

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 284/08
5102926

BETWEEN SHAUN MICHAEL MINTO
Applicant

AND EAGLE AIRWAYS LTD
Respondent

Member of Authority: James Wilson

Representatives: Luke Stewart for the applicant
Kevin Thompson for the respondent

Investigation Meeting: 18 and 19 March 2008 at Auckland

Submissions received: 11 April and 8 May 2008 from the applicant
12 April and 24 April 2008 from the respondent

Determination: 8 August 2008

DETERMINATION OF THE AUTHORITY

Mr Minto's employment relationship problems

[1] The applicant, Shaun Minto, makes a number of claims against his former employer Eagle Airways Ltd (Eagle Air). In his original statement of problem these claims are listed as:

(a) Unjustified actions by Eagle Airways:

(i) Disestablishment of his position as Manager of Standards and Training in Hamilton, without adequate consultation and in breach of the Company's good faith obligations. Mr Minto says that this action effectively forced him to commence the lesser role of Check and Training Captain in Tauranga. Mr Minto says that in the alternative this action by his employer amounted to unjustified/constructive dismissal.

(ii) Eagle Airways failed to conduct his annual performance and salary reviews as required by his employment contract.

(iii) The company failed to make back payment of an agreed salary increase. (The company subsequently made this payment but without any compensation for the delay in the payment or interest).

(iv) The company refused to allow Mr Minto to join the pilot's superannuation scheme.

(v) Mr Minto's initial engagement with the company (from September 1999 to October 2000) purported to be as an independent contractor whereas, Mr Minto says, the true nature of the relationship was more closely aligned to that of employee and employer. Mr Minto says that this action was contrary to the Employment Relations Act 2000 and resulted in the company incorrectly calculating his period of service as an employee which had significant subsequent flow-on effects on holiday and sick leave entitlements and service-based salary levels.

(vi) Eagle Airways failed to refund Mr Minto for expenses following the company cancelling a flight reservation and asking him to use his personal vehicle.

(vii) The way in which Eagle Airways handled his suspension from flying on medical grounds due to fatigue, depression and stress (which, Mr Minto says, had been caused by Eagle Air's earlier breaches of the Employment Relations Act and the way they had handled his earlier grievance matters).

(viii) Eagle Air failed to meet his numerous reasonable requests for information to be provided in a timely manner and his request that matters not be handled by company representative, Mr Wayne Taylor because of the additional stress Mr Minto was suffering because of the way Mr Taylor was handling Mr Minto's concerns.

(b) That Eagle Air's decision to terminate his employment in September 2006, on medical grounds, was unjustified because Eagle Air failed to correctly consult with him prior to his termination and because there was a disparity of treatment between himself and another employee.

[2] By way of compensation for the company's alleged unjustified actions Mr Minto asks that he be awarded:

(a) compensation for loss of remuneration up to the termination of his employment of \$105,000 (including penalty interest) and \$75,000 in terms of s.123(1)(c)(i) of the Employment Relations Act, for the hurt and humiliation those actions had caused him; and

(b) reimbursement of lost remuneration for the period subsequent to the termination of his employment for a period of one year together with compensation for hurt and humiliation of \$85,000.

Eagle Airway's response

[3] Eagle Air rejects all of Mr Minto's claims. In particular, in regard to the allegations of unjustified action, they say:

(i) Mr Minto sought and voluntarily applied for the position as Check and Training Captain in Tauranga and vacated his previous position (Manager Standards and Training) before that position was changed. Eagle Air had no duty to consult with Mr Minto as to its future intentions in respect to the vacated position. They say that in fact Eagle Air sought Mr Minto's opinion throughout this process.

(ii) Mr Minto's employment agreement when he commenced the role of Manager, Standards and Training did not contain a substantive performance or annual salary review provision. The company's practice of annual review was in schedule 1 to that agreement and in a covering letter to that agreement. Reviews did not commit the company to pay an increase or refer to any right to receive performance bonuses. Performance reviews when undertaken were not themselves salary related. The covering letter also referred to a one-off review that would be undertaken should a fleet replacement occur. During that period the Air New Zealand Group (of which Eagle Airways is a part) suffered severe financial implications and a moratorium was imposed on base increases for salaried staff for an indefinite period from 2001. However Mr Minto received:

