He listed the issues relevant to her fitness to fly including: the psychiatrist's report and diagnosis; Ms Milne's sensitisation to interactions involving conflict; and Ms Milne's associated fear of flying. There was a discussion about her decision-making capability and her ability to cope in emergencies.

[42] Also in July, Dr Sprott arranged an appointment for the psychiatrist to review Ms Milne's condition. The psychiatrist declined to see Ms Milne again out of concern about whether a suitable level of rapport could be established, and suggested the name of another psychiatrist. For his part, Dr Sprott concluded a further assessment was unlikely to lead to a change in the prognosis.

[43] Ms Milne met with Dr Sprott again on 4 or 5 August 2004. Dr Sprott advised that, for reasons of the kind discussed in July, he believed Ms Milne was medically unfit to return to flying duties. By letter dated 4 August 2004 Dr Sprott confirmed his

opinion that Ms Milne was medically unfit to fly for the foreseeable future but that she was fit to undertake ground based duties.

[44] The reasons were discussed again at a meeting between Dr Sprott and Ms Milne on 12 or 13 August. According to a meeting note of Ms Milne's, Dr Sprott expressed concern that another incident would bring on Ms Milne's disorder and its symptoms, and suggested that Ms Milne speak to Mr Thomas about other work she could do.

[45] Dr Sprott's conclusion was confirmed in the form of a medical certificate dated 27 August 2004.

[46] In September 2004 Ms Milne sought information about her right to challenge the conclusion, and raised what she called a personal grievance against Dr Sprott in respect of it. In a letter to Mr Thomas dated 4 October 2004 she identified her concerns and sought, in effect, that Dr Sprott reconsider his conclusion in the light of an update of the psychiatrist's assessment. Ms Milne said in evidence that her concern was with the procedure used to reach the conclusion about her fitness to fly. Otherwise she no longer wished to fly.

[47] Nevertheless Ms Milne obtained a referral from her GP to another psychiatrist, although Air New Zealand was not informed of this at the relevant times. The GP's letter of referral dated 10 October 2004 asked the psychiatrist for an assessment of Ms Milne's mental state and of her fitness to fly based on her then-present condition.

[48] The psychiatrist's written report to the GP, dated 21 February 2005, recorded that he interviewed Ms Milne on 10 and 24 November 2004. His conclusion concerning fitness to fly was that Ms Milne did not by then suffer from any psychiatric disorder that would inhibit her performance, although there was a risk that re-exposure to specific circumstances may trigger a relapse. The likelihood of this could not be predicted, and the presence of factors mitigating the risk of a relapse was noted.

[49] The report recommended that Ms Milne enter into negotiations regarding a return to work.

Actions following certification of lack of fitness to fly

[50] Dr Sprott's certifying of Ms Milne as unfit to fly led to a formal process with Ms Milne. On 30 September 2004 Ms Cohen asked Ms Milne to attend a meeting to discuss the medical certificate regarding her fitness to fly, and the options available.

[51] The meeting went ahead on 4 October. Ms Milne attended with her union representatives. She challenged the certification of her lack of fitness to fly on the ground that the psychiatrist's report was not current. She believed Dr Sprott's conclusion rested on that report - which was not the case because he had taken other matters including his own observations into consideration - and asked that Dr Sprott review the conclusion on the basis of an updated reassessment.

[52] Although Ms Cohen was relying on Dr Sprott's certification she indicated Air New Zealand was happy for Ms Milne to see a specialist of her choice, but full disclosure of the medical details would be required. Ms Cohen asked whether Ms Milne had made an appointment to see another specialist, and was advised she had not. Ms Cohen advised further that, alternatively or in addition Air New Zealand would arrange and pay for Ms Milne to see a specialist of its choice, but again disclosure would be required.

[53] Ms Cohen then moved to discuss alternatives to a flight attendant's position, and asked Ms Milne for an updated CV. No updated CV was available at the time, and Ms Milne was to take time to prepare one. Ms Cohen also suggested Ms Milne consult the Air New Zealand intranet regarding suitable alternative vacant positions of interest to her. Ms Milne confirmed her earlier advice to Ms Cohen that she was not prepared to change her terms and conditions of employment. Ms Cohen described Ms Milne as very insistent on this. An arrangement was made to meet again on 13 October to discuss possible alternative positions.

[54] A further meeting went ahead on 13 October. Meanwhile there had been an unfortunate incident between Ms Milne and Ms Cohen regarding Ms Milne's CV, with the result that an updated CV was not yet available. In addition Ms Milne's union had advised that it would no longer be representing Ms Milne, so that Ms Milne attended with a support person instead.

