

[2] Mr O'Rourke is employed as a Flight Service Manager (FSM). The root of his application lay in his disagreement with the view of his manager Amy Bennett that he was not doing what she regarded as necessary to meet ANZL performance standards. Ms Bennett is at the level of ANZL management bearing the title Performance and Development Manager (PDM). She is responsible for a group of 16 FSMs, including Mr O'Rourke.

[3] Since 14 April 2010 Mr O'Rourke has been off work on sick leave (except for 31 May and part of 1 June) – with his ill-health said to result from the issues which are the subject of his personal grievance application.

[4] The Authority's investigation focussed on several interrelated actions or decisions of Air New Zealand, made by Ms Bennett, which Mr O'Rourke says were unfair and amounted to unjustified disadvantage to him.

[5] ANZL's actions – through the decisions of Ms Bennett – are subject to the test of justification enacted at s103A of the Employment Relations Act 2000. The Authority must assess, on an objective basis, whether those actions were what a fair and reasonable employer would have done in all the circumstances at the time.

[6] The issues for determination are:

- (i) whether ANZL was justified in:
 - (a) reviewing Mr O'Rourke's performance on a basis to which he says he had not agreed;
 - (b) placing Mr O'Rourke on a performance management programme in January 2010; and
 - (c) issuing Mr O'Rourke with a written warning on 26 March 2010; and
 - (d) grounding Mr O'Rourke from flying duties and requiring him to attend a coaching programme; and
- (ii) if one or more of those actions were not justified, what remedies are due to Mr O'Rourke?

The investigation

[7] Written witness statements were lodged by Mr O'Rourke, Ms Bennett, and the following other ANZL personnel: General Manager for international cabin crew Alan Gaskin; PDMs John Flett and Chris Wallace; FSMs James McElwee and Sue Macky; purser Brandon Hayat; and chief medical officer Tim Sprott. Each of these witnesses, under oath or affirmation, confirmed their written statement at the investigation meeting and answered questions from the Authority and the parties' representatives. Oral evidence was also heard from FSM Lynda Jameson. Speaking to written synopses, the representatives gave oral closing submissions on the issues for determination.

[8] In preparing this determination I have considered the extensive written and oral evidence of the witnesses, the parties' closing submissions, and more than 1000 pages of background documents provided by the parties. As allowed for under s174 of the Act, I have not recorded here all evidence and submissions received but state findings of facts and law and express conclusions on the issues for determination.

Roles

[9] Mr O'Rourke had previously worked for Freedom Air and Pacific Blue. He began work for ANZL in May 2008 and took up a position as an FSM in the long haul section in October 2008.

[10] A FSM has two main roles. Firstly, an FSM is the senior on-board flight attendant during regular rostered flying duties and supervises the work of the cabin crew. Secondly and separately to those flight duties, an FSM is responsible for leadership and development of between six and ten flight attendants. In Mr O'Rourke's case six attendants were assigned as directly reporting to him although they would seldom, if ever, work on the same flights. Rosters are not organised to ensure an FSM performs flight duties with his team of attendants. An FSM is responsible for the continued support and development of their own direct report flight attendants whether they fly with them or not.

[11] In a 28-day roster period, ten days are rostered free of duties. During the other 18 days between one and three days are rostered as "*admin days*" for an FSM. The remaining days are allocated for flight duties, which may include a tour of duty (ToD)

requiring an extended period travelling away and back on an international route. Not all days on a ToD involve flying duties, such as during layover days at the international destinations. In such layover days there is an expectation FSMs will attend to administrative work, including electronic communication with their team and preparing various reports. For the purpose of that work, ANZL provides laptop computers to FSMs to connect through the internet with its information system.

Performance and information matters

[12] Mr O'Rourke and Ms Bennett first met on 21 August 2008 while Mr O'Rourke was still completing FSM training. In a 45-minute meeting the two discussed their roles with Ms Bennett outlining her expectations and referring to some relevant documents, including one referring to Goals, Measurements and Targets (GMT).

[13] The GMT are set annually by senior managers and then 'cascaded' in a form appropriate to each level of staff. At the FSM level in 2009 this included goals of managing absenteeism, checking meal and allowance claims for accuracy, improving communication with direct reports, and reducing the level of customer complaints and improving survey results for customer satisfaction. Assessment against the GMT is a factor in considering payments to be made under a company bonus scheme.

[14] Ms Bennett arranged for a GMT document to be sent to Mr O'Rourke after he started in the FSM role. On 7 November 2008 he sent Ms Bennett an email saying he was confused by some of the GMT material and he understood that each of the GMTs must be agreed between the individual and the manager.

