

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Gordon Raddock
AND Air New Zealand Limited
REPRESENTATIVES Ann-Marie McNally for applicant
Kevin Thompson for respondent
MEMBER OF AUTHORITY Vicki Campbell
DATE OF DETERMINATION 19 March 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Raddock claims his employment was subject to an unjustifiable action by Air New Zealand Limited (Air NZ) when he was randomly selected and required to undertake a drug test. Mr Raddock considered the drug test to be an unreasonable invasion of his privacy and without lawful justification. He seeks compensation and a declaration to the effect that his current role should not be subject to Air New Zealand's random drug testing regime. Air New Zealand denies Mr Raddock's claims.

[2] I am required to scrutinise Air NZ's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[3] The statutory test obliges the Authority to separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[4] If I find Air NZ's actions were not those of a fair and reasonable employer, I must then consider whether those actions have led to Mr Raddock's employment or one or more terms and conditions of his employment being affected to his disadvantage.

The facts

[5] Mr Raddock is employed as a Logistics Controller – Paxco in the Airline Services division of Air NZ and is a member of New Zealand Engineering, Printing & Manufacturing Union (EPMU). Air NZ has declared all roles in Airline Services, with two exceptions, to be “safety sensitive” which includes the role undertaken by Mr Raddock,.

[6] Mr Raddock works in an open plan office in the operations centre, referred to as the day of operations (DOO). Also located in the operations centre are employees whose functions include: flight planning, weight and balance matters, crew competency, passenger disruptions, operations control and aircraft worthiness issues, flight despatch, and maintenance control.

[7] The location of the worldwide 24/7 Group Emergency Control Centre is also in DOO. Mr Raddock is rostered to work a night shift in DOO, approximately six weekly. During these night shifts, the number of staff available to answer the emergency telephone are reduced and therefore, Mr Raddock is expected to be able to undertake that task. The DOO area is also where the team which evaluates bombs and other threats to aircraft convenes.

[8] In March 2006 Air NZ randomly selected Mr Raddock to undertake a drug test pursuant to its Alcohol and Other Drugs policy. In his statement of problem Mr Raddock stated that he was told that failure to do so would be viewed as serious misconduct and could lead to disciplinary action including dismissal. However, at the investigation meeting Mr Raddock confirmed Deborah McKeown’s evidence that he was not told he could be dismissed, but rather, that if he refused the test, that refusal “...could lead to an investigation.”

[9] The introduction of Air NZ’s policy containing random drug testing was not without controversy. Litigation in the Employment Court was required to clarify the legality of Air NZ’s intention to implement such drug testing.

[10] The Employment Court held that while the question of random testing was a difficult one, random testing in safety sensitive areas, but not across the board, was lawful and reasonable. (*NZ Amalgamated Engineering, Printing and Manufacturing Union Inc v Air New Zealand Ltd* [2004] 1 ERNZ 614, cited hereafter as *EMPU v Air NZ*)

[11] The Court held that random testing of employees working outside safety sensitive “areas” could not be justified. The Court stated:

The evidence that random testing acts as a deterrent persuades us to hold that in safety sensitive areas where the consequences can be catastrophic, the objection to the use of intrusive methods to monitor

in an attempt to eliminate a recognised hazard must give way to the over-riding safety considerations. These factors take precedence over privacy concerns.

[12] Further, the Court at paragraph 251 writes:

We appreciate that the expression "safety sensitive areas" may not always be easy to define but nevertheless it should be better defined than it is a present and the exercise of defining it, which is not one for the Court to undertake, is the responsibility of the [company] which it should now discharge in consultation with [the union].

[13] Further, the Court stated at paragraph 254:

It is unreasonable to require employees engaged in non-safety sensitive roles in Air New Zealand to submit to suspicionless, random testing. Concerns about safety cannot, for such employees, override the other factors against such testing.

[my emphasis]

[14] Following the determination of the Court and pursuant to its directive, in May 2005 Air NZ commenced a period of consultation with EPMU, including consultation on the definition of safety sensitive areas and those roles falling within the safety sensitive areas, which would be considered safety sensitive. The consultation process took approximately seven months.