[55] During the 13 October meeting there was reference to the limited number of vacancies on the company's intranet. Ms Cohen had not identified an alternative position that looked suitable, and asked Ms Milne whether she had done so. Ms Milne said she had found a team leader role in the customer services area.

[56] When asked whether she would like to explore the alternatives some more, Ms Milne returned to her 'personal grievance' against Dr Sprott. There was an arrangement that a response to Ms Milne's concerns about Dr Sprott would be forwarded in writing. In relation to the concern that the psychiatrist's assessment was out of date, Ms Cohen said she would speak to Dr Sprott and convene a further meeting for 15 October to discuss the outcome. Discussion on these and related points meant that no conclusion was reached regarding possible alternative positions.

[57] The 15 October meeting went ahead. Ms Milne attended with a support person. Ms Cohen reported that the outcome of her discussion with Dr Sprott was that in his view his assessment still stood. He had also commented on Ms Milne's refusal to allow information from the psychologist to be released to him, and expressed the opinion that Ms Milne's difficulties in dealing with conflict would be an obstacle to finding alternative employment.

[58] The meeting returned to possible alternative positions. With reference again to vacancies advertised on the company's intranet, most were identified as heavily keyboard reliant and involved data entry. They included the team leader role in customer services, which had been found to require keyboard skills. Obstacles to pursuing such roles were Ms Milne's OOS-related condition, as well as Ms Cohen's understanding that Ms Milne's keyboard skills were limited. The significantly lower remuneration associated with these positions was also noted.

[59] Further to the OOS-related condition, a physiotherapist's report dated 28 June 2004 recorded Ms Milne's difficulties with posture and positioning, and said Ms Milne should be capable of carrying out computer work and filing if these matters were addressed. A report from an occupational medical specialist, and dated 30 September 2004, noted improvement and that Ms Milne was not currently performing computer work. It also noted that Ms Milne had some reluctance to return to computer work because she associated it with the development of pain. It concluded

that Ms Milne was fit for a clerical role and to work on computers, although she would benefit from further input from an occupational physiotherapist.

[60] Regarding other alternatives, Ms Milne expressed an interest in the possibility of a role in the human resources area. There were no vacancies at the time, and Ms Cohen did not consider Ms Milne would be suited to such a role in any event. Ms Milne also raised the prospect of a position in Australia, but acknowledged the manager based there had indicated that a vacancy was unlikely. Indeed no such vacancy was identified. Neither of these possibilities was pursued.

[61] Finally, Ms Cohen explained to Ms Milne that if no alternative work could be found the termination of Ms Milne's employment would have to be considered. At the time Ms Cohen used the term 'frustration of contract' in an attempt to define the legal basis for Ms Milne's employment ending. Since it was clear the parties were addressing Ms Milne's certification as unfit to fly, and whether an alternative position was available, I do not consider anything turns on Ms Cohen's use of this terminology. Moreover Air New Zealand relied on Ms Milne's medical condition and the lack of alternative positions to say it imposed a dismissal which was justified, and has not sought to rely on the doctrine of frustration as a defence to the personal grievance. If - as seems to be the case from the submissions - the terminology is significant to Ms Milne because she believes one approach suggests fault on her part while the other does not, I do not discern a suggestion of fault in either approach.

[62] In a letter dated 22 October 2004 Ms Cohen replied to Ms Milne's concerns about Dr Sprott. She went on to refer to Ms Milne's refusals to consider a position that did not have the same terms and conditions as those she currently held, and the difficulty associated with her OOS claim. She said those issues meant the company may not be able to continue Ms Milne's employment. She sought a further meeting on 29 October in order to discuss Ms Milne's ongoing employment.

[63] As Ms Milne's support person was not available that day, the meeting went ahead on 3 November. Ms Milne attended with another support person. By this time Ms Milne's updated CV was available and was produced.

[64] There was further discussion at the 3 November meeting about roles in customer service or the travel office. Ms Milne also handed Ms Cohen a letter, at the end of which she said:

> *I will consider alternative proposals that you may have. It is not that I am seeking the same terms and conditions, however I have serious reservations about the nature of the alternative jobs on offer – especially those that may involve a pay cut. I am not closed to looking at alternative options that you may have available.*

[65] This does not amount to an unequivocal abandoning of the requirement that there be no diminution of terms and conditions of employment.

