

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 62
5320148

BETWEEN DAVID SMITH
 Applicant

AND AIR2THERE.COM (2008)
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Barbara Buckett, Counsel for Applicant
 Graeme Gowland, Counsel for Respondent

Investigation Meeting: 28 October 2010 and 28 January 2011 at Wellington

Submissions received: 18 February and 4 March 2011 from Applicant
 25 February 2011 from Respondent

Determination: 26 April 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr David Smith, claims that he has been unjustifiably disadvantaged in his employment in that:

- He has been denied the right to work by the Respondent, Air2there.com (2008) Limited (“Air2there”).
- There has been an unjustified application of his employment provisions in breach of contract and anticipated unjustifiable dismissal.
- Air2there has failed to comply with its obligations to act in good faith, and to be responsive and communicative.

[2] Mr Smith claims that he was unjustifiably dismissed by Air2there.

[3] Air2there deny all of these claims on the part of Mr Smith.

Issues

[4] The issues for determination are:

- Did the suspension of Mr Smith constitute an unjustifiable action by Air2there?
- If deemed to be an unjustifiable action, did it constitute a disadvantage pursuant to s 103(1)(b) of the Employment Relations Act 2000 (“the Act”)
- Was Mr Smith unjustifiably dismissed by Air2there?

Background Facts

[5] Air2there is a charter scheduled airline with bases at Paraparaumu and Blenheim airports.

[6] In 2008 Air2there, a company owned or controlled by Mr Richard Baldwin, Chief Executive Officer, acquired the business www.Air2there.com Limited, and stated that it offered Mr Smith, who was at that time the Operations Manager employed by www.Air2there.com Limited, employment as the Operations Manager/Chief Pilot of Air2there on the same terms and conditions of employment as had previously applied under Mr Smith’s period of employment with www.Air2there.com Limited. The employment commenced in July 2008.

[7] Air2there provided to the Authority a copy of the draft individual employment agreement (“the employment agreement”). The copy of the employment agreement had not been signed by Mr Smith, and Mr Smith denied he had ever been provided with a copy.

[8] Mr Baldwin said that he tried to speak to Mr Smith on 16 August 2010, but was unable to do so as Mr Smith had already left for the day. The following day, 17 August 2010, Mr Baldwin telephoned Mr Smith and asked to meet with him. This meeting took place that same day off site in the 180 Degrees Café.

[9] Mr Baldwin stated that the meeting lasted approximately one and a half hours and that he discussed disciplinary issues with Mr Smith. Mr Smith denied that was the case and said that he was simply handed an envelope containing a letter. The letter was dated 16 August 2010 and outlined an extensive number of concerns which Air2there had with Mr Smith's performance.

[10] The concerns as detailed in the letter of 16 August 2010 were:

- *Failure to respond to many written requests for information. Emails and telephone calls often ignored*
- *Repeated failure to follow company policies*
- *Failure to supply reports.*
- *Failure to act or notify the company of incidents which give rise later to CAA requests for formal reports.*
- *Rude and inconsiderate treatment of subordinate staff and others.*
- *Manipulation of rosters and overtime for personal benefit at the expense of company and co-workers.*
- *Failure to hand over funds entrusted for safekeeping, adding to concern previously expressed about honesty for these issues in the past and the taking of aviation fuel for personal use.*
- *Disregard of safety rules and an attitude giving rise to concern of personal standards of aircraft operation.*

- *Failure to take responsibility for mistakes and denial of events.*
- *Reports from the public about drinking and flying too soon and confidence in denial being undermined by consumption of alcohol working overnights at Blenheim.*
- *Discovery of evidence on recently retired terminal server computer hardware of activities involving pornographic websites and downloading images using company computer equipment in contravention of accepted standards, company policy and general requests to desist.*
- *Fostering a negative culture among flight crew by lack of applied leadership and the undermining of company officers and subordinates.*
- *A lazy, don't care attitude expressed to others and denigrating company officers and staff.*
- *Failure to communicate with company officers.*
- *Mounting concern that a lack of respect for the rules could result in a serious aircraft incident.*

[11] The letter concluded by stating that: “... *there is a loss of trust and confidence by company and regulator in your ability to modify your behaviours and ultimately suitability to occupy the position*”; and notified Mr Smith that he would “*be absented on paid leave and advised against attempts to influence staff*” until a meeting scheduled for 24 August 2010.