- a bonus of \$500 in 2002 consistent with all other full-time salaried staff.
- His remuneration was reviewed in 2002 in relation to the fleet upgrade "undertaking" and he was granted a *significant base increase* in his salary of \$7,896.
- In 2003 Mr Minto received a performance bonus payment of \$2352 for the 02/03 year
- In July 2004, as a result of a request from Mr Minto, the company agreed to back pay the 2002 "fleet upgrade" increase to October 2001 and subsequently further backdated this payment to 1 August 2001. The company says it understood that this matter was resolved to Mr Minto's satisfaction.
- Despite the fact that Mr Minto had taken up his non-salaried position his salary was further reviewed in late 2004 resulting in a performance bonus of \$9,565 for the 03/04 year

(iii) The company says it has no obligation for paying interest for the back dated salary increases. Eagle Air says that it believes it acted more than reasonably in respect to Mr Minto's salary and acted in good faith at all times.

(iv) Eagle Air say that Mr Minto was not eligible to join the company's contributory superannuation scheme introduced in 2002 because he was not covered by the relevant collective employment agreement. The company says Mr Minto was invited to join the Air New Zealand general staff superannuation scheme in January 2003. They say no application was received and that when he subsequently became eligible to join the pilots superannuation scheme (when he took up the position of Check and Training Captain in 2004) he did not avail himself of that opportunity.

(v) The company says that Mr Minto was engaged by Eagle Airways in September 1999 on a temporary contract under a contract for services. In October 2000, when he was appointed as Manager Training and Standards, he became an employee and was employed on an individual employment agreement. The company says there was no employment relationship pre-existing his appointment in 2000 and that his employment service commenced on and from that appointment only.

(vi) Mr Minto's claim for expenses related to a claim for use of his private motor vehicle in September 2004 and January 2005. An investigation was conducted by the company at that time and Mr Minto's then representative (the New Zealand Airline Pilots Association) were advised on 23 August 2005 why one of these claims was declined. The company continues to say that Mr Minto is not entitled to these expenses.

(vii) Eagle Air says that it does not accept that Mr Minto's mental health condition causing his temporary loss of licence were caused by breaches of the company's duty to him.

(viii) The company says that it has endeavoured to meet Mr Minto's various requests for information. They say that since Mr Minto's request, in September 2005, not to interact through Mr Taylor, correspondence was largely through the company's HR Manager, Ms Sharon Forbes. While there are two letters signed by Mr Taylor during 2006 the company says that they were reasonably entitled to have the manager responsible (Mr Taylor) kept fully informed and engaged in the issues.

In response to Mr Minto's claims of unjustified dismissal, the company says that it made every reasonable attempt to consult fully with Mr Minto and to ascertain his likely period of disability. They say however that Mr Minto failed to co-operate as might be reasonably expected and the decision to terminate his employment was taken based on medical advice, that he had authorised, that his likely incapacity to return to duty was for at least six months beyond August 2006. Eagle Air point out that the total absence at that point was already 11 months and could extend to a minimum of 17 months according to the medical advice given.

Chronology of events

[4] In September 1999 Mr Minto began working for Eagle Air as "contract pilot" on a contract for services. One aspect of Mr Minto's claim is that this period of contract should be regarded as a period of employment for subsequent service-based entitlements and salary. In October 2000 Mr Minto was offered and accepted the position of Manager, Standards and Training based in Hamilton. The terms and conditions of this appointment were contained in a letter dated 10 October 2000 and an individual employment agreement (IEA) signed on 14 October 2000. In the letter

of appointment the company agreed to review Mr Minto's salary on a "one-off" basis if and when a proposed fleet replacement occurred.

[5] In October 2002 Mr Minto raised the question of a one-off salary review with Mr Doug Roberts. After some discussion it was agreed that Mr Minto's salary would be reviewed in line with the offer made in his letter of employment. This issue was revisited in June 2004 and the increase awarded in October 2002 was backdated to October 2001.