[66] Other alternatives that were discussed required keyboard skills Ms Milne did not possess, and Ms Cohen expressed concern about placing Ms Milne in a role which could exacerbate her OOS-related condition. Further to the possibility of a role in customer services, there remained a concern about the relatively lower salary and a concern about Ms Milne's ability to deal with difficult people. Finally, Ms Cohen confirmed there were no vacancies in Australia.

[67] Ms Milne asked about retraining in keyboard skills, and there was a discussion about the extent of Ms Milne's existing skills and where they could be used. Ms Cohen considered Ms Milne's computer skills to be at a basic level, which would justify terms and conditions of employment significantly less than those Ms Milne had enjoyed as an ISD. The experience noted in Ms Milne's CV lends support to that view of the level of Ms Milne's computer skills. Although by then Ms Milne had indicated she would consider lesser terms and conditions of employment, Ms Cohen remained of the view that no suitable alternative positions were available. Further to the possibility of retraining in the area of customer service, Ms Cohen again expressed unwillingness to place Ms Milne in a situation where she would have to deal with irate people.

[68] As no suitable alternative positions could be identified, Ms Cohen advised that Ms Milne's employment was to be terminated with one month's pay in lieu of notice.

[69] Although the termination of Ms Milne's employment with payment in lieu of notice was confirmed by letter dated 9 November, and was effective on 9 November, there was a further meeting on 12 November to discuss matters raised in a letter of Ms Milne's to Ms Cohen also dated 9 November.

[70] In the letter Ms Milne spoke of the 30 September report on her OOS status, asserting that her ability to work on computers was not an issue and offering to provide the report to Ms Cohen. The letter went on to suggest she remain in her then-present role. Finally Ms Milne offered to upskill in computer skills at her own expense.

[71] Ms Cohen did not find these suggestions advanced matters, and the decision to terminate Ms Milne's employment stood.

Determination

[72] Because the dismissal occurred before the coming into force of s 103A of the Employment Relations Act 2000, its justification must be addressed with reference to the law at the time.

[73] A leading case on the test for justification was the judgment of the Court of Appeal in *W & H Newspapers Limited v Oram*[1], where it was said the court had to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken at the time.

[74] With reference to factors relevant to the employer's necessary enquiry, another well-known leading case was *Airline Stewards and Hostesses IUOW v Air New Zealand Limited*[2], where the Court of Appeal said:

> *.. relevant to the inquiry is not only the evidence as known to the employer at the time of the dismissal but also the evidence, in the words of the question 'available to the employer'. But we read the question as meaning evidence which is available to an employer who makes reasonable enquiry. An employer could not justify the dismissal if he had closed his eyes to available evidence or not given the employee an opportunity to be heard in his or her own defence. However, the employer is not required to continue investigations indefinitely, only to carry out enquiries to a reasonable extent in all the circumstances of the case (p 590)*

[75] In *Lang v Eagle Airways Limited*[3], a case which involved an employee's incapacity, the Court of Appeal said the question was not whether the tribunal or court would have made the same decision as the employer, but whether the decision was

[1] [2000] 2 ERNZ 448.
[2] [1990] 3 ERNZ 584
[3] [1996] 1 ERNZ 574.

one to which a reasonable and fair employer could come as at the time when it became effective.

[76] Ms Milne's argument that her dismissal was unjustified concerns the fairness of Air New Zealand's approach to the availability of an alternative ground-based position for her. She has not pursued a return to flying duties, and although she raised the concerns I have recorded regarding the certification of her fitness to fly her lack of a wish to fly means no remedy has been sought in respect of those concerns. Further to the justification for the dismissal and the remedies sought, Ms Milne says that:

(a) having put her on a rehabilitation programme, Air New Zealand should have followed through with the programme and at least completed a rehabilitation plan;
(b) the process commencing in October 2004 and which led to the termination of her employment did not appear to take cognisance of her psychological condition, and in the light of that Air New Zealand should have done more to assist when her union representatives withdrew;
(c) no genuine or constructive approach was taken to the availability of a suitable alternative ground-based position, and Air New Zealand did not have sufficient information on which to make that assessment; and
(d) the dismissal process was unfair.