[12] Mr Smith said that he had tried to discuss the concerns raised in the letter and his suspension with Mr Baldwin, requesting that he be allowed to return to work immediately. Mr Baldwin acknowledged that Mr Smith had offered to continue working, but went on to say that after consideration Mr Smith had agreed to take leave in order to prepare a response to the matters raised in the letter. Mr Smith denied that he ever agreed to take leave of any description.

[13] On 20 August 2010 Mr Smith, having obtained legal advice, lodged a personal grievance with Air2there by means of a letter from the legal advisor acting on his behalf. The personal grievance claimed unjustifiable actions by the employer causing disadvantage and requested that:

- the disciplinary process be ceased immediately;
- Mr Smith be allowed to return to work,;
- copies of all the information which had been available to Air2there when making the decision to suspend Mr Smith be provided
- the date of the proposed disciplinary meeting be postponed..

[14] Air2there complied with both the request for information and a postponement. However Mr Baldwin explained that he had not agreed to the request that Mr Smith be allowed to return to work for a number of reasons, these being:

- in light of the request for a postponement of the disciplinary meeting date scheduled for 24 August in order that Mr Smith could review all relevant information received from Air2there, Mr Baldwin had been concerned that Mr Smith would have insufficient time to prepare a response for the rearranged meeting if he returned to work.
- Mr Baldwin considered that there were safety issues arising if Air2there allowed Mr Smith, a pilot in whom it was losing confidence, to fly, and.
- Mr Baldwin was concerned about allowing Mr Smith to fly when he (Mr Smith) might be suffering from stress.

[15] Mr Baldwin responded by letter dated 24 August 2010. In the letter Mr Baldwin alluded to “*issues of flight safety*” but provided no details of these, amplified the allegations concerning Mr Smith’s dishonesty, suggested alternative dates for the disciplinary meeting, and confirmed his refusal to consider Mr Smith returning to work prior to the meeting.

[16] Mr Baldwin stated that during the interval between the first (16 August 2010) and second meeting (1 September 2010), Air2there discovered that Mr Smith had failed to complete and return an occurrence report as requested by the Civil Aviation Authority (“CAA”) in a letter addressed to Air2there dated 2 June. The occurrence report was requested following a written complaint made by the Airways Corporation in May alleging airspace infringement and breaches of safety protocols. However Mr Baldwin did not raise this matter with Mr Smith prior to the meeting on 1 September 2010.

[17] The rearranged meeting took place on 1 September 2010. Mr Smith had representation at this meeting. Mr Baldwin was accompanied by Mr John West, a Solicitor and Barrister. Mr Baldwin opened the meeting by providing information on the log on history of pornographic website viewing in the workplace, and on the fact that Air2there had sought police advice concerning the funds which had been entrusted to Mr Smith and which were missing. There was discussion about what had been advised to the CAA concerning the appointment of Mr Simon Wright as Acting Chief Pilot.

[18] Mr Baldwin said that Mr Smith refused to discuss the issues at the meeting, a claim which Mr Smith denied, however at the Investigation Meeting Mr Baldwin accepted that Mr Smith had been responsive at the meeting on 1 September 2010.

[19] During the course of the meeting on 1 September 2010 there had been a short adjournment during which time Mr Smith and his representative contacted the CAA to ask about their knowledge of Mr Wright’s appointment. Mr Smith again requested that he be allowed to return to work, but Mr Baldwin refused the request.

[20] On 2 September 2010, Mr Smith lodged a further personal grievance claim citing unjustifiable actions causing disadvantage and unjustifiable suspension.

[21] Following the 1 September meeting Air2there requested mediation. Mediation took place but the issues were not resolved between the parties.

[22] By letter dated 25 September 2010, Air2there terminated Mr Smith’s employment.

Determination

The Law

[23] Section 103A of the Employment Relations Act 2000 (“the Act”) provides the test to be applied to a dismissal, and as appropriate, to circumstances in which an unjustified disadvantage in employment arises. An employee’s inability to work arising from an employer’s refusal to allow him or her back into the workplace constitutes a disadvantage in that employee’s employment.¹ The question to be applied in the case of dismissal and/or disadvantage is the extent to which the action may be justifiable.

[24] In either cases s 103A sets out the test to be applied, namely whether the employer’s actions, and how the employer acted, determined from an objective basis, were what a fair and reasonable employer would have done in all the circumstances at the time.

Did the suspension of Mr Smith constitute an unjustifiable action by Air2there?

[25] Mr Baldwin claimed that Appendix B in the employment agreement made provision for suspension in cases of serious misconduct stating at clause 4: *“If the offence is sufficiently serious an Employee may be placed on suspension pending an investigation”*.