[15] Ms Bennett took the email as a query about the performance review process and expectations. She suggested a meeting to ensure Mr O'Rourke was clear about expectations. They met on 19 November. Ms Bennett explained documents on GMTs and periodic performance review. Following that meeting Mr O'Rourke entered a "complete and submit" section of his review documents in ANZL's electronic records system. In her evidence Ms Bennett described that latter action as signalling acceptance of the GMTs and the performance documents.

[16] In late January 2009 Mr O'Rourke sent Ms Bennett a "*team development summary*". Ms Bennett had asked all FSMs reporting to her to provide a plan for how they would demonstrate leadership and enhance the skills and performance of flight attendants in their teams.

[17] On 4 March Ms Bennett and Mr O'Rourke met for a formal performance review. It was referred to as a second period or T2 review. A discussion on the team development summary provided by Mr O'Rourke highlighted a difference of expectations between him and Ms Bennett. Mr O'Rourke wanted a training budget to be allocated to him and authority to change the rosters for the attendants in his team. He wanted that authority in order to arrange training opportunities and schedule ToDs so he could fly with those attendants and "*provide mentoring*". Ms Bennett viewed those ideas as grander and more expensive than was warranted. Her concept of leadership and enhancing performance was simpler – she wanted Mr O'Rourke to contact the attendants more often and encourage them to look at areas where they could improve their work.

[18] Mr O'Rourke also incorrectly completed a self-assessment section of the review documentation by giving himself what he took to be a 100 percent rating for each category. However the scale was more complicated than that – the rating range went from zero up to 133 rather than 100.

[19] Ms Bennett's evaluation of Mr O'Rourke resulted in an overall score of 91, which placed him in a category described as "*close to meeting expectations*". Mr O'Rourke's own assessment was that his performance was "*100 per cent*".

[20] In an email to Ms Bennett on 14 May 2009 he complained that his capabilities were "*dumbed down*" by the FSM role with "*a disproportionate amount of time spent on ground based tasks*". Ms Bennett responded with a request for Mr O'Rourke to arrange a meeting to discuss those issues. That meeting took place on 30 June. Ms Bennett says it lasted more than two hours and canvassed a wide range of issues, providing a copy of a note she prepared with headings covering issues and expectations. Mr O'Rourke says the meeting lasted around 30 minutes.

[21] One concern related to problems logging onto ANZL's system from overseas

with Mr O'Rourke concerned that the 'tablet' device he had been given was inadequate. Ms Bennett took Mr O'Rourke to the IT section at ANZL's head office to arrange contact with staff who could help.

[22] Because Mr O'Rourke had concerns about the GMT system, Ms Bennett arranged for him to meet with a human resources manager. This meeting took place on 9 July and Mr O'Rourke confirmed he understood the GMT process.

[23] On the same day Mr O'Rourke and Ms Bennett met for his annual review.

[24] Ms Bennett's evaluation of Mr O'Rourke's performance involved a number of criticisms of his work. These included not arranging monthly one-to-one meetings with her, having referred a leave issue for one of his direct reports to her rather than dealing with it himself, not providing her with copies of team update newsletters prepared by him, inadequate information about how often he was contacting his team and the content of communication with them and whether he had taken action to resolve problems such as logging on from overseas.

[25] In the self-evaluation part of the review documentation Mr O'Rourke had rated himself with a score of 100 so he came within the category of meeting expectations. Ms Bennett's evaluation resulted in a rating of 83 which fell into the category of "*failing to meeting expectations*". She described him as competent "*in a regulatory FAI capacity*" – referring to flight duties – but not showing a willingness to "*embrace the FSM role*" beyond that.

[26] She suggested Mr O'Rourke would benefit from mentoring by "*high performing FSMs*" and proposed a performance improvement plan (PIP).

[27] Mr O'Rourke immediately sought advice from his union which resulted in what I need only summarise as an extended wrangle over the information on which a PIP was assessed as being required.

[28] In September 2009 he was formally notified of the requirement to attend a meeting to discuss a PIP and on 9 December 2009 his union raised a personal grievance alleging the proposed PIP and ANZL's actions leading to it were an

unjustified disadvantage.

[29] The formal performance review meeting eventually took place on 14 December 2009. Detailed notes of the conversation record considerable debate about the information on which the proposal for a PIP was based and Mr O'Rourke's view that it was Ms Bennett's performance that should be assessed. ANZL counsel Graham Norton identified a need for "*examples and specifics*" and said this would be provided.