[15] Air NZ's initial proposal to the union contained a list of principles, against which it was proposed to establish whether roles were considered to be safety sensitive:

- Roles where employees work on aircraft, or because of the nature of their job are required to have physical contact with an aircraft, whether frequent or infrequent.
- Roles where employees handle, or have any responsibility for, any material, goods, baggage, freight or other items to be placed on or taken from an aircraft.
- Roles where employees work on the ramp, in the cargo operation, or in physical proximity to the aircraft.
- Roles where employees prepare or provide documentation or data of any kind related to the operation of the aircraft.
- Roles in an airport environment.
- Roles where employees repair or maintain aircraft or any other machinery or equipment which is used on or around aircraft.
- Roles requiring decision making regarding aircraft operations, and roles involving crew rostering and planning.
- Roles where employees may be called upon to assist in dealing with an emergency, including employees who deal with response services for enquiries and family assistance.
- Roles where employees are involved in operational and technical training, including emergency procedures training, simulator training and other training roles reliant on certification or qualification.
- Roles where employees are required to be issued with and display a red backed airport security ID card.
- Roles where employees may be required to assess the medical suitability or safety of other employees to carry out work in any of the above roles.
- Roles where managers are required to manage, or have an overall responsibility for, employees in the above circumstances, where the manager may not directly be involved in the broad roles above.
- Roles which entail major decisions with (sic) could have an impact on safety or security.

- Roles where employees may be required to monitor, assess or address matters of security affecting employees, passengers, aircraft or cargo.
- Roles where employees are involved in information technology and /or / computer / programming tasks which could affect the safety or security of the airline's operations.

[16] Air NZ's proposal also identified the areas and roles it considered fell within the principles and therefore were safety sensitive:

Airlines	
Regional Airlines	All roles
Pacific Airlines	All roles
International Airline	All roles
Operational Standards and Safety	All roles
Airline Services	All roles except Uniform co-ordination
IT	Airlines/Operations Solutions Programmes
Ventures	
ANZES	All roles
Airport Services	All roles
Cargo	All roles except Finance
Freedom Air	All roles except Reservations, finance
Human Resources	Medical, OCC Health and Safety roles, and HR roles located at airports
Public Affairs/Government Relations	All roles
Internal Audit and Risk	All roles
EXCO	All roles

[17] The union did not agree with the principles set out in the proposal on the basis that they were too broad and caused confusion as to what categories of jobs would be affected. The union had previously proposed the adoption of a Canadian definition which focussed on the actual position being carried out and the likelihood of the person engaged in that position causing harm if impaired by drugs and/or alcohol.

[18] Early on in the consultation process it was agreed that the union would be responsible for obtaining feedback from union members and would provide that information to Air NZ for its consideration.

[19] By 28 September the EPMU had received the feedback from its members and wrote to Air NZ requesting the following roles be reconsidered and reclassified as non-safety sensitive:

- All trainers.
- All IT groups (we understand Alaster Grigg's department has already queried its inclusion as safety sensitive).

- All cleaners, including on the aircraft, the ramp and in the airport.
- Passenger assistants.
- Classified officers.
- Anyone in the airport environment whose job is predominantly clerical or catering.
- Customer services agents.
- Any clerical staff involved in the cargo area, not already exempt.
- Warehouse staff that are not required to drive fork lifts, or other heavy machinery.
- Non-engineering roles at ANZES.
- Uniform co-ordinator.

[20] Air NZ gave consideration to the submissions made by the union and reclassified the following roles as non-safety sensitive:

- Administration and receptionist employees in Domestic and International Terminals in Auckland, Christchurch and Wellington
- The airport Services Finance Team in the International Terminal at Auckland
- The roistering staff at Auckland International, Christchurch and Wellington
- ANZES roles involved in Finance and the receptionist

[21] The area of Airline Services (in which Mr Raddock is employed) was consistently classified as safety sensitive throughout the consultation period with only two roles, undertaken within Airline Services, as being classified non-safety sensitive.

[22] Mr Raddock claims he, personally, was not consulted when the company defined the safety sensitive roles and that this failure meant he did not know his role was caught in the random testing regime. I do not accept Mr Raddock's claim.

[23] On 18 July 2005 Mr Raddock was sent an email outlining Air NZ's proposals including detailed information as to the areas, and positions within those areas, deemed to be safety sensitive. The email sets out the principles used by Air NZ to determine which roles will be deemed safety sensitive and states:

On the basis of the principles the proposal would mean that all roles in the Airlines Division are considered to be safety sensitive areas ...

The reason why the roles are considered to be safety sensitive is that one or more of the principles set out above will apply to the roles in areas within the Airlines Division.