A. Rehabilitation

[77] Air New Zealand's sick leave policy provided that a 'return to work rehabilitation plan will be established.' Here the parties did not enter into a formal document called a 'rehabilitation plan', but arrangements for Ms Milne's rehabilitation were addressed in what I consider amounted to a plan. In particular:

. there was a return to work in April 2004 on a trial basis, on limited alternative duties and with limited hours, and with a view to increasing hours of work as appropriate and to assessing fitness to fly in three months (according to the GP's recommendation);

. Ms Milne signed the first rehabilitation agreement setting out among other things the nature of the alternative duties she would perform;

. until May there was a gradual increase in Ms Milne's hours of work as she adjusted to being at work;

. Dr Sprott intended to assess Ms Milne's fitness to fly in June;

. there was an intervening difficulty in that Ms Milne suffered an OOS-related condition, necessitating the introduction of ACC procedures in respect of the condition and entry into a new rehabilitation agreement in July;

. in July and August Dr Sprott worked on assessing Ms Milne's fitness to fly;

. in August Dr Sprott certified Ms Milne as not fit to fly;

. Ms Milne had by then been on long term sick leave for more than 6 months and the continuation of her employment fell to be addressed.

[78] These arrangements were entered into for the purpose of easing Ms Milne's return to work on her flying duties in association with the long term sick leave policy. In that the underlying purpose was to facilitate her re-entry into the workplace - as a step in her return to flying duties - the real focus was on maintaining or reintroducing general workplace skills. Otherwise the purpose was not to provide training in a new set of skills, nor to provide retraining for a new position in the event Ms Milne was unable to return to her flying duties.

[79] Ms Milne referred to the procedures contained in Air New Zealand's 'Injury Management Procedures' document, and her concern seems to be that no rehabilitation plan of the kind set out in that document was entered into and completed.

[80] The document provides for entry into rehabilitation plans which are defined in it as 'a signed agreement involving the injured employee and all relevant parties that considers treatment, vocational and social needs according to the legislative framework'. Although the document makes what I consider passing reference to returns to work after illness it is plainly and overwhelmingly a document created for the purposes of meeting ACC-related obligations - including in relation to rehabilitation - and not for addressing long term illness.

[81] It was also submitted that in any event Mr McCloskey indicated to Ms Milne that a rehabilitation plan of that kind would be entered into in respect of her long term absence, going as far as to say she was to be retrained for alternative ground-based duties.

[82] That was not Mr McCloskey's evidence. There was discussion about alternative duties pending a resolution of Ms Milne's return to work in her primary employment, and the nature of the associated rehabilitation agreements was explained. If there was discussion about the possibility of training for alternative ground based duties on a more permanent basis, I do not accept the discussion went as far as an undertaking or agreement that Ms Milne would not return to flying duties at all and would be trained for alternative ground duties instead. It was a discussion about what could happen if Ms Milne did not return to flying duties.

[83] In conclusion, and in the context of an absence on long term sick leave, Air New Zealand was not under an obligation to enter into or complete a rehabilitation plan that would retrain Ms Milne for a position other than the one defined in the parties' employment agreement – namely a member of the cabin crew or more specifically an ISD. It was not under an obligation to enter into the more prescriptive arrangements for rehabilitation which it was obliged to follow in injury cases. Its discontinuing efforts to rehabilitate Ms Milne into the workplace on the termination of her employment following certification that she was unfit to return to her primary duties did not breach any obligation and was not unfair or unjustified.

B. Ms Milne's psychological condition and the availability of representation

[84] The submission in support of the relevance of Ms Milne's psychological condition and a need to be extremely proactive in respect of the employee's representation relied on a judgment of the Employment Court in *Lewis v Howick College Board of Trustees.*[4]

[85] A significant circumstance in that decision was the employer's knowledge of the full extent of the employee's mental disabilities, and the court considered it must have been obvious that what was regarded as Mr Lewis' 'erratic behaviour' was

[4] [2010] NZEmpC 4

uncharacteristic. Similarly here it was submitted that Ms Milne's circumstances were such that Air New Zealand should have done more in respect of her entitlement to representation, particularly when her union ceased to represent her.

[86] I do not accept that Ms Milne's circumstances were comparable with those of Mr Lewis. The contents of the meeting notes, the correspondence between the parties at the time, and her evidence show that Ms Milne consistently demonstrated a rigid desire to protect or enforce her rights or follow procedures as she believed them to be, occasional failures to understand her rights or relevant procedures on their being explained to her, and on other occasions refusals to accept those explanations. I do not accept that her behaviour was demonstrative of mental disability to a level comparable with that of Mr Lewis, or that any disability should have been obvious to the point that a lack of professional representation during the discussions about the availability of alternative positions vitiated the justification for her dismissal.

C. The availability of alternative positions

[87] It was submitted that Air New Zealand had an obligation to seek more medical information from Ms Milne in the course of assessing the availability of alternative employment. There should have been more detailed inquiry, and associated assessment, into whether matters such as Ms Milne's sensitivity in conflict situations could be addressed and whether in turn Ms Milne could be suitable for a customer service position. More broadly, there was no assessment of whether Ms Milne's adjustment disorder could be managed for a position on the ground, whether in customer services or another position. Finally, Ms Milne was not asked to participate in an assessment of this kind, and nor was it explained to her that the disclosure of further medical information in such a context (and extending to information about her OOS-related condition) might assist.

