

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 376
5321848

BETWEEN

HAYDEN ROSS
Applicant

AND

AIR NEW ZEALAND LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
Kevin Thompson, Counsel for Respondent

Investigation Meeting: 19 July 2011 at Auckland

Submissions received: 29 July and 1 August 2011 from Applicant
29 July 2011 from Respondent

Determination: 29 August 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Hayden Ross, claims that he has been unjustifiably disadvantaged by the failure of the Respondent, Air New Zealand Limited (“ANZL”) to properly and/or adequately investigate an allegation of assault against him which had occurred on 8 June 2010.

[2] ANZL claims that it carried out a prompt, fair and thorough investigation of Mr Ross’s complaint of assault.

[3] ANZL denies that Mr Ross has suffered any disadvantage by any unjustified action by ANZL.

Issues

[4] The issue for determination is whether Mr Ross was unjustifiably disadvantaged by ANZL failing to carry out a fair and reasonable investigation into his complaint of assault by head-butting by Mr Uepa, a fellow employee, on 8 June 2011.

Background Facts

[5] Mr Ross is currently employed by ANZL as a Cargo Airline Clerk. At the time of the alleged head-butting incident on 8 June 2010, Mr Ross was employed in the Imports section of ANZL's International Cargo Operations ("Cargo"), which was located in a separate building to the Export section. The Import and Export sections are separated from each other by a large open area of tarmac which is used for vehicular access to collect and deliver cargo.

[6] The workforce in Cargo consists of full-time, permanent and casual employees, the majority of whom work shift patterns to provide coverage for a seven day a week operation. There are approximately 90 employees in each of the Import and Export sections.

[7] There are both members of the Engineering, Printing and Manufacturing Union ("EPMU") and the Service and Food Workers Union ("SFWU") in Cargo, although the SFWU members are in a minority.

[8] Prior to June 2010, Cargo had been working with the EPMU on a competency-based pay solution. Mr Stephen McKeefry, International Cargo Operations Manager for ANZL, explained that several alternative framework documents had been drafted and were the subject of discussions within a working party set up for discussion purposes. The SFWU had not been involved in these discussions, but because the Collective Employment Agreement required that the SFWU be a party, and agree to, the development of this framework, Mr McKeefry invited the SFWU to join the working party. This offer was accepted.

[9] Mr McKeefry said that a short time before 8 June 2010, he had met with Mr Grant Sutton, a Cargo Airline Clerk who, like Mr Ross, was also a SFWU delegate, to present the documentation and to discuss the content with a view to familiarising Mr Sutton with the working party activity during the preceding two year period. Mr McKeefry said he had informed Mr Sutton that the draft documentation was confidential to the working party.

[10] Mr McKeefry said that Mr Sutton rather than respecting the confidential nature of the documentation, had shown it to EPMU members, some of whom had subsequently resigned from the EPMU and joined the SFWU.

[11] On 8 June 2010 the EPMU held a stop work meeting in the morning with its members whose terms and conditions of employment would be covered by any competency-based pay agreement.

[12] At approximately 2 p.m. on 8 June 2010 Mr Sutton said that he had entered the lunch room where he had seen Mr Uepa, a Process Co-ordinator in Cargo, who had transferred from the Export section to the Import section. Mr Sutton said Mr Uepa had made a comment to him that following the union meeting that morning, he (Mr Uepa) could see more employees joining SFWU. Mr Sutton said he had responded with the words "*Think you're right John*".

[13] Mr Ross had entered the room at the time that Mr Sutton and Mr Uepa were talking and said he had heard Mr Uepa say that he did not like unions. Mr Ross said he had asked Mr Uepa why he didn't like unions and Mr Uepa had replied that they were for lazy people who did not like to work.

[14] Mr Ross said that Mr Uepa had then walked towards the sink and as he approached Mr Ross, he had head-butted him.

[15] Mr Ross then left the lunch room and Mr Sutton followed behind. Mr Sutton, a competent First-Aider, said he had made an initial assessment of Mr Ross and confirmed although there was some redness on the face, there was no blood loss, nor did an assessment of Mr Ross's pupils indicate that Mr Ross was concussed. Mr Ross said Mr Sutton told him to immediately report the incident to management.

[16] Mr McKeefry said that Mr Ross and Mr Sutton had arrived at the office area where he and another manager, Mr John Ward, were based at approximately 2.05 p.m.. Mr McKeefry said that both Mr Ross and Mr Sutton appeared to be angry and Mr Sutton told him that Mr Ross had just been head-butted by Mr Uepa in the lunch room.

[17] Mr McKeefry stated that he was sitting very close to Mr Ross in a well-lighted room and that he could observe no obvious indication from Mr Ross' appearance of a head-butt having occurred. Mr McKeefry said there were no signs of blood, bruising, broken skin or other damage which he would have associated with a head-butt. Additionally, although Mr Ross appeared agitated, he did not show any other signs of distress such as holding his head, grimacing in pain, or indicating light-headedness.