You are asked to consider this information and if you work in an area which is considered to be safety sensitive under the proposal you may provide feedback on the designation of your area as safety sensitive. Such feedback should be provided to the union delegates for the area concerned within 14 days of the issue of this notice.

[24] Mr Raddock does not recall receiving this email. I am satisfied, however, that it is more likely than not that Mr Raddock did receive this email. The distribution list in the email shows Mr Raddock as a named recipient.

[25] Further, Mr David Grey, a union delegate, was seated in a desk beside Mr Raddock's. Mr Grey was not part of the union's team consulting over the implementation of the random drug testing regime, however, he did have all the relevant literature and emails setting out Air NZ's proposals. He told me that as a delegate he never arranged to discuss the issues with members formally, although he knew that his area (being DOO) was safety sensitive. Mr Grey and Mr Raddock both acknowledged that they discussed the issue from time to time, but not in any detail.

[26] On 7 December 2005 further information was provided to all employees of Air NZ via email. This communication updated all staff about the drug testing policy. Air NZ set out the background information and reasons behind the policy formulation. The email also identified, once again, the areas, and the roles within those areas, classified as safety sensitive. Included in the list are all roles within Airline Services, except roles in Business Performance and Uniform Co-ordination. The draft policy was also made available on Air NZ's intranet.

[27] Following the consultation process, Air NZ produced a colourful brochure outlining the main aspects of the alcohol and other drugs in the workplace policy including identifying, once again, the specific areas and roles which were considered to be safety sensitive. This brochure was made available for all staff. Mr Raddock says he did not see a brochure until two days after he was randomly selected for a test.

[28] Given the sensitivity of the issue of random drug testing, I do not accept Mr Raddock was unaware the DOO and his role were caught up in the classification of safety sensitive. I am satisfied Air NZ has met its obligations to consult with both the union and the affected employees. The union undertook to and did gather feedback from its members which it provided to Air NZ. Further, Air NZ provided Mr Raddock, personally, with the opportunity to provide feedback on at least 2 occasions. He also had discussions, albeit not formally, with a union delegate without raising any concerns over the areas and roles being classified as safety sensitive.

[29] Further, the brochures were readily available to all staff in DOO and were located in a central place. I have concluded that Mr Raddock chose to ignore the fact that these brochures were available until he was directly affected by the implementation of the new policy.

Determination

[30] As already set out in this determination the Court has held that it was a matter for Air NZ to define its safety sensitive areas and roles subject to Air NZ consulting with the union and its employees pursuant to section 4 of the Act.

[31] I have concluded that Air NZ has met its obligations to consult in good faith with both the union and its employees. Mr Raddock, who was a union member, did not provide any feedback, and therefore did not take the opportunity provided to him for input into the definition process.

[32] Mr Raddock is required to show on the balance of probabilities that one or more of his conditions of employment were affected to his disadvantage as a result of being randomly selected and then drug tested (s.103(1)(b) Employment Relations Act 2000).

[33] The Employment Court has held disadvantage grievances arise out of the employment activity, the on the job situation. The words "are affected" are related to physical conditions of employment, the environment in which the work is carried out, the amenities and facilities available, the payment to the employee and matters of that kind (*Wellington Area Health Board v Wellington Hotel IUOW* [1992] 2 ERNZ 466).

[34] I am not satisfied Mr Raddock has been disadvantaged in his employment. Air NZ had developed a clear policy, in consultation with the Union, of which Mr Raddock was a member, which provided for random drug testing of the role undertaken by Mr Raddock in the area of DOO, both of which were classified as safety sensitive.

[35] Even if Mr Raddock's random selection had amounted to a disadvantage, I am not satisfied that Air NZ's action in doing so was unjustified. The Employment Court confirms Air NZ's right to define its safety sensitive areas, and the roles working within those areas. The only rider attached to this was that Air NZ do so in consultation with the union and affected employees.

[36] In addition, in answer to questions at the investigation meeting Mr Raddock told me he had the test which returned a negative result. No further action was taken by Air NZ and all Mr Raddock had to say about the way the test was handled was that he was disappointed in having to have the test.

[37] A finding of disadvantage can only be made on the basis of evidence. In the circumstances of this case Mr Raddock's evidence does not go far enough to justify such a finding. Had Mr Raddock refused the test and been subject to an investigation and disciplinary action, then I may have come to a different result.

[38] Mr Raddock's claim of disadvantage in employment fails.

Costs

[39] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Vicki Campbell
Member of Employment Relations Authority