[26] Mr Smith disputes that there was an employment agreement in place with Air2there and no signed employment agreement was produced to the Authority. Mr Smith agreed that he had been employed under the written terms of an employment agreement with www.Air2there.com Limited at the time of the business being purchased by Air2there and Mr Baldwin stated that the proposed employment agreement with Air2there was virtually identical in respect of terms and conditions to the previous agreement.

[27] However, even if Mr Smith had received a copy of the proposed employment agreement, and he denies he did do so, there is no evidence either that he signed and

¹ *Radio NZ v Snowden* [2003] 1 ERNZ 12

returned it, or that Mr Baldwin made any attempt to ensure a signed copy was in place over the ensuing 2 year period. Nonetheless, Mr Baldwin stated that other employees had been provided with employment agreements at the same time as he had provided a copy to Mr Smith, and these had been signed and returned to him. I find it credible on the basis of the evidence advanced during the Investigation Meeting that Mr Smith was provided with a copy of the proposed employment agreement, which he omitted to return, and in these circumstances accept that Mr Smith did work for Air2there under the terms of an employment agreement which were very similar to those he had previously worked under for www.Air2there.com Limited.

[28] There are several leading judgments which establish the law on justification for suspension. In this case there is some doubt as to whether there was an express contractual term providing Air2there with the power to suspend Mr Smith. I have found it probable that Mr Smith was provided with an employment agreement containing such a term. However under the Disciplinary Procedures section of the employment agreement it states: *Before any substantive disciplinary action is taken, an appropriate investigation is to be undertaken by the employer*".

[29] Moreover, even if accepted that Mr Smith had been working in accordance with the terms and conditions of an employment agreement with Air2there which he had received but failed to sign and return, the Employment Court in *Tawhiwhirangi v Attorney-General in respect of Chief Executive Department of Justice* established that there is nonetheless a requirement to apply the rules of natural justice to a decision involving suspension².

[30] Additionally there is a legislative requirement that that parties to an employment relationship deal with each other in good faith as set out in s4 of the Act:

S4(1A)The duty of good faith in subsection (1)-

(b) requires the parties in an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

² [1993] 2 ERNZ 546

- (c) *without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected-*
- (i) *access to information, relevant to the continuation of the employees' employment; about the decision; and*
- (ii) *an opportunity to comment on the information to their employer before the decision is made.*

[31] Mr Baldwin said that he believed at the meeting held on 17 August 2010 that Mr Smith had agreed to take 'garden leave', thereby avoiding the need for disciplinary action and suspension. Mr Smith denied this was the case and said that at that meeting he had requested to be allowed to return to work, and had continued to do so consistently thereafter. The letter dated 16 August 2010 which clearly suspended Mr Smith was not subsequently amended, and therefore given the lack of further evidence, it is reasonable to conclude that Mr Smith had been suspended with effect from 16 August 2010.

[32] Mr Smith was suspended pending an investigation into potentially serious misconduct that might, and in fact did, have an adverse effect on his continuation of employment. The law is clear that Mr Smith should have been provided with access to pertinent information about the decision to suspend him, and the opportunity to comment on this information prior to the decision to suspend him being made by Air2there.

[33] Mr Smith was informally invited to the meeting on 17 August 2010, he had not had any prior notification of the purpose of the meeting, nor had he been given the opportunity to have a support person present. At the meeting Mr Smith was presented with a letter dated 16 August 2010 which outlined a number of allegations and concluded with: "*In the meantime and until meeting on Tuesday 24th August you will be absented on paid leave and advised against attempts to influence staff*".

[34] I find that with regard to the matter of suspension, Mr Smith was in effect presented with a *fait accompli* on 17 August 2010, the letter dated 16 August 2010 made it quite clear that Mr Smith had been suspended, a decision which had been pre-determined, and Mr Smith had not been provided with any opportunity to comment on

alternatives to suspension. Nor had Air2there followed their own internal disciplinary rules in accordance with the Disciplinary Procedures as outlined in the employment agreement.

[35] The suspension continued notwithstanding the fact that Air2there received the letter of 20 August 2010 requesting that Mr Smith be allowed to return to work. Mr Baldwin said that he had been reluctant to allow this on the basis that he was concerned about safety issues and Mr Smith being unfit to fly an aircraft due to the stress of disciplinary proceedings and what was deemed in submissions to be “*the applicant’s dereliction of responsibilities*”.

[36] Air2there cited *Kereopa v Go Bus Transport Ltd*³ as authority for a submission that safety concerns gave the employer the right to suspend without delay. The letter of 16 August 2010 referred in general and nebulous terms to safety issues, but no specific information to substantiate these claims were advanced at this point.