[6] Mr Minto says that on several occasions he approached his managers regarding his annual salary and performance reviews. He says that he was not surprised that no performance payment was made in 2001 because of the severe financial setback suffered by Air New Zealand. However in 2002 he approached the HR Manager regarding performance bonuses for that year. He says that HR advised that the performance review process for 2002 had already been completed. Mr Minto says that in 2004 his manager, Mr Taylor, advised that he still intended to conduct a performance review on Mr Minto. The 2004 annual performance review was never conducted and no performance payment was received. He says he only received one annual performance review and one annual performance payment. As set out in [3](ii) above, Eagle Air says that, in addition to the "fleet replacement" salary increase(s) Mr Minto received 3 bonus payments over this period.

[7] The 2002 to 2004 pilot employees Collective Employment Agreement (CEA) introduced a contributory superannuation scheme. Mr Minto says that, despite not being a party to the collective agreement, he received several communications from the company inviting him to join the scheme. In March 2003 he presented his application form to the Finance Manager and was subsequently told that he was not eligible to join and advising that the information sent to him had been sent in error.

[8] In early 2003 Mr Minto says that he indicated to his managers (Mr Doug Roberts and Mr Wayne Taylor) that for personal reasons he would like to relocate to Tauranga. About this time there was discussion regarding the possibility of the establishment of a Check and Training Captain (C&T) position in Tauranga which might be suitable for Mr Minto.

[9] In April 2004 Mr Minto says it was agreed that his current (Manager Standards and Training/MST) position would be advertised at the same time as the new position (C&T Captain) was advertised. He says he agreed to the advertising of his old position to enable Eagle Air to explore further possibilities in order to facilitate his living in Tauranga. However, he says, in doing so he clearly expressed that he would need to know the remuneration and level of seniority of the Tauranga position before considering the matter further.

[10] At about this time Mr Minto advised Eagle Air that he intended to move to Tauranga on 5 June 2004. He says it was agreed that if the situation had not been resolved he would continue as MST and commute from Tauranga until such time as the final agreement could be reached. Mr Minto says he applied for the Tauranga position because he understood it was necessary for him to do so to enable Eagle Air to continue to explore the possibility of his accepting that position. On 14 May 2004 Eagle Air published a newsletter advising that Mr Minto would be moving Tauranga on Queen's Birthday weekend but would continue to commute until a replacement was appointed. A few days later a notice was published confirming that Mr Minto had been awarded the Tauranga vacancy with a commencement date to be advised. On 5 June Mr Minto moved to Tauranga and continued to commute to Hamilton and carry out the MST role.

[11] In July 2004 interviews were conducted for a replacement to Mr Minto's old role and Mr Minto received a phone call from Mr Taylor advising that his old role was to be disestablished. Mr Minto says that this disestablishment effectively removed his ability to decide whether or not to accept the Tauranga position and removed his ability to negotiate and confirm remuneration for the new role prior to deciding whether or not to accept the position. [Eagle Air point out the new position was covered by the pilots CEA and the salary was transparent and based on seniority.]

[12] On 20 July 2004 a notice was issued advising that Mr Minto had resigned from his position as Manager Standards and Training and as a result Eagle Air had decided to revise the flight operations structure, discontinuing the MST position and the Manager Fleet Operations position and creating two new positions. Mr Minto says that this notice was incorrect as he had never resigned from the MST role.

[13] On 23 August 24 Mr Minto's old position was disestablished and he commenced duties in the C&T position and his salary was reduced. Eagle Air say that they agreed to accept Mr Minto's service as Manager Standards and Training as relevant service despite this position not being covered by the CEA.

[14] During September and October 2004 Mr Minto met several times with Mr Taylor and Mr Roberts to discuss the possibility of his undertaking project work over and above his full-time role as a way of improving his total remuneration.. These negotiations failed to reach any agreement.

[15] On the 16 November 2004 Mr Minto wrote to Eagle Airways Human Resources Manager, Ms Sharon Forbes, raising a number of concerns including the disestablishment of his MST position, the company's failure to conduct performance reviews, the back payment of salary increases due to the aircraft upgrade and his exclusion from the pilot superannuation scheme. I note that in his statement of problem Mr Minto says that by this letter he *formally raised a personal grievance*. However the letter does not specifically say he is doing so. On 14 December 2004 Ms Forbes responded to Mr Minto indicating:

- That Eagle Air considered that his relocation to Tauranga was voluntary and the company had endeavoured to accommodate his relocation with the creation of a new position.
- Rejected his claim that he had not received performance bonuses but acknowledged that his 2004 performance review had not been carried out and stating that Mr Taylor would contact him shortly to begin this process. (this review resulted in an \$9565 performance bonus)
- Reviewed the backdating of his fleet upgrade salary increase and agreed a further backdating to 1 August 2001.
- Confirmed the company's position that he had not been eligible to join the pilots contributory superannuation scheme but offering to allow him to join the scheme now that he was covered by the CEA.