[18] Mr McKeefry further explained that as he knew of Mr Sutton's First-Aid background, he had assumed that if either Mr Ross or Mr Sutton felt immediate medical attention was required, they would have sought it.

[19] In line with normal practice Mr McKeefry asked Mr Ross to confirm details of the incident in writing, which Mr Ross did later that same day.

[20] After leaving Mr McKeefry and Mr Ward, Mr Ross and Mr Sutton had gone to the Police Station located at the International Airport Terminal and Mr Ross had laid a complaint against Mr Uepa.

[21] Mr McKeefry said he had received the emailed written complaint on 8 June 2010. The email stated that Mr Ross had been head-butted by Mr Uepa and that the alleged assault had not been provoked in any way by Mr Ross.

[22] The following day, 9 June 2010, Mr Ross had visited Airport Doctors Limited to seek medical attention.

The Investigation Process

[23] Mr McKeefry explained that upon receipt of the emailed complaint from Mr Ross, he had then commenced the investigation process. Mr McKeefry was the decision maker in the process and was accompanied at all meetings in the process by Ms Joann Hunia, HR representative, and the note taker at the meetings.

[24] Mr McKeefry commenced his investigation by interviewing those persons who had been present in the lunch room at the time of the incident, and required these witnesses to provide him with diagrams of who was where in the lunch room at the time of the alleged head-butt.

[25] The diagrams, which were produced in evidence, show that the lunch room is set out in a manner similar to a classroom style set-up, with six individual tables and a large television screen at the front of the room, and indicated Mr Ross, Mr Sutton, Mr Uepa, Mr Fred Tavilione, Mr George Maoate, Mr Nicky Maxwell and Ms Atele Tiatia as being present in the lunch room on 8 June 2010. Mr Ross is situated between Mr Uepa and Mr Sutton, and Mr Maoate and Mr Maxwell are shown to be at the side of the room, looking into the room, directly across from Mr Ross and Mr Sutton.

Ms Tiatia and Mr Maoate

[26] On 9 June 2010 Mr McKeefry interviewed Ms Tiatia and Mr Maoate. Ms Tiatia, a cleaner with OCS Airport Services who are contracted to provide cleaning services for Cargo, told Mr McKeefry that she had not seen any head-butt by Mr Uepa upon Mr Ross. Ms Tiatia said she had not noticed any blood when later cleaning the lunch room, or any blood on Mr Ross's face at the time of the incident. Ms Tiatia had observed that Mr Maoate and Mr Maxwell were the only persons who would have been able to see the alleged head-butt.

[27] Mr Maoate when interviewed made reference to the discussion regarding skills-based pay which had been underway prior to the incident, stating that Mr Ross and Mr Uepa had been arguing about what had happened at the meeting that morning and that Mr Ross and Mr Sutton were both provoking Mr Uepa. Mr Maoate explained that he had heard Mr Uepa to say he had had enough, and saw him stand up to leave the lunch room, but stated that he had not seen a head-butt. Mr Maoate further stated that he had not seen Mr Uepa touch Mr Ross, or noticed any blood on Mr Ross' face, and Mr Ross appeared to be as normal.

Mr Tավilione

[28] On 10 June 2010 Mr McKeefry interviewed Mr Tավilione. Mr Tավilione had told Mr McKeefry that he had been watching the television in the lunch room at the time of the incident, and that he had heard Mr Ross swearing at Mr Uepa and using the 'F' word. Mr Tավilione had said he had not noticed any blood on Mr Ross' face, nor did Mr Ross appear to be dazed. Mr Tավilione commented that Mr Maoate, Ms Tiatia or Mr Maxwell would have been in the best position to see what had occurred, but that in his opinion nothing had happened. In terms of proximity, the diagrams show Mr Tավilione as being the closest to Mr Ross.

Mr Uepa

[29] Mr McKeefry wrote to Mr Uepa on 10 June 2010 attaching a record of the interviews with Ms Tiatia, Mr Maoate and Mr Tավilione, and interviewed him on 11 June 2010. Mr Uepa's account of events included the discussion about pay rates, and Mr Ross using abusive language towards him, leading to his own decision to leave the lunch room. Mr Uepa denied head-butting Mr Ross and said that in his opinion Mr Maoate and Mr Maxwell would have been able to observe his movements. Mr Uepa explained that as he was leaving the lunch room he passed Mr Ross who was standing near the sink, and had bumped him with his upper arm. Mr Kelvin Mayes, who was representing Mr Uepa, had observed that it was not unknown for Mr Ross to lay assault charges against who worked in Cargo.

[30] The meeting with Mr Uepa concluded with Mr McKeefry informing Mr Uepa that he would be suspended on full pay until the conclusion of the investigation.

[31] Mr McKeefry, who at this time had been made aware by the interviewees that Mr Ross may have behaved inappropriately on 8 June 2010, decided that it would be appropriate for Mr Ross to also be suspended on full pay pending the outcome of the investigation. Mr McKeefry also considered that there were issues of workplace safety to be considered. Consequently Mr McKeefry invited Mr Ross to meet with him on 11 June 2010.

