

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

5039542
CA 86/07

BETWEEN JONATHON NEILL
 Applicant

AND AIR NELSON LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Richard McCabe, Counsel for Applicant
 Kevin Thompson, Counsel for Respondent

Investigation Meeting: 22 March 2007 at Nelson

Submissions received: 30 March, 10 April, 19 April 2007

Determination: 25 July 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Neill, the applicant, is employed by the respondent as a First Officer flying Dash 8 Q 300 aircraft. He has been with the company for 13 years. The applicant is required under the Civil Aviation Act 1991 to hold a Class 1 medical certificate, the maintaining of which requires him to undergo a thorough six monthly medical examination. Mr Neill is required to ensure he holds the certificate, for if he does not, the company is able to suspend him without pay under the terms of the Collective Agreement.

[2] The applicant claims he has been disadvantaged in his employment with Air Nelson by the alleged unjustifiable action of the respondent in the person of Captain Guard, the airline's Manager, Flight Operations. He seeks compensation of \$5,000 for humiliation, loss of dignity and injury to feelings, reimbursement of costs incurred in having his Class 1 certificate reinstated and other related incidental costs, and legal costs associated with this action.

[3] The respondent denies it has acted unjustifiably in respect to Mr Neill. Its position is that its representative, Captain Guard, acted correctly in passing information to Civil Aviation Authority

(CAA) which led to the suspension and then disqualification of the applicant's Class 1 certificate from 14 December 2005 until 9 January 2006. It therefore resists the applicant's claims.

The cause of the problem

[4] As this matter relates to an ongoing employment situation, I will not traverse all the evidence put before the Authority as the parties are conversant with the detail.

[5] In early December 2005 Captain Guard became aware of two incidents involving the applicant. One was in the cafeteria at Napier airport and the other at the airline's Nelson facilities. Both, he believed, indicated that Mr Neill was under stress. Other information from two pilots including First Officer Pumphrey, a NZALPA representative, confirmed Captain Guard's view so he arranged an informal meeting with Mr Neill to determine the situation and what help could be provided.

[6] The two men met in Captain Guard's office on 5 December 2005 in what Captain Guard referred to as an "off the record" discussion. In the course of the discussion Captain Guard suggested Mr Neill visit his doctor for a blood pressure check and take a "couple of weeks off". The applicant said he would think about this and later in the day told Captain Guard that he agreed to the proposed break.

[7] After the discussion, Captain Guard contacted Dr Rumble, the Air New Zealand Medical Officer. The doctor, having heard the situation as set out by Captain Guard, recommended a stand down period of one month. Meanwhile, the applicant had attended his doctor who reported Mr Neill's blood pressure to be normal.

[8] Captain Guard advised the applicant by email that he was standing him down for a minimum four week period and that he required the applicant to obtain a new Class 1 certificate before returning to work. He also asked for a medical certificate covering the four weeks.

[9] Mr Neill said he was "totally sandbagged" by Captain Guard's actions. They had agreed to two weeks and Captain Guard had increased it to four weeks and made his return to work conditional on securing a Class 1 certificate when his certificate was still current. Mr Neill told the Authority that Captain Guard had contacted his doctor and advised him that Mr Neill was receiving counselling for depression. Captain Guard also contacted CAA and advised of the stand down due to depression and also advised that the applicant was receiving "psychiatric counselling".

[10] The result was that CAA initially suspended, then withdrew Mr Neill's Class 1 certificate. Following representations to CAA, including correcting inaccurate information supplied earlier, CAA reinstated the applicant's certificate on 9 January 2006.

[11] Mr Neill's evidence was that he was seriously disadvantaged by the withdrawal of the certificate as, should he seek employment with another airline in the future, he is required to disclose this to a prospective employer.

[12] Captain Guard maintained that the information he received from Mr Pumphrey was that Mr Neill was receiving counselling for depression or a stress related condition. Mr Pumphrey strongly rejected this. He said, "*I did not say to Mr Guard that Mr Neill was having counselling of any sort*". He also told the Authority "*I should add that after leaving Mr Guard's office I felt like he was going to support Mr Neill and do what he could to help*".

The issues

[13] The issues needing to be resolved are:

- Was Mr Neill disadvantaged by the respondent's actions; and
- Were the actions of the respondent unjustified; and
- If so, what remedies are due to Mr Neill?

The Investigation Meeting

[14] The Authority was assisted by the applicant and by Mr Pumphrey who gave evidence for Mr Neill. For the respondent, Captain Guard, Dr Rumble and Mr Neil Kenny presented evidence. All were open and direct in their response to questions put to them. All were professional and measured in the presentation of their views.

[15] The Authority also records its appreciation of the efforts of counsel for each party to focus on the main issues in this matter.