[37] The second letter from Air2there dated 24 August 2010 raised further issues of honesty and the viewing of pornographic material on Air2there’s computer under Mr Smith’s log-in, but there were no details relating to any safety concerns which Air2there may have had.

[38] Air2there seeks to rely on two main grounds for the suspension: firstly safety issues, including the fact that the allegations themselves might be causing Mr Smith stress, which in turn was a safety issue, and secondly that Mr Smith required time to prepare the response to the allegations..

Safety Issues

[39] As Chief Pilot Mr Smith’s employment was subject to the requirements of his employment relationship with Air2there, and to those of the Civil Aviation Act 1990. Section 13 of the Civil Aviation Act 1990 defines the duties of a Pilot in Command as:

³ [2010] ELB 2

The pilot-in-command of an aircraft shall-

- (a) be responsible for the safe operation of the aircraft in flight, the safety and wellbeing of all passengers and crew, and the safety of cargo carried, and*
- (b) have final authority to control the aircraft while in command, and for the maintenance of discipline by all persons on board, and*
- (c) subject to section 13A of this Act, be responsible for compliance with all relevant requirements of this Act and regulations and rules made under this Act.*

2008 Incident

[40] Mr Baldwin gave evidence in relation to Mr Smith having been stood down in 2008 from Instrument Flight Rules duties on the instructions of the CAA. The incident giving rise to this situation involved Mr Smith having on 14 December 2007 flown beneath the glide slope at Wellington International Airport. Mr Smith disputed that he had been stood down but agreed that following the incident he had had to fly with another pilot until he had retrained.

[41] It is relevant that this situation occurred prior to Mr Smith commencing employment with Air2there and that Mr Smith had undertaken retraining which, as Mr Baldwin explained, had been financed by Air2there.

[42] In *Ashton v Shoreline Hotel*⁴ the Employment Court commented that:

Disciplinary action in reliance in whole or in part on the employee's historical misconduct will not ordinarily be open to an employer who, with knowledge of that misconduct, has chosen to overlook it or not to inquire further into it.

[43] I find that Air2there employed Mr Smith as Chief Pilot with full knowledge of this incident, which had taken place during the period when Mr Baldwin was employed as manager of Air2there, and cannot now rely on it to justify a suspension some two years later.

9 April 2010 Incident

[44] On 9 April 2010 Mr Baldwin said there had been an incident regarding a power-up and taxi away before the start cart could get clear. Mr Baldwin had emailed

⁴ [1994] 1 ERNZ 421

Mr Smith the same day and asked for an explanation. Mr Smith stated that he had discussed the incident with Mr Baldwin and believed it had been resolved, moreover that it was the Chief Pilot's decision when to taxi away. Mr Smith said he had not believed there had been any safety issues involved.

[45] This incident took place on 9 April 2010 and there is no evidence in the months after 9 April 2010 until the disciplinary action commenced in August 2010 to indicate that Mr Baldwin considered this matter to be an unresolved safety issue.

2 May 2010 Incident

[46] The next incident on which Air2there sought to rely occurred on 2 May 2010 and was in relation to a low flying manoeuvre. The CAA investigation carried out by Mr Woods, CAA Occurrence Investigator, and which involved an interview with Mr Smith, resulted in a finding that there had been a breach of, and non-compliance with, CAA Rule 91.311 Minimum heights for VFR flights. Mr Smith stated that this was not a safety issue.

[47] Mr Baldwin emailed Mr Smith on 19 May 2010 asking Mr Smith for an explanation by 28 May 2010. Attached was a copy of Mr Wood's report. Mr Smith did not provide a response by 28 May 2010.

[48] Air2there deducted \$180 from Mr Smith's salary without his agreement to cover the cost of the investigation, other than this there was no further action taken by Air2there, no reminders to Mr Smith that an email response was still required, and there was no disciplinary action taken against Mr Smith.

[49] Following this incident, Mr Baldwin sent an email to Mr Smith notifying him that CAA engineers had concerns about strain caused to the airframe in the pull up over Masterton aerodrome which required that the aircraft be inspected by engineers for stress damage. There is no evidence that the aircraft had suffered any strain and Air2there took no further action in the matter.

19 May 2010

[50] There was an airspace incident on 19 May 2010 in relation to which the CAA requested an occurrence report on 2 June 2010. This request was passed by Air2there

to Mr Smith for immediate action but he failed to lodge the CA005 Incident Report (“the Report”) with the CAA at that time. In fact the Report was not lodged with the CAA until 29 November 2010. Mr Halliburton, Safety Data Registrar of the CAA, said at the Investigation Meeting that late lodgement was acceptable to the CAA, his main concern having been to obtain the information.