[30] In mid-January Ms Bennett sent Mr O'Rourke a letter setting out "*the company's expectations with respect to improvement of your performance*" under three key headings: Reporting Level and Standard, Communication Level and Standard, and Attitude and Ownership. He was told to provide monthly team updates to his team and Ms Bennett and to complete sector and monthly reports with more detail. Eleven activities were identified to increase communication. The section on attitude referred to acting on feedback and using the support offered by managers and "*a buddy FSM*". Mr McElwee was identified as the FSM to provide that support.

[31] The letter set 12 April 2010 as the time for a formal review meeting date to discuss progress. It included the statement that disciplinary action might result if Mr O'Rourke was not able to meet the required level of performance.

[32] Mr O'Rourke was also given copies of sample team newsletters and monthly reports as examples of the required standard.

[33] Through his representative on 18 January 2010 Mr O'Rourke asked for the PIP to be postponed pending mediation in late February. On 2 February 2010 a representative advised that he would not come to a team day and would spend the day on administrative work.

[34] On 11 February 2010 Ms Bennett wrote to Mr O'Rourke about what she called a disappointing response to the PIP. Over nine closely typed pages she set out further details of her concerns with his work under the headings of Monthly Reports, Monthly Team Updates, Sector Reports, Reporting, Admin Days, Hours of Work, Monthly 1:1 Meetings, Team Meetings and Conference Calls, Communication

Protocol, Logging Onto Tablet Whilst Overseas, Management of Your Team Whilst You Are On Annual Leave, Team Contact, FSM FY10 GMTs, and FSM Support. Under most headings a specific date was identified for particular tasks to be begun or completed. For example he was required to attend the In-flight Services centre on his rostered admin days, meet once a month with Ms Bennett, complete a GMT form for 2010 by a set date, and meet twice a month with Mr McElwee.

[35] She also advised that a review meeting would be held each month – rather than in three months as set earlier – with the first such meeting to be on 11 March.

[36] A letter from Ms Bennett to Mr O’Rourke on 8 March identified a number of shortfalls under the same headings used in her 11 February letter. She advised he would have the opportunity at the 11 March meeting to comment on his “*apparent failure to follow the requirements*” and, if there was not a satisfactory explanation, disciplinary consequences could follow.

[37] In the 11 March meeting Mr O’Rourke, through his representative, rejected the notion that he was “*in deficit*” in any of the identified concerns and insisted there was no need for a PIP. The notes from the meeting record this statement from Mr O’Rourke to Ms Bennett about the information she required:

“You have it in your databases, just because I don’t duplicate it, you need to go and find the work, it is for you to go and find out about my performance not for me to show you.”

[38] In a letter to Mr O’Rourke on 26 March 2010 Ms Bennett set out his responses to the performance concerns under each heading and why she found those unsatisfactory. The letter concluded with a first written warning. It also set out a plan to remove Mr O’Rourke from operational flying duties and to attend to administrative duties for three weeks from 31 March. He was to spend that time working on a coaching programme.

[39] Mr O’Rourke responded with a letter protesting the warning and being grounded because of “*various collateral administrative duties*”. He advised he would attend on 31 March as instructed but wanted “*further and better particulars of my failings*”.

[40] Operational requirements meant Mr O'Rourke could not be removed from flying duties by 31 March. That was deferred to 15 April. A further letter from Ms Bennett responded to a number of his queries for information and set out eight items which would be addressed in the coaching programme. This included identifying specific PDMs who would work with Mr O'Rourke on those matters.

[41] Through his representative Mr O'Rourke criticised the grounding and coaching programme as an unjustified suspension and sought its deferral pending mediation.

[42] On 14 April Mr O'Rourke reported he was sick and would visit a doctor the following day and get a medical certificate.

[43] The parties met in mediation on 21 April without resolution. On 22 April Mr O'Rourke's representative advised he remained unwell.

[44] On 28 April Mr O'Rourke was ordered, under a provision of his employment agreement, to undergo an examination by the company medical officer. He did so on 30 April. At the time Mr O'Rourke was certified by his own GP as unfit for work due to work related stress. The company medical officer, Dr Sprott, took a different view. By email to Ms Bennett on 14 May Dr Sprott advised that Mr O'Rourke had "*stressors regarding the employment relationship with his manager*" but no diagnosed psychiatric disorder and was medically fit to return to work, including flying duties.

[45] Ms Bennett then issued a letter containing a "*final instruction*" to Mr O'Rourke requiring him to attend the ground-based coaching programme from 24 May.