[16] In April 2005 Mr Minto submitted an expenses claim in relation to travel to Auckland on company business. As part of a protracted exchange of correspondence the General Manager of Eagle Air, Mr Doug Roberts, wrote to the Airline Pilots Association (ALPA) on 23 August 2005 regarding Mr Minto's declined expense claims. He said:

13 September 2004

We acknowledge that Captain Minto has amended his explanation for this claim and can confirm that the flights were cancelled on 12 September 2004. However we have some difficulty in excepting Captain Minto's claim that Network Ops cancelled flights without reasonable cause.....

... therefore the company advises that this claim is declined as alternative travel was booked and available for Captain Minto to use.....

10 January 2005

As there is no evidence to the contrary, the company accepts Captain Minto's explanation that he had a head cold may have prevented him from using air travel. As this claim is now accepted payment of \$285.20 will be processed and deposited into Captain Minto's bank account

Eagle Airways Ltd now considers this matter as closed

Mr Minto continues to seek payment of his claim for travel on 13 September 2004.

[17] In August 2005 Mr Minto, accompanied by a representative from ALPA, met with Mr Roberts, Mr Taylor and Ms Forbes to discuss his outstanding grievances. (As set out in Mr Minto's letter of 15 November 2004). Following that meeting Mr Roberts wrote to ALPA advising that he intended separating the expense claims from Mr Minto's other grievances and went on to say:

It would appear our efforts to resolve this matter have reached an impasse. Eagle Air does not accept the arguments Captain Minto has presented nor believe there is any merit or logic in the position that has been argued. The company's position has therefore not changed and we have no offer to make.

[18] Mr Minto says that as a result of the treatment by the company he started suffering from insomnia and the early stages of depression. On 6 September 2005 due to an oversight on Mr Minto's part, an incident occurred which caused an aircraft tire to blow-out. Mr Minto says this oversight by him was due to a lack of ability to concentrate given the stress he was suffering from a non-resolution of his grievances. On the same day he received an e-mail from Mr Roberts (via ALPA) conveying the company's final decision on his expense claims. As a result of the days events he says he felt extremely stressed and achieved very little sleep. The next day he received an indication that the company had decided not to proceed with the project work he had discussed with Mr Roberts and which had been linked to the resolution of his outstanding grievances.

[19] On 8 September 2005 Mr Minto advised the company that he would be unable to report for duty due to fatigue and proceeded on sick leave. There was some initial confusion regarding the completion of an appropriate "fatigue report" and, at one point in a letter to Mr Minto Mr Taylor incorrectly attributed his absence from work as being due to a sinus condition. In his evidence Mr Minto says:

At this time it had been more than a year since I first met with Eagle Air regarding the Project Officer position and more than a year since my base salary was cut without notice by 35%. In addition to the stress I was suffering from Eagle Air's handling of my employment and a non resolution of my grievances I was starting to experience financial pressures and I began to see the only way to resolve the grievance would be through extended legal proceedings. I found this extremely stressful as I had all times attempted to resolve matters in good faith.

My health continued to deteriorate with increased insomnia, heart palpitations, panic attacks and increase in pain levels due to the stress I was suffering.

[20] On 27 September 2005 Mr Minto consulted Dr Tim Rooke and was diagnosed as suffering from clinical depression. Dr Rooke issued a medical certificate requiring him to take three months off work. As it happened this period coincided with his previously approved extended parental leave. Mr Minto says that he requested that Dr Rooke supply medical information directly to Mr Taylor but Dr Rooke declined to do so and agreed to liaise with the Air New Zealand Aviation Medicine Unit. (ANZMU) Mr Minto says that Dr Rooke subsequently arranged for him to be assessed by the ANZMU. Also on 27 September 2005, as a result of his diagnosis, Dr Rooke suspended Mr Minto's aviation medical certificate and advised both CAA and the ANZMU to that effect. On 14 November 2005 the CAA notified Mr Minto that they had disqualified him from holding a medical certificate meaning that he could no longer work as a pilot until such time as the CAA was satisfied that his illness had been resolved.