[88] Submissions of this kind bear more directly on whether obligations under a rehabilitation programme under the ACC regime have been met, than on whether Air New Zealand made a fair and reasonable inquiry into whether a suitable alternative position was available for Ms Milne when illness prevented her from returning to her contracted position. The latter is relevant here.

[89] In that respect, only two real alternatives were identified. One was a specific role in customer services. The other involved a more generalised assessment of Ms Milne's suitability for clerical positions which required work on a computer and the possession of keyboard skills, and which attracted a lower level of remuneration than Ms Milne had been receiving.

[90] The role in customer services was considered unsuitable in part because of the concerns about Ms Milne's ability to handle conflict situations. That issue was also relevant to the decision about Ms Milne's fitness to fly, and it was reasonable for Ms Cohen to conclude Ms Milne should not be placed at similar risk elsewhere. In forming her conclusion Ms Cohen had the benefit of Dr Sprott's view. Dr Sprott was himself a medical specialist, had extensive contact with Ms Milne and had more than enough information on which to form that view. Further, although at the time Air New Zealand was not aware that through her GP Ms Milne had sought an updated assessment from another psychiatrist, the assessment is not a full endorsement of Ms Milne's continued ability to address conflict. On the information available to it at the time, I find Air New Zealand was justified in considering that the customer services role was not suitable.

[91] No other specific vacancy was identified by either party as possibly being suitable. Further to Ms Milne's general suitability for a position requiring work on computers, Ms Cohen had the benefit of a CV which did not disclose any skills or experience in work of that kind, and was aware that Ms Milne did not currently possess such skills.

[92] I find that Ms Cohen also took into account the fact that Ms Milne was suffering from an OOS-related condition in assessing her suitability for positions requiring the use of a computer, and accept that she did not go further and obtain more detailed medical information or assess the possibility of further training. However I do not accept that Air New Zealand was obliged to embark on an investigation of that kind when an employee was no longer able to perform her existing role because of illness and with one exception had not identified a vacancy of interest. It was obliged to address the possibility of an alternative position, which Ms Cohen did. Very few vacancies were identified at all, and the vacancy of interest was found to be unsuitable.

[93] Moreover, Ms Milne had an obligation to be proactive on her own account. Beyond suggesting that she might be interested in particular kinds of positions - and where for the most part there were no vacancies - she did not apply for any vacancies. She expected Air New Zealand to identify and offer her a position acceptable to her. Secondly, although she eventually abandoned her insistence on an alternative position with no loss of terms and conditions of employment, she did not do so unreservedly. Overall, Air New Zealand was not obliged to create a position for her, retrain her for a new position, or by-pass its recruitment procedures.

[94] Regarding the additional suggestions Ms Milne made on 9 November, her assertion that her OOS condition was 'not an issue' is not accurate as the report noted that she was not currently performing computer work and had expressed some reluctance to return to that work. Further although she was fit to return to the work, it was said there would be benefit in further physiotherapy. In other words, issues did remain in respect of any resumption of computer work. Secondly, the suggestion that Ms Milne remain in her then-present position had no merit as the position was a supernumerary position created to assist in her return to flying duties. Thirdly, the offer to upskill at her own expense begged the question of whether there were suitable vacant positions available and acceptable to her in any event.

[95] I find Air New Zealand concluded on reasonable grounds that no suitable alternative position was available.

D. Fairness of the dismissal process

[96] In addition to the above, it was submitted that the dismissal process was unfair because in all of the circumstances the timeframe during which the relevant meetings occurred was too short, Ms Milne did not have an opportunity to obtain the updated psychiatrist's assessment she sought when questioning the certification of her fitness to fly, Ms Milne did not appreciate her employment was at risk until 15 October 2004, and her submissions were not given genuine consideration.

[97] I do not accept these submissions on the facts. I comment further on only one of them. That is, in other circumstances I might accept that Ms Milne should have been given an opportunity to obtain an updated assessment from a psychiatrist, but

even then she took steps to obtain such an assessment and did not advise of those steps. More significantly, the exercise was academic because she did not wish to return to flying.

E. Conclusion

[98] For the above reasons I conclude the dismissal was justified.

Costs

[99] Costs are reserved.

[100] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan
Member of the Employment Relations Authority