[46] A further email from a union representative advised Mr O'Rourke was not able to attend the programme due to his illness. However on 30 May he advised crew control he was fit for duty so he could attend a two-day annual Safety and Emergency Procedures training course. He attended that course on 31 May 2010.

[47] Early on the morning of 1 June Ms Bennett – who had been told Mr O'Rourke

was now clear for duty – had his roster changed from the training course to an administrative day. She and Mr Gaskin went to the course venue in person to tell Mr O’Rourke he was required to start his coaching programme. Mr O’Rourke would not speak to them without his representative and left the building. Shortly after, he telephoned Mr Gaskin who told Mr O’Rourke that the change of roster was an instruction to attend the coaching programme. About an hour after that call Mr O’Rourke sent Ms Bennett a text message stating he was sick and was making an appointment with his doctor. Mr O’Rourke provided a medical certificate from his GP saying he was unfit for work for six days. He later got another certificate for a longer period.

[48] Mr O’Rourke subsequently had an assessment by a consultant psychiatrist who diagnosed an adjustment disorder with mild symptoms of depression and anxiety. The psychiatrist’s opinion was that Mr O’Rourke was likely to be able to return to full duties after a week of rest “*should the whole performance issue be clearly resolved*” however loss of his job was likely to cause significant deterioration in his condition.

Were the performance reviews and conclusions unjustified?

[49] Mr O’Rourke’s closing submissions provided a trenchant and extended critique of the basis on which his performance was reviewed. These included what was called loose and misleading information around GMTs, opaque mathematical calculations within annual performance review criteria and a lack of meaningful or explicit explanation around these factors. Criticism was also made of the “*misnomer*” that GMTs were agreed.

[50] In response to the criticism of the performance review rating system, Ms Bennett’s evidence conceded a “*slight possibility, at least superficially, for some confusion around this*”. It was loyal but not very credible defence of the idiosyncratic nature of the rating system designed by ANZL for these reviews. While it may have an internal logic apparent to those well-used to and trained in its operation, it does not conform to ordinary or intuitive standards in a metric and decimal-based society.

[51] It uses a rating range from 1 to 133 in five bands ranging from “*failed to meet expectations*” to “*met expectations*” and “*far exceeded expectations*”. Despite not

being based on 100, the range in each band is referred to as percentages with, for example, 'met expectations' being a total score falling in a range between 94 and 104 per cent. The very highest rating is not, as would ordinarily be expected, 100 but 133.

[52] For that reason Mr O'Rourke's initial difficulties with his own ratings in the self-assessment part of the exercise were understandable. However it was a difficulty identified and addressed by Ms Bennett – both by providing additional explanation herself and arranging for Mr O'Rourke to further discuss the matter with a human resources manager. After those initial difficulties, Mr O'Rourke's issues were not with the rating system but the difference between his own perception of his achievements and what Ms Bennett saw as the reality.

[53] I find a similar confusion was caused by the notion that Mr O'Rourke was required to agree to the GMTs being included in the documentation for his performance review documents. While the word 'agree' was used, it was a 'misnomer'. The elements of the GMTs are not intended or required to be negotiated if they are properly understood as simply statements by the company of its goals and targets, which managers and staff at variously levels are then directed to work to achieve. In that sense the GMTs themselves are not contractual but the direction to work towards them is – and adds nothing to the standard obligation on employees to carry out the instructions of their employer as best as they can legally and safely do.

[54] However I also accept ANZL's submission that it was not the content of the GMTs set for 2009 or 2010 that were the subject of the performance concerns identified with Mr O'Rourke. Rather it was a series of expectations or instructions set by Ms Bennett for reports and work from Mr O'Rourke that, in her assessment, were not being complied with or met. In that respect the status of the GMTs, and whether they had been agreed to, was a red herring.

[55] I am not satisfied Mr O'Rourke's evidence established Ms Bennett's reviews of his work in 2009 lacked evidential foundation – for the comments made and ratings given – or resulted in conclusions which were unreasonable. Her concerns were focussed on what he later dismissed as collateral administrative matters but were within the requirements of the job description and within the range of matters on which Ms Bennett could give him reasonable directions.

Was the PIP unjustified?

[56] Mr O'Rourke, in his oral evidence, criticised the PIP as dealing with historical matters only having "*no evidential foundation since July 2009*". And in closing argument, his submission was that if there was any shortfall in his performance or meeting expectations, the cause was equipment fault and a "*mismatch*" with his manager.