[32] However Mr Ross declined the meeting on the basis that his chosen representative was unavailable. Additionally Mr McKeefry explained that due to a misunderstanding over a medical certificate, he had not appreciated that Mr Ross was not at work. Consequently Mr McKeefry telephoned Mr Ross at home and after discussing the matter with Mr Ross, informed him that he would be suspended on full pay until the conclusion of the investigation.

Mr Maxwell

[33] Mr McKeefry interviewed Mr Maxwell on 18 June 2010. Mr Maxwell stated that he had heard Mr Ross swearing at Mr Uepa; it was at that point when Mr Maxwell had turned around and started listening. Mr Maxwell had seen Mr Ross waving his arms at Mr Uepa but stated that Mr Uepa had remained calm. Mr Maxwell was definite in his recollection that there had been no head-butt and clarified that had one occurred, he would have been able to see it from his position in the lunch room, as also would Ms Tiatia and Mr Maoate. Mr Maxwell had further stated that Mr Sutton would not have been able to see what happened clearly since his back had been turned at that time.

[34] Mr McKeefry interviewed Mr Ross on 22 June 2010. Mr Peter Shannon was present as Mr Ross' support person. Mr Ross in his explanation of events in the lunch room denied swearing at Mr Uepa and said he had just been speaking in a normal voice, without any gestures. Mr Ross said Mr Uepa had bent down, and head-butted Mr Ross in the face hitting his nose and teeth.

[35] Mr Ross said that when he had rubbed his nose there was blood on the top of his hand, and he had referred to the Police having pointed out a small scratch with blood on his nose when he had reported the matter to them on 8 June 2010. Mr Ross informed Mr McKeefry that after he had seen Mr McKeefry and Mr Ward on 8 June 2010, he had gone immediately to the Police Station. Mr McKeefry said he had reminded Mr Ross that he had requested access to photographs which Mr Ross claimed he had which purported to show his alleged injuries, and Mr Ross had said he would provide these.

[36] Mr McKeefry said that when he had later received the photographs, he had compared them with photographs which he had of Mr Ross, and which had been taken prior to the incident on 8 June 2010. Mr McKeefry stated that he had seen no difference in the two sets of photographs. Mr McKeefry was also in receipt of a medical certificate for Mr Ross from Airport Doctors dated 9 June 2010. The medical certificate stated that Mr Ross had a contusion to the nose and forehead, and signed him off work for 2 days.

Mr Sutton

[37] Mr McKeefry interviewed Mr Sutton on 23 June 2010. Mr Sutton told Mr McKeefry that during the incident in the lunchroom on 8 June 2010 Mr Uepa had stood up, walked to the sink and head-butted Mr Ross in the face. Mr Sutton, who had been peeling a persimmon at the time, said that there was no swearing by Mr Ross, and that he had had a good view of the incident. Mr Sutton explained that the area above Mr Ross' eye had been slightly red and raised, there was bloody mucus around the bottom of Mr Ross' nostrils and that Mr Ross had "copped" it most in the teeth. Mr Sutton had stated that as he was qualified in first-aid, he was qualified to make an assessment.

[38] Mr Sutton informed Mr McKeefry of a discussion which he said Mr Kyle Smith and Mr Tana Mae'a had had with Mr Maxwell appropriately 45 minutes after the incident on 8 June 2010. Mr Sutton provided Mr McKeefry with a letter which he said he had written and asked Mr Smith and Mr Mae'a to sign. Mr McKeefry was aware that neither Mr Smith nor Mr Mae'a had been present in the lunch room during the incident.

[39] The letter which was produced in evidence and dated 13 June 2010 stated:

*To whom it may concern
 We the undersigned confirm in writing the following.
 That on 8th of June when asked what had happened in the lunchroom that day,
 Grant Sutton said he had witnessed John Wepa head butting Hayden Ross.
 That leading up to the head butt, John Wepa said words to the affect "that after the two stop work meetings he could see more people joining Grants union".
 Grant said he had said to John "I think your right".
 John then replied how he didn't like unions to which Hayden had asked why he (John) had a problem with unions.
 John replied how unions are for lazy people who don't want to work.
 He (John) then got up out of his seat as if going to wash his hands but then came round and head butted Hayden in the face.
 Grant said he didn't expect it and was shocked.
 Nicky Maxwell then gave a matching account of the head butting to that of Grants.*

Mr Smith

[40] Mr McKeefry had interviewed Mr Smith on 23 June 2010. Mr Smith had not been present in the lunch room at the time of the incident but said that in a subsequent conversation he had had with Mr Maxwell at appropriately 2.30 p.m. on 8 June 2010, Mr Maxwell had told him he had seen the head-butt.