[21] At about this time Mr Minto advised Mr Taylor and Ms Forbes that he believed a large part of his stress was caused by Mr Taylor's handling of his grievances and requested that all further correspondence be from either Ms Forbes or Mr Massey Lynch.

[22] On 6 December 2005 Mr Minto advised Eagle Air that he would be returning to employment on the expiry of his parental leave on 2 January 2006 but, because he was disqualified from flying, would need to continue sick leave beyond that date. On 14 December he attended a further assessment with Dr Rooke who confirmed that he was medically unfit to return to work until the 14th of March 2006

[23] In mid-February Mr Minto received an envelope containing several items of correspondence. It appears these items, including his request for sick leave and associated medical documents were being forwarded to the company's employment relations specialist but had been addressed to him in error. Mr Minto believes that this correspondence indicated that the company had already taken the initial steps towards terminating his employment.

[24] Despite his request that communication from the company not come from Mr Taylor, on 8 March Mr Minto received a letter from Mr Taylor which included the following.

... you have been incapacitated since September 2005,..... the total period of incapacity/absence is now just on six months and it appears from your comments.... that you are not fully confident of being adjudged fit at the next assessment.

... should your assessment not declare you fit to resume at that point, we would still need to have a better understanding of your health situation in terms of regaining your capacity to return to full duties within a reasonable period..... if we are to continue holding a position for a period beyond April we are, as a minimum, entitled to request medical advice through you in the form of a brief prognosis.... and also to be updated regularly. Whether you decide to allow your doctor to provide additional information in relation to the nature of your illness to the company to assist in its understanding of the prospects for a return to full pay duty/capability is entirely a matter for you to determine of course.

As you do understand though, the company cannot continue to maintain employment indefinitely without reasonable information being provided and the company having confidence that a return to duty is both likely and reasonably imminent. ... A copy of this letter is enclosed for (your doctor's) information and to avoid any misunderstanding as to what is sought.

The prognosis should be provided through you to the company, addressed to me. We appreciate you have wished to maintain privacy as to your condition. In the circumstances, it would not be necessary that your doctor relay his/her prognosis through or discuss your health with Dr Powell of Air New Zealand Limited.

[25] On 24 March 2006 Mr Minto met with Dr Powell the Chief Medical Officer for Air New Zealand. Following this meeting Dr Powell sent an e-mail to Ms Forbes and Eagle Air saying, in part:

(Mr Minto) has most certainly been unwell and is making good progress. However because of treatment he is unlikely to gain his CAA medical certificate for a further three months from now.

[26] After further correspondence Mr Minto was again assessed by Dr Powell who wrote to Ms Forbes on 28 July 2006 stating:

I reviewed (Mr Minto) a couple of days ago, corroborated with information from both his GP and the assessment arranged by the help of the mutual benefit fund. Based on this information, I believe he will be unable to regain his medical certificate for at least six months from now. ...

[27] On 10 August 2006 Mr Taylor wrote Mr Minto advising that he had recently received information from Dr Powell stating that it was unlikely that Mr Minto would be able to return to work for at least another six months. The letter went on to say:

As we have advised previously and given the extended period of absence to date we cannot continue to hold the position indefinitely for you when the company is not able to be confident that your medical will be reinstated and a return to duty is reasonably imminent. We had hoped that a more positive prognosis would have been given and that an early return would have been possible.

We regret therefore that this letter is advising you that we cannot maintain your continued employment further. I have to confirm that, with four weeks notice ... your employment with the company as a pilot will terminate on 11 September 2006 as a consequence of your extended incapacity.

[28] In his statement of evidence Mr Minto advises that by November 2007 he had successfully commenced the reduction in his antidepressant medication but that he would not be able to work again as a pilot until 2009 at the earliest. He has since been appointed to the position of General Manager of the Falkland Island Government air service, a role he took up in February 2008.

[29] It is relevant to note that Mr Minto received sick leave payments for 10 weeks, loss of insurance payments from December 2005 of \$4000 per month and, from late May 2006, \$3292 per month from the pilots "mutual benefit fund". According to calculations provided by Eagle Air, Mr Minto has not only not lost income due to his incapacity or dismissal but has received a greater income than he would have received had he continued to be employed.