Analysis and discussion

[16] There is no doubt that Captain Guard has serious responsibilities under CAA Rules. The airline industry is strictly regulated in respect to safety requirements and it is evident that Captain Guard is very diligent in the exercise of his duties on behalf of the respondent. It is also evident

that he does not lack empathy when analysing situations involving staff, indicated by his eschewing the disciplinary path in respect of the two incidents and viewing them in a health setting.

[17] In this matter the fault lies not with the man but with the process adopted. I accepted Captain Guard acted in good faith in what he saw as the best interests of Mr Neill and of the airline.

[18] The meeting of 5 December 2005 between Captain Guard and Mr Neill was well intentioned. It was described to the Authority as an “off the record” meeting. There seemed to have been no formal structure but rather a discussion around the issues by two men who knew each other quite well. The offer of the two weeks’ leave was made and later accepted by Mr Neill, who also undertook to visit his doctor to have his blood pressure checked.

[19] The applicant, prior to these events, was receiving counselling support over a personal, historical matter, quite unrelated to his health or his employment. Mr Neill conveyed the fact of his having counselling to Captain Guard in the course of the meeting. Mr Neill says he did not elaborate on the focus of the counselling, nor did Captain Guard inquire. As he said, he “did not want to pry”. However, Captain Guard drew the very clear inference that it was of a psychological or psychiatric nature. Captain Guard told the Authority that this “*tied in with what Alan Pumphrey had told me*”.

[20] Upon analysis of the evidence, I am clear that Mr Pumphrey’s conversation with Captain Guard was certainly in the context of the concern over the applicant’s health, but related to the Union arranging for Mr Neill a consultation with a Dr McEwan, the NZALPA consultant. The purpose of this was to try and identify the applicant’s condition and, hopefully, “*sort out an appropriate strategy*”.

[21] Captain Guard linking these issues erroneously was regrettable. He saw a Pilot whose “*health, and in particular his head space were not in good shape*”. In his evidence Captain Guard pointed out “*our guiding approach on all matters relating to safety is the cornerstone of our operation, it is not negotiable and even if this may mean taking a precautionary approach, then that is adopted*” (para.39).

[22] As a frequent passenger on Air Nelson, the Authority has no issue with that stance.

[23] The primary issue is that having formed a medical layman’s view, Captain Guard put in train a series of communications which included the misstatement that Mr Neill was undergoing “psychiatric counselling”. The situation was simply that Captain Guard had drawn an incorrect inference from what Mr Neill had told him, shored that inference up with his misunderstanding of

the communication from Mr Pumphrey about the purpose of the applicant's visit to Dr McEwan, decided the counselling was "psychiatric" and then proceeded to advise CAA of this in a statutory safety setting.

[24] The problem was compounded by Captain Guard not meeting with the applicant prior to his email to Mr Neill advising that the "stand down period" was now four weeks and that the applicant's return to duty was contingent upon his gaining a new Class 1 certificate. What had begun as a concern for Mr Neill's health and how best to assist the applicant, then escalated, without any further conversation with the applicant or the Union, (which was known to be involved due to similar concerns), to the suspension and then disqualification of Mr Neill's Class 1 certificate.

[25] In effect, Mr Neill's flying career is tagged as a direct result of the respondent's actions in respect of his Class 1 certificate. He has been subjected to unfair treatment by his employer, who deployed inaccurate information arising in an off the record meeting with both serious and ongoing consequences for Mr Neill.

[26] The Authority accepts also that Captain Guard genuinely believed he was complying with the statutory regime. It is critical only in that he fails to establish the fact accurately by acting without further consultation with Mr Neill. His misconceptions could have been corrected had he taken that step.

The Determination

[27] Returning to the issues set out above in this determination –

- I find the applicant has been disadvantaged by the actions of the respondent.
- I find, after carefully considering the respondent's motives and the statutory framework within which it operates, that its actions were unjustified. This is because the information supplied to CAA about the applicant was erroneous in fact, and because, had the respondent turned its mind to ensuring that it was factually correct, would have been made aware of its error.
- I find the applicant, Mr Neill, has a personal grievance.

Remedies

[28] For the avoidance of doubt, I find that Mr Neill has not contributed to his personal grievance.

[29] The applicant sought the sum of \$5,000 in compensation. For an employee of some 13 years, the claim is moderate. I award Mr Neill the sum of \$5,000.

[30] The applicant has sought reimbursement of a number of expenses he incurred unnecessarily due to the respondent's actions. I direct the parties to quantify those expenses and to attempt to resolve those issues between themselves. Leave is reserved for either party to return to the Authority should they be unable to resolve them.

Costs

[31] Costs are reserved. The parties are to attempt to resolve this issue between themselves. If this is not achieved, Mr McCabe is to lodge and serve his memorandum and Mr Thompson has 14 days in which to respond.

Paul Montgomery
Member of the Employment Relations Authority