Mr Mae'a

[41] Mr McKeefry also interviewed Mr Mae'a on 23 June 2010. Mr Mae'a had also not been present in the lunch room at the time of the incident, but told Mr McKeefry that he had had a group conversation with Mr Maxwell, Mr Smith, Jason and Mr Reggie Thomas at about 2.30 p.m. on 8 June 2010 in which he said Mr Maxwell had said he had seen the head-butt.

Mr Maxwell

[42] Following these three interviews, Mr McKeefry re-interviewed Mr Maxwell on 24 June 2010 to query with him the claims by Mr Sutton, Mr Smith and Mr Mae'a that he (Mr Maxwell) had witnessed the head-butt. Mr Maxwell said that there had been no group discussion, but that they (Mr Sutton, Mr Smith and Mr Mae'a) had all been pressurising him. Mr Maxwell assured Mr McKeefry that he had been telling the truth.

[43] Mr McKeefry said that Mr Maxwell had been upset and had broken down during the interview and that it had been clear to him that Mr Maxwell had been put under pressure from his co-workers, particularly by Mr Smith, who was seeking support for Mr Ross' complaint. Mr McKeefry noted that Mr Smith and Mr Mae'a were SFWU members.

[44] Mr McKeefry said that he had checked video camera footage from 8 June 2010. There were 130 digital cameras in operation at Cargo and he was able to ascertain from the footage viewed that whilst there was no group meeting held as alleged by Mr Mae'a, there had been a number of individual approaches made to Mr Maxwell, which strengthened Mr McKeefry's view that pressure had been applied to Mr Maxwell to change his statement.

Mr Uepa

[45] Mr McKeefry re-interviewed Mr Uepa on 7 July 2010. Mr Uepa maintained that he had not head-butted Mr Ross, that he had only brushed him as he went to the sink. Mr McKeefry discussed the Police charge against Mr Uepa, who told him that he had pleaded not guilty to the charge. Mr Uepa said he had seen the photographs of Mr Ross but observed that Mr Ross had always had a bump on his nose and that he could not notice any difference from how Mr Ross's nose normally appeared.

[46] Mr McKeefry said Mr Uepa had expressed to him his concern that the complaint against him had become "*a union motivated thing*".

Following the investigation

[47] Following the investigation Mr McKeefry explained that he had gathered together all of the detailed notes of the meetings which had been taken by Ms Hunia, the before and after photographs of Mr Ross, and the medical certificate relating to Mr Ross.

[48] Mr McKeefry said he had collated this documentation into a lengthy document which also comprised all the information received during the investigation and the explanations which he had been given. Mr McKeefry then proceeded to set out his conclusions in a 'Findings' document.

[49] At a meeting with Mr Uepa on 9 July 2010 Mr McKeefry presented a copy of the Findings document to Mr Uepa and read it out verbatim to him. Mr McKeefry followed up this interview by letter dated 16 July 2010 in which Mr McKeefry provided Mr Uepa with a summary of his findings and confirmed the outcome as discussed at the meeting on 9 July 2010, which had included the requirement that Mr Uepa return to work on 12 July 2010.

[50] Mr McKeefry advised Mr Uepa in the letter that although his shift times would remain the same, he would be moved from the Import section to the Export section of Cargo in order that he and Mr Ross would not have contact with each other.

[51] Mr McKeefry had stated in the letter that the conversation between Mr Uepa and Mr Ross in the lunch room on 8 June 2010 had been inappropriate, represented a serious lapse in judgment on Mr Uepa's part and should not reoccur. There was to be no disciplinary action taken against Mr Uepa as a result of Mr Ross' complaint, however Mr Uepa was to be provided with counselling regarding the nature of inappropriate discussions in the workplace.

[52] On 13 July 2010 Mr McKeefry met with Mr Ross, provided him with a summary of his (Mr McKeefry) findings, which were that Mr Uepa had not head-butted Mr Ross, as had been supported by the evidence of the majority of eye witnesses interviewed during the investigation. The findings were confirmed in a letter dated 28 July 2010 in which Mr McKeefry had also advised Mr Ross that there would be no disciplinary action taken in connection with his language and behaviour on 8 June 2010. However Mr McKeefry reminded Mr Ross of the inappropriateness of swearing in the workplace and of engaging in certain types of discussion.

[53] During the meeting on 13 July 2010 Mr McKeefry instructed Mr Ross to return to work the next day, 14 July 2010. In the letter dated 28 July 2010 in which Mr McKeefry

confirmed this discussion, he also advised Mr Ross that Mr Uepa had been transferred to work in the Export section.