Discussion

[30] Mr Minto's claims are all to some extent interrelated and culminate in his belief that the depressive illness he suffered which eventually resulted in his dismissal, were caused by the actions of Eagle Air over the term of his employment. To properly assess this over arching claim it is necessary to discuss the individual grievances.

Contract for service faces contract for services

[31] Mr Stewart, for Mr Minto, has acknowledged that Mr Minto's original engagement by Eagle Air was as a contract pilot, and the majority of the period of that engagement was subject to the Employment Contracts Act. Only 14 days of this engagement were during the Employment Relations Act 2000 which came into effect on 2 October 2000 and Mr Stewart says that Mr Minto does not wish to pursue this point.

Superannuation entitlement

[32] The question of Mr Minto's entitlement to join the pilot superannuation scheme in 2003 is a matter of contractual entitlement. Mr Minto was not employed in terms of the relevant collective agreement and was therefore not entitled to join the scheme. It is unfortunate that the publicity surrounding the new scheme was made available to Mr Minto and he was not advised of his ineligibility until after he had gone to the trouble of completing the application form. However there is no evidence that this was anything other than a genuine error. Even if Mr Minto could be said to have been disadvantaged by being denied access to the scheme, Eagle Air quite rightly point out that his grievance in this regard was not raised until well outside the 90 day period required by the Employment Relations Act (the Act).

Failure to conduct performance and salary reviews

[33] Again the conduct of annual performance and salary reviews is a matter of contractual entitlement. While it is true that Mr Minto was entitled to have his performance assessed on an annual basis there is no corresponding entitlement that these assessments must result in increases in salary. His performance reviews were not always carried out and when they were they were on occasions very late. However these oversights and/or delays did not of themselves cause Mr Minto any disadvantage. Despite the lack of contractual entitlement he did receive additional payments. Other than the so-called “fleet replacement” payments, which I will discuss shortly, Mr Minto received all of the salary payments that were contractually due to him. Mr Minto has no outstanding claims in respect to performance review and/or salary payments.

Failure to back date fleet replacement increase

[34] At the very least the eligibility and timing of this increase were unclear. To their credit Eagle Air, at Mr Minto's request, reviewed the level and/or commencement date of this payment on at least three separate occasions. On each occasion they agreed to adjust either the payment or the commencement date to the point where eventually Mr Minto was satisfied that he had received his full entitlement. Eagle Air continued to contend, and I accept, that there was no absolute entitlement for Mr Minto to receive this payment until November 2002, although it was eventually backdated to August 2001. Eagle Air also say that none of Mr Minto's terms and conditions were affected to his disadvantage and that the back payment was simply a way to settle Mr Minto's concerns. As there was no contractual entitlement to the back payment there can be no contractual entitlement to interest on the back payment. Mr Minto's claim in this regard is rejected.

Disestablishment of Mr Minto's position of Manager Standards and Training

[35] The position of Manager Standards and Training in Hamilton in which Mr Minto was employed was “disestablished” on 20 July 2004 i.e. the day on which the decision to revise the flight operation structure was published. Eagle Air have pointed out that Mr Minto did not notify the company of his concerns until 16 November 2004 - outside the 90 day time limit to notify personal grievance. They also point out that this letter did not in fact specifically say that Mr Minto wished to raise a personal grievance. In any event Eagle Air say that Mr Minto applied for, and was appointed

to a new position before the old position was disestablished and it was not therefore necessary to consult with Mr Minto regarding the disestablishment. It is their contention that Mr Minto voluntarily relinquished his old position.

[36] It is of course Mr Minto's contention that, had he appreciated the drop in salary required should he accept the new position, he would not have relinquished his old role. He says that at the time he indicated that he would apply for the new role it was on the understanding that details such as salary etc would be satisfactorily agreed. He says that no such agreement took place and that the disestablishment of the position in Hamilton forced him to accept the new position in Tauranga to his disadvantage.