[57] However I am satisfied that ANZL's evidence established Mr O'Rourke continued to fail to meet reasonable performance requirements both before and beyond July 2009 in ways which were not the fault of equipment such as the tablet device provided to him or other difficulties of recording or accessing information in the airline's electronic records.

[58] Requirements as relatively straight forward as arranging a monthly meeting with Ms Bennett or providing her with a copy of his newsletters to his direct reports were repeatedly not done.

[59] The 14 December meeting identified the need for Ms Bennett to be specific and give examples of what was needed to meet performance expectations. That was a requirement consistent with the long-established principles identified in *Trotter v Telecom*.¹ I find the level of detail given in ANZL's letters of 12 January and 11 February 2010 was a readily comprehensible criticism of the work so far and an objective statement of standards required to be met.

[60] The evidence of Mr Flett, Ms Macky and Mr McElwee also established that Mr O'Rourke had access to people to assist with technical issues and that the expectations of him were not different from or more difficult than those placed on and achieved by other FSMs.

[61] Mr O'Rourke submitted that ANZL should have considered changing his reporting line from Ms Bennett to another PDM as an alternative to imposing a PIP. However I accept Mr Gaskin's evidence that to have made such a change would not

¹ 1993] 2 ERNZ 659.

have resolved what ANZL had reasonably identified as a problem – a “*disconnect*” about the requirements of the FSM role which likely would be replicated with any other PDM to whom Mr O’Rourke was required to report. It was a view I accept a fair and reasonable employer would come to in all the circumstances at the time and was therefore justified.

Was the written warning unjustified?

[62] Mr O’Rourke submits the written warning in the 26 March letter was made without adequate warning of the prospect of it. He also says the warning was, at best, premature because ANZL had said in January that it would be April before his progress against the performance goals was reviewed.

[63] However the ANZL correspondence to him over the several months prior to 26 March meeting shows the prospect of disciplinary action around performance issues was clearly identified. The most recent was the 11 March letter which set out ANZL’s concerns at that time and stated the 26 March meeting would be his opportunity to comment but if ANZL found no satisfactory explanation “*then there may be disciplinary consequences*”.

[64] While Ms Bennett conceded that she did not then expressly say in the meeting that she was considering a written warning, I find the course of correspondence had given adequate notice of the prospect of a disciplinary sanction.

[65] It was also consistent with ANZL’s published procedure for managing poor performance which refers to “*relevant warnings*” where there has been insufficient performance improvement. In the circumstances at the time, where Mr O’Rourke continued to dispute the need for the PIP at all, there had been no progress in the performance programme. In that context ANZL was justified in bringing forward the April review date and deciding review meetings should be held on a monthly basis to check progress.

Was the grounding and coaching direction unjustified?

[66] Against that background ANZL’s decision to require Mr O’Rourke to cease

flying duties and attend a coaching programme may have been to his disadvantage, at least subjectively, but was not unjustified. Rather, if it had not made such a decision, ANZL could have been accused of failing to provide the necessary training and support for remedying the identified performance issues.

[67] It is not necessary for me to find ANZL acted impeccably in deciding on this measure, only that it was substantially fair and reasonable.² I do so.

[68] It contrasts with some of Mr O'Rourke's actions. I note particularly his decision to return to work on 31 May to attend a training course which he wanted to attend. I understand that course was necessary to maintain his regulatory compliance for flying duties but was also available at other times. While Mr O'Rourke decided he was fit enough for work he wanted to do, he was supposedly too unwell to attend to other tasks he was told to do but did not want to do on 1 June. That behaviour undermined the credibility of his evidence on other matters.

Determination

[69] In summary, I accept ANZL's submission that its concerns with Mr O'Rourke's performance were genuinely held, the steps taken by ANZL managers to address those concerns were fair and reasonable, and ANZL has not asked anything exceptional of Mr O'Rourke or which was inconsistent with its legitimate expectations of someone in the FSM role. In that respect its actions, scrutinised broadly rather than minutely, were what a fair and reasonable employer would have done in all the circumstances.

[70] For the reasons given Mr O'Rourke's personal grievance application is declined and no remedies may be awarded to him.

[71] At the time of the Authority investigation meeting Mr O'Rourke remained on sick leave. There is an existing employment relationship and the parties must now make the arrangements necessary for it to continue in light of this determination.

² *McKean v Board of Trustees of Wakaaranga School* [2007] ERNZ 1 at [70].

Costs

[72] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so, ANZL may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr O'Rourke will then have 14 days to lodge a reply before the Authority determines costs. No application will be considered outside this timetable without prior leave.

Robin Arthur
Member of the Employment Relations Authority