The Outcome basis

[54] Mr McKeefry outlined the key points which he had taken into consideration when reaching his conclusion as being:

- That the exchanges between Mr Uepa and Mr Ross had been inappropriate, with some witnesses describing Mr Ross as being abusive to, and swearing at, Mr Uepa. Mr McKeefry had concluded that there appeared to have been some degree of provocation of Mr Uepa by Mr Ross.
- That three of the witnesses in the lunch room at the time of the incident, being Mr Maoate, Mr Maxwell and Ms Tiatia, had all said that they had not seen a head-butt take place. Mr Tavilione had also said that he had not seen a head-butt but that he could only see Mr Maxwell and Mr Sutton. Mr Uepa had said he had not head-butted Mr Ross. Further that although Mr Sutton supported Mr Ross' contention that he had been head-butted, there were a greater number of witnesses who had said there had not been a head-butt.
- That Mr Sutton's involvement in the matter had been unhelpful. Whilst a witness and not Mr Ross' representative, he had spoken to other witnesses who may have had relevant information, prepared a letter for them to sign, and by so doing may have influenced the gathering of that information.
- That Mr McKeefry's own observations of Mr Ross immediately following the incident did not support the allegation of a head-butt of the severity which Mr Ross had reported, or that a head-butt had in fact taken place at all. Mr Ross and Mr Sutton had spoken to Mr McKeefry and Mr Ward in terms of Mr Ross being dazed, of being head-butted in the forehead, nose and mouth occasioning bleeding, but Mr McKeefry had observed nothing of this. Nor did the photographs provided to Mr McKeefry provide evidence in support of the allegation of head-butting.
- That there was an unexplained expediency in bringing the matter to his attention, in that Mr McKeefry would have expected a serious assault such as that described by Mr Ross to have warranted immediate medical attention, rather than the path which had been pursued by Mr Ross which in the first

instance had been the making a complaint to Mr McKeefry, and in the second instance a complaint to the Police, with medical attention not having been sought until the following day.

Police Investigation

[55] Mr Ross had lodged a complaint with the Police on 8 June 2010 to which Mr Uepa had pleaded not guilty.

[56] Mr McKeefry's investigation was completed in July 2010. However the Police process was not completed until December 2010, by which time Mr Uepa had resigned from ANZL and had plans to move to Australia.

[57] A letter from Mr Uepa's lawyer dated 15 December 2010 and addressed to Mr Rick Nelson, General Manager ANZL Cargo, explained that a defended hearing had been set down for February 2011, but that in view of both Mr Uepa's wish to resolve the matter, and also that legally a guilty plea had to be entered before a discharge without conviction could be granted, Mr Uepa had reluctantly decided to change his plea to guilty for the sole purpose of receiving a discharge and bringing the matter to a close.

[58] Mr McKeefry said that Mr Uepa's guilty plea during the Police process had not altered his view of the matter in light of the fact that a court had not heard evidence on the head-butting allegation, whereas he had interviewed all the witnesses who had been present at the time of the alleged incident, and had tested their explanations during questioning.

Events post the Police process

[59] On 15 December 2010 Mr Ross wrote to Mr Rob Fyfe, ANZL's Chief Executive Officer seeking to provide further information. Mr McKeefry said that the only additional information Mr Ross provided to Mr Fyfe were copies of Mr Ross' ACC claim, a statement he had made at mediation, and a statement from Mr Reginald Thomas, a Cargo Warehouse Agent.

Mr Thomas' Statement

[60] The statement provided by Mr Thomas and dated 12 September 2010 read:

To whom it may concern

I Reginald Thomas want to make the following statement regarding the John Uepa incident with Hayden Ross that took place at my work

That Tee Jay Simmons told me in the days after that incident he rang Nicky Maxwell to have him change his story as a witness, to be on John's side.

He told me this face to face that he rang Nicky and told him that people were waiting for him to comeback to work to get hold of him to change his story.

[61] Mr McKeefry said that although this statement by Mr Thomas had been provided long after he had concluded his investigation and informed Mr Uepa of the outcome, he nevertheless followed up the statement by interviewing Mr Thomas, Mr Simmons and Mr Maxwell.

[62] Mr McKeefry said that Mr Simmons had denied when questioned that there had been any conversation between himself and Mr Thomas in which he had said that he had asked Mr Maxwell to change his statement. Mr Simmons did confirm that he had spoken with Mr Maxwell approximately 10 minutes after the incident on 8 June 2010 and asked Mr Maxwell what had happened. Mr Simmons said that Mr Maxwell had told him that Mr Ross was alleging Mr Uepa had head-butted him.

[63] Mr McKeefry said that following Mr Simmons comments, Mr Thomas had then stated that the conversation with Mr Simmons to which he had been referring had taken place a few days following the incident between Mr Ross and Mr Uepa. Mr McKeefry explained that Mr Thomas had initially said that Mr Simmons had told him that he (Mr Simmons) had called Mr Maxwell to ask Mr Maxwell to tell the truth, but that Mr Thomas had become rather confused and said that Mr Simmons had called Mr Maxwell to check if Mr Maxwell's version of events agreed with Mr Uepa's version.

[64] Mr McKeefry explained that as he had become confused himself at what Mr Thomas was telling him, he asked Mr Thomas if he had written his statement, and that Mr Thomas had told him that Mr Sutton had written it and asked him (Mr Thomas) to sign it.