[37] I cannot accept Mr Minto's arguments on this issue. It is clear that the position in Tauranga was at least in part created to allow Mr Minto to relocate. While it is true that his application was to meet the necessary time constraints required by the collective agreement he made this application knowing that the position was in terms of the collective agreement and therefore must have known (or could have found out) the range of salary offered. While he may have had some hope that his salary could be supplemented by project work there was never any undertaking or guarantee that this would be the case. As it transpired his income expectations were well outside what Eagle Air could satisfy. It is somewhat disingenuous for Mr Minto, in hindsight, to recast the events surrounding his relocation to Tauranga. I have absolutely no doubt that this relocation was in large part at Mr Minto's request and to satisfy his personal lifestyle choices. It was only when he could not obtain the level of income he had anticipated that he chose to recast the events as being in some way imposed by Eagle Air to his disadvantage. Mr Minto was senior, experienced pilot in a management position. It stretches credibility to suggest that he acquiesced to these changes without understanding their implications and without heated protestations. I do not accept that Eagle Air acted either unfairly or to Mr Minto's disadvantage in this episode. Mr Minto's claim in this regard is rejected.

Expense claim

[38] Mr Minto's claim for unpaid expenses can be classed as a recovery action, i.e. he believes he is entitled to be reimbursed for expenses incurred, and not a personal grievance claim. This claim is therefore not subject to the 90 day limit imposed on the raising of a personal grievance. Eagle Air point out that Mr Minto changed his explanation for why he was required to use his own car and that they declined his expense claim because alternative, Eagle Air, transport was available. Following the rejection of his claim by Eagle Air, Mr Minto produced evidence of a telephone call which appears to substantiate his version of events. However Eagle Air say they undertook a full investigation of Mr Minto's claim and reached the conclusion that, despite this additional evidence he was not entitled to the payment. On balance I find that this was a reasonable conclusion given the evidence available to them. Mr Minto is not entitled to be reimbursed for the use of his own car on 18 September 2004.

Eagle Air's handling of Mr Minto's suspension from flying on medical grounds

[39] Mr Minto says that the stress which led to his fatigue and depression was caused by Eagle Air's actions regarding the disestablishment of his Hamilton position and other events. While I have no doubt that these events did cause Mr Minto some stress I do not accept that that stress can be attributed to Eagle Air's unjustified actions. Having reviewed all the correspondence and evidence surrounding the suspension, I do not accept Mr Minto's contention that the way in which his suspension was handled was inappropriate or caused him unnecessary stress. Certainly there was some initial confusion regarding why Mr Minto was on sick leave but this confusion could not entirely be blamed on Eagle Air. Mr Minto did not receive a form faxed to him but this was due to a technical fault with his fax machine and not due to Eagle Air's failure. Mr Taylor believed in good faith that Mr Minto was suffering from a sinus condition and that this was affecting his ability to work. This was a genuine mistake on Mr Taylor's part.

Failure to supply information and request that Mr Taylor not communicate with Mr Minto

[40] Again having read all of the correspondence and reviewed the evidence in this matter I believe Mr Minto's allegations are unfounded and in fact Eagle Air appears to have gone out of its way to ensure that Mr Minto was given ample opportunity to communicate with them and there is no evidence that they failed to supply him with any information which he, or his representatives, requested. His request that Mr Taylor not communicate with him was not a request that Eagle Air was obliged to accept. In fact Eagle Air for the most part did communicate through Ms Forbes where this was appropriate. I have read the correspondence signed by Mr Taylor and while it is at times "formal" it cannot be said to be in any way aggressive or intimidatory. This correspondence clearly conveys Eagle Air's position and requests for information. While Mr Minto may have found the content stressful, Eagle Air had a responsibility to convey this information to him. As the decision maker it was appropriate that Mr Taylor sign this correspondence.

Mr Minto's dismissal

[41] As set out above I have found that Mr Minto's illness was not caused by Eagle Air's unjustifiable actions. Although Mr Minto obviously suffered from stress and a depressive illness, his work situation and his dealings with Eagle Air were no more stressful than those of other employees in similar positions. There is no evidence that the level of work related stress was abnormal or that there was any causal link between that stress and Mr Minto's illness.

[42] In March 2006, some six months after his initial incapacity, Eagle Air advised Mr Minto that *the company cannot continue to maintain (your) employment indefinitely*. In late July 2006 Dr Powell advised Eagle Air that *(Mr Minto) will be unable to regain his medical certificate for at least six months*. On the strength of Dr Powell's prognosis, and without further consultation with Mr Minto, Eagle Air dismissed him with four weeks notice. When questioned regarding this lack of consultation Eagle Air argued that, as Mr Minto had been reluctant to provide information to them and had indicated that he did not wish to communicate with Mr Taylor, there was no necessity or responsibility to consult further with him.