[65] Mr McKeefry said that when he interviewed Mr Maxwell on this third occasion, Mr Maxwell agreed that he had had a conversation with Mr Simmons when he was on bereavement leave. Mr Maxwell said Mr Simmons had told him that ANZL was probably going to call Mr Maxwell as a witness and that all Mr Simmons was telling him was that he was likely to be interviewed.

[66] Mr McKeefry's view of this later information was that it was confusing and inconclusive, further that it was a result of Mr Sutton seizing on a piece of information and trying to make it more significant than it actually transpired to be.

[67] Mr McKeefry had not decided to reopen the investigation on the basis of this information.

Determination

Was Mr Ross was unjustifiably disadvantaged by ANZL failing to carry out a fair and reasonable investigation?

[68] The focus of this determination is upon how ANZL acted at the time the action occurred, that is the procedural process adopted, at the time the investigation meeting into the alleged assault by Mr Uepa to Mr Ross took place.

[69] The Test of Justification prior to the amendment on 1 April 2011 and which is applicable in this case, is set out at s 103A of the Employment Relations Act ("the Act") which 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"

[70] As was stated by the Employment Court in *Air New Zealand v V¹*: "...the Section requires the Court to determine the question of justification on an objective basis and in all the circumstances at the relevant time."

[71] The requirement that such a determination be made on an objective basis is to be made by reference to "a fair and reasonable employer". In *Fuiava v Air New Zealand Limited*² Judge Travis stated:³

The Court in Hudson found that the new s103A did not give the Employment Institutions the unbridled licence to substitute their views for that of the employer. Their role was instead to ask if the

¹ [2009] ERNZ 185 at para [29]

² [2006] ERNZ 806; (2006) 4 NZELR 103 (EMC)

³ At para [50]

actions of the employer amounted to what a fair and reasonable employer would have done and to evaluate this objectively.

[72] Additionally there is a requirement to assess the action taken by the employer by taking into consideration “*all the circumstances at the time the action occurred*”.

[73] Mr Ross is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee’s employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee’s disadvantage by some unjustifiable action by the employer;

[74] The elements of s103 (1) (b) are:

- An action
- The action was unjustifiable
- The action affected the employee’s terms and conditions of employment, and this was to the employee’s disadvantage.

Procedural Justification

[75] The process adopted by ANZL must be procedurally fair. The test as set out in s103A of the Act requires the employer to adhere to the principles of natural justice. The then Labour Court in *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd*⁴ stated:

That is not to say that the employer’s conduct of the disciplinary action is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person.

⁴ [1990] 1 NZILR 35

[76] The basic requirements as outlined in *NZ Food Processing Union v Unilever NZ Ltd*⁵ are: notice informing the employee of the allegations and the possible consequences, a real opportunity for the employee to respond to the allegations, and a decision not tainted by bias or pre-determination. Additionally the fair and reasonable employer will inform an employee of their entitlement to have a representation at a meeting of a disciplinary nature.

The Action

[77] The action which forms the basis for Mr Ross's unjustifiable disadvantage claim I consider to be the investigation by ANZL of an alleged incident, the alleged head-butt, between Mr Ross and Mr Uepa. The claim is unusual, in that Mr Ross is seeking to rely upon an action taken in relation to another employee, Mr Uepa.

[78] Whilst not convinced that Mr Ross relying upon the action taken in respect of another employee qualifies as fulfilling the first requirement of unjustifiable disadvantage pursuant to s 103 (1)(b), I shall nonetheless proceed to address the central issue of whether ANZL carried out a fair and reasonable investigation in respect of the complaint against Mr Uepa made by Mr Ross.

Justifiability of the Action

[79] On 8 June 2010 Mr McKeefry was verbally informed by Mr Ross that he had been head-butted by Mr Uepa, Mr Ross later that same day confirmed the allegation by way of a written complaint. Mr McKeefry then embarked upon the investigation process in what I consider to be a timely manner.

[80] Having carried out the initial step of ascertaining who had been in the lunchroom at the relevant time, Mr McKeefry proceeded to interview the primary witnesses. Ms Tiatia and Mr Moate had been interviewed on 9 June 2010, the day immediately following the alleged assault. Mr McKeefry interviewed Mr Tavilione on 10 June 2010. Mr McKeefry did not find that the evidence provided by these three witnesses to support Mr Ross' allegation that he had been head-butted by Mr Uepa.

[81] On 11 June 2010, following these interviews, from which Mr McKeefry had been made aware of the inappropriate nature of the interchanges between Mr Ross and Mr Uepa; Mr McKeefry interviewed Mr Uepa, who denied the allegation of having head-butted Mr Ross. Mr McKeefry took the decision to suspend Mr Uepa from employment pending the outcome of the investigation. Mr McKeefry had also intended to meet with Mr Ross that same day, however due to Mr Ross not wishing to meet because his chosen representative had

⁵ Ibid at pgs 45-46

not been available and Mr Ross being away from work, there was a telephone discussion, the outcome of which was that Mr Ross was informed that he was also suspended pending the outcome of the investigation.

[82] Mr McKeefry made his decision to suspend Mr Uepa and Mr Ross on the basis not only of the alleged assault which raised safety in the workplace issues, but also on the basis of the reported inappropriate nature of the exchanges between the two men which had immediately preceded the alleged assault, and which Mr McKeefry considered heightened the safety concerns.

[83] Given the safety concerns, I find that suspension was an option available to the fair and reasonable employer in all the circumstances at the relevant time.

[84] Mr McKeefry interviewed Mr Maxwell on 18 June 2010. Mr Maxwell's evidence was that there had been no head-butt to Mr Ross by Mr Uepa on 8 June 2010.

[85] Following the interview with Mr Sutton on 23 June 2010, when Mr Sutton provided Mr McKeefry with the letter signed by Mr Smith and Mr Mae'a to the effect that Mr Maxwell had provided a false statement to Mr McKeefry, Mr McKeefry interviewed Mr Smith and Mr Mae'a on 23 June 2010. Neither of these men had been present in the lunchroom and their evidence related to a statement allegedly made by Mr Maxwell at a group meeting consisting of Mr Maxwell, Mr Smith, Mr Mae'a, Jason, and Mr Thomas at approximately 2.30 p.m. on 8 June 2010.

[86] Mr McKeefry re-interviewed Mr Maxwell on 24 June 2010. Mr McKeefry gave evidence that he was of the view as a result not only of this interview, but from the video camera evidence, that Mr Maxwell had been pressurised by some of his fellow employees into changing his evidence. I find this to be a conclusion available to the fair and reasonable employer.

[87] Mr McKeefry had re-interviewed Mr Uepa on 7 July 2010. Mr Uepa had maintained that he had not head-butted Mr Ross and stated that he had pleaded not guilty to the Police charge. Following this interview, Mr McKeefry had collated and given full consideration to all the information he had received during the investigation process before reaching a decision.

[88] I find that ANZL had adhered to the elements of procedural fairness in that Mr Uepa was fully informed of the allegations against him and the possible consequences, Mr Uepa

had a real opportunity to respond to the allegations, and I do not find that Mr McKeefry's decision was either biased or pre-determined. I also note that Mr Uepa (as indeed did Mr Ross) had representation at all the meetings.

[89] In this context I note the following matters. Mr McKeefry followed up all the information presented to him. In addition to the 7 primary witnesses, there was the additional evidence of Mr Smith and Mr Mae'a which was fully investigated, Mr McKeefry not only re-interviewing Mr Maxwell, but viewing the video camera footage in an attempt to verify the information which had been provided to him.

[90] Mr McKeefry, who was accompanied throughout all the interviews and meetings by Ms Hunia, gave due and proper consideration to the evidence provided by each of the witnesses, taking into account from the diagrams obtained the witnesses' degree of visibility, the reliance which could be placed on their accounts, and weighting these accordingly.

[91] I also take into consideration the fact that, following the conclusion of the investigation at the end of July 2010 when there was no onus on him to do so, Mr McKeefry further interviewed Mr Thomas following receipt of a statement from him dated 12 September 2010.

[92] Mr McKeefry considered the absence of physical evidence as significant. I do not find Mr McKeefry's non-referral of Mr Ross for medical attention fatal to the conclusion that ANZL carried out a fair and reasonable procedure in circumstances in which Mr McKeefry had observed that there was no blood on Mr Ross, physical damage to Mr Ross, and no apparent disorientation on the part of Mr Ross at the initial interview on 8 June 2010.

[93] I consider it relevant in this context that Mr Ross was accompanied by Mr Sutton at this interview. Mr Sutton is, from his own evidence given at the Investigation Meeting, a highly qualified and experienced First Aider. I consider that Mr McKeefry was entitled to draw support for his own assessment of Mr Ross's medical condition from Mr Sutton's non-referral of Mr Ross for medical attention.

[94] Additionally I find it significant that neither Mr Ross nor Mr Sutton requested medical attention for Mr Ross whilst with Mr McKeefry, and that having left Mr McKeefry's office they went, not to seek medical attention, but to the Police station. Further Mr Ross did not actually visit a doctor until more than 24 hours later on 9 June 2010. I consider that Mr McKeefry was entitled to take these matters into consideration.

[95] Mr McKeefry had studied photographs of Mr Ross obtained from the Police. Mr McKeefry did not consider that these had altered his original observation that Mr Ross had no injuries consistent with a head-butt of the severity claimed by Mr Ross and Mr Sutton. Having studied these photographs and compared them with photographs taken prior to the alleged assault, I find no grounds for concluding that Mr McKeefry's view that the photographs were not conclusive of the alleged injuries was misplaced.

[96] Mr McKeefry said that he had given consideration to the medical certificate, however given the delay in obtaining it and the aspects of self-reporting evident in the medical certificate e.g. "*It was bleeding from the left nostril, now stopped*", he had felt it had limited significance. I find this to be a reasonable conclusion.