[43] While I can accept that Eagle Air had become somewhat frustrated with Mr Minto, his reluctance to communicate and his lengthy and persistent pursuit of his various grievances, they should have at very least attempted to discuss his possible dismissal with him. In his evidence Mr Minto accepts that in reality he would not have been able to return to work as a pilot in the immediate future. In fact at the time of the Authority's investigation meeting, almost 2 years after his dismissal, he was still unable to work as a pilot. However given the protracted timeframes involved since Mr Minto's suspension, and the enormity of the consequences for Mr Minto, it would have been relatively simple for Eagle Air to advise him that they were considering his dismissal, offer him the opportunity to make submissions (either in person or in writing) and suggest that he might wish to engage the services of a representative. Mr Minto was clearly surprised by his dismissal and, had he been aware that such a decision was imminent, no doubt would have wished to put forward a counter argument. Eagle Air's failure to offer Mr Minto this opportunity added to Mr Minto's stress and constitutes an unjustifiable action by his employer. This omission was not what *a fair and reasonable employer would have done in all the circumstances* (s. 103A of the Employment Relation Act). Mr Minto has a personal grievance in this regard.

Disparity of treatment

[44] In support of his claim that he was unjustifiably dismissed Mr Minto alleges that another pilot employee had been allowed to return to work after an absence on long term sick leave of some 14 months. He says that this was a disparity of treatment as he was dismissed after an absence of only 11 months. Eagle Air point out however that the other pilot suffered from a physical illness, maintained a full and open communication with the company and his medical condition was such that his recovery could be reasonably accurately predicted. This, they say, contrasts with Mr Minto's prognosis which suggested that his recovery was much more difficult to predict and he in fact is still not able to work as a pilot some 2 1/2 years after his suspension. Mr Minto's case is clearly distinguishable from the other case he has raised. There was no disparity of treatment.

Determination

[45] For the reasons set out above, with one exception, all of Mr Minto's claims are dismissed. This exception is that Eagle Air's failure to consult with Mr Minto before the final decision to dismiss him was made was unjustified and **Mr Minto has a personal grievance in that regard.**

Remedies

Contribution

[46] As I am required to do by section 124 of the Employment Relations Act I have considered whether or not Mr Minto contributed to the situation which gave rise to his personal grievance. While Mr Minto was somewhat reticent in his communication with Eagle Air, Eagle Air had a responsibility to ensure that he was offered every opportunity to put forward his position in respect to his possible dismissal. They did not do so. Mr Minto cannot be said to have contributed to Eagle Air's lack of action in this regard.

Recovery of wages

[47] As outlined above Mr Minto received sick leave and insurance payments prior to and subsequent to his dismissal. From the figures supplied to me it is clear that he has suffered no loss of income as a result of his dismissal and it is therefore not appropriate to make any award under this head.

Compensation for hurt and humiliation.

[48] I have found that Eagle Air's actions, in not allowing Mr Minto a final opportunity to discuss his possible dismissal, were unjustified and added to his stress. I should emphasise that any compensation awarded to Mr Minto is for this additional stress and not for the stress related to his other perceived grievances or as compensation for his depressive illness. This is obviously a somewhat artificial differentiation and it is impossible to give specific weighting to the various stressors. Nevertheless on balance I have decided that the appropriate financial compensation is \$5,000.

[49] Eagle Air is ordered to pay Mr Minto, in terms of section 123(1)(c)(i) of the Employment Relations Act, \$5,000 without deduction.

Costs

[50] Costs are reserved and the parties are urged to attempt to resolve this matter between themselves in the first instance. If they are unable to do so Mr Minto may file a submission in respect costs within 28 days of the date of this determination. Eagle Air will then have 14 days in which to file a response. I will not accept submissions outside of this timeframe except with leave.

[51] To assist the parties in their discussion regarding costs I would point out that while Mr Minto has been successful in one aspect of his claim, Eagle Air have been required to spend a good deal of time and money in successfully defending a wide range of other claims. Under the circumstances this may be an instance where costs are left to lie were they fall.

James Wilson

Member of the Employment Relations Authority