[97] I have not found Mr McKeefry to have pre-determined the matter or to have shown bias. I have considered whether Mr McKeefry was influenced, as Mr Ross asserted, by ANZL's desire to maintain an injury-free workplace for a period of twelve months.

[98] Apart from the fact that Mr McKeefry explained that the Injury Management Team is independent of Cargo management, which is a prerequisite of an employer being certified as an Accredited Provider under the ACC legislation, I find no evidence in support of this proposition. Far from minimising the allegation of what, if proven, would amount to serious misconduct on Mr Uepa's part, Mr McKeefry conducted full interviews and verified information obtained.

[99] As regards the Police investigation, this was a separate process to that which ANZL, as Mr Uepa's employer, was obliged to undertake, with separate considerations regarding the standards of proof required. In *Warehouse v Cooper*⁶ Colgan J stated:⁷

It is fundamental employment law that an employer considering allegations of serious misconduct by an employee is not required to conduct a criminal or civil trial or employ a judicial process In all cases where employers investigate allegations of misconduct by employees, they may be said to be judges in their own cause. That is the nature of the employment relationship. The decision maker is not an independent and disinterested third party for whom such rules of natural justice might be appropriate.

[100] The guilty plea entered by Mr Uepa was towards the end of 2010, months after ANZL's investigation had been concluded. The reasons behind Mr Uepa's guilty plea had been made known to Mr McKeefry by Mr Uepa's barrister, but irrespective of these, Mr

⁶ [200] 2 ERNZ 351 at 359

⁷ Ibid at para [31]

McKeefry was entitled to maintain his view of the matter, given that he had interviewed all the witnesses and tested the evidence, whereas a court in the Police case had not.

[101] The outcome of Mr McKeefry's investigation is not for determination; this determination focus is solely on the issue of whether ANZL, as regards the process adopted, acted as a fair and reasonable employer would have acted in all the circumstances at the time the action occurred, that is at the time the investigation into the alleged assault by Mr Uepa took place.

[102] I determine that in all the circumstances at the relevant time, viewed objectively ANZL acted as a fair and reasonable employer, and carried out a fair and reasonable procedure.

Terms and conditions affected to disadvantage

[103] Mr Ross claimed unjustifiable disadvantage arising out of the investigation process. I am unable to ascertain a causative link in the areas of disadvantage to which Mr Ross refers, these being a change in his shift pattern following the investigation, and receiving training to provide a fuller range of his role as a Cargo Airline Clerk.

[104] Mr Ross's shift did change following the investigation, however Mr Ross did not have a contractual entitlement to a certain shift pattern and, in common with the other shift workers at Cargo, his shift pattern did change from time to time. I do not accept therefore that the shift change constituted an unjustifiable disadvantage.

[105] Mr Ross gave evidence at the Investigation Meeting that he enjoyed the aspect of his role known as the "document runner function" which involved him meeting aircraft and retrieving documents. The role of Cargo Airline Clerk encompasses various duties and Mr Ross is required to carry out any or indeed all of these. Mr Ross had a preference for the "document runner function" which gave him significant flexibility of movement compared to the other more truly clerical functions of his job position.

[106] It was decided following the investigation that Mr Ross, following consultation with the management team, be given additional training to up-skill him in the other areas of his role. Such additional training is part of the normal operation of ANZL and designed to improve operational efficiency. Mr Ross objected to the fact that one aspect of his role was therefore reduced in frequency. I find that ANZL was within its entitlements as Mr Ross's employer to require him to undertake additional training from time to time to increase operational efficiency. Mr Ross was not being required to undertake a completely different

role, but to widen the coverage of his duties to all areas of his job responsibilities. I do not accept that a diminishment in the “document runner function” aspect of his role, if it has taken place, constitutes an unjustifiable disadvantage.

[107] Mr Thompson has highlighted that the leading cases in this area are *Wellington Area Health Board v Wellington Hotel IUOW*⁸ and *Victoria University of Wellington v Haddon*⁹. These cases clarify that the section of the Act governing disadvantage grievances is directed at grievances arising out of the employment activity or from the “*on the job situation*”.

[108] The cases identify as relevant the physical environment in which the work is required to be performed, the amenities and facilities available, and the payment to the employee. The issues identified by Mr Ross, being the requirement to change his shift pattern in line with normal practice and his personal preferences in the job duties to be performed, are not encompassed within the conditions of employment being affected to disadvantage as identified in these cases and other cases concerning disadvantage grievances..

[109] I determine that Mr Ross has not suffered unjustifiable disadvantage in respect of the terms and conditions of his employment.

[110] I have determined that Mr Ross has not been unjustifiably disadvantaged by ANZL and that ANZL carried out a fair and reasonable investigation into the allegation of assault against Mr Ross by Mr Uepa. I am unable to assist Mr Ross further.

Costs

[111] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority

⁸ [1992] 2 ERNZ 466

⁹ [1996] 1 ERNZ 139