[51] Mr Baldwin said he had not been aware that the Report had not been lodged until he was notified of this by Mr Halliburton, Safety Date Registrar of the CAA, on 16 September 2010.

[52] Mr Baldwin had not followed up the CAA request for the Report after 2 June 2010, and there was no disciplinary action taken against Mr Smith

21 May and 8 June 2010 Incidents

[53] On 8 June 2010 Mr Baldwin said that Air2there had received a written complaint from the Paraparaumu airport manager concerning Mr Smith landing short at the aerodrome at 2.45 p.m. on 21 May 2010 and again at 9.30 a.m. on 8 June 2010. Mr Baldwin had passed the complaint to Mr Smith requesting an explanation.

[54] Mr Smith said that he had discussed the matter with Mr Baldwin and had considered the matter closed, although there is no supporting documentation. There is no evidence that Mr Baldwin followed up the non-submission of an explanation, and there was no disciplinary action taken against Mr Smith at that time.

Subsisting Safety Issues at 17 August 2010

[55] The last of these incidents had taken place on 8 June 2010, there had been no reference to any one of them after this time until Mr Smith was given the letter on 17 August 2010. Mr Smith was unaware during the intervening period that Mr Baldwin had any concerns about his performance as Chief Pilot in connection with safety issues.

[56] I do not find that there were subsisting safety issues at the time Mr Smith was suspended, such as to justify the suspension.

Stress as a Safety Issue

[57] Mr Baldwin had relied in part on the fact that being subject to disciplinary proceedings was stressful for Mr Smith, and as Mr Smith was Chief Pilot, passenger safety could be compromised.

[58] I do not accept this reason as a justification for Mr Smith's suspension. Disciplinary proceedings are by their very nature inherently stressful but there is no evidence that Mr Smith was unacceptably stressed by these proceedings. On the contrary there is evidence that he was concerned that he was not being allowed to attend work in the situation in which it was important, given his vocation, that he maintained his skills.

Requirement for Sufficient Time to Prepare a Response

[59] Mr Baldwin said he believed Mr Smith required additional time to prepare a response to the disciplinary allegations given the request on 20 August 2010 for a postponement of the disciplinary meeting.

[60] A request for a postponement of a disciplinary meeting does not support a decision to suspend an employee.

[61] I determine that a fair and reasonable employer would not have suspended Mr Smith.

If deemed to be an unjustifiable action, did it constitute a disadvantage pursuant to s 103(1)(b) of the Act?

[62] Having determined that a fair and reasonable employer would not have suspended Mr Smith, it follows that the act of suspension is an unjustifiable action. As such it constitutes a disadvantage pursuant to s 103A of the Act.

[63] I determine that Mr Smith was unjustifiably disadvantaged in his employment as a result of the suspension.

Was Mr Smith unjustifiably dismissed by Air2there?

Historical Issues

[64] Apart from safety issues, there had been a number of other concerns raised by Air2there in the letter dated 16 August 2010. Many of these were historical in nature and there was no evidence that these had been raised as disciplinary issues at the time they had arisen or within a reasonable time thereafter.

[65] Ms Andrea Palmer, Air2there Office Manager, gave evidence of cash handling and other issues she had had with Mr Smith. Examples of these matters included:

- Accessing of pornographic websites: this related to a complaint raised anonymously with Ms Palmer on or about January or February 2010 by a member of Ground Crew, namely that Mr Smith had been viewing pornographic websites
 - When the issue had been raised with him, Mr Smith had denied the complaint and explained that other members of the flight crew had his log on password. Mr Baldwin subsequently held a meeting with all the pilots and outlined his expectations. There was no disciplinary or further action taken by Air2there against Mr Smith.
- Reports from the public about Mr Smith drinking and flying too soon after consuming alcohol
 - These reports were unsubstantiated and not date specified, not discussed with Mr Smith and there were no alcohol/blood tests done. No disciplinary or further action was taken by Air2there against Mr Smith.
- Allegations that Mr Smith had been stealing petrol
 - Mr Baldwin said that this issue arose in 2008, and in July 2009 he had asked Mr Smith had he been taking petrol for his own private vehicle use. Mr Smith had denied that he had been doing so and Mr Baldwin agreed that there had been no proof. The matter had not been raised after that time until raised in the letter of 16 August 2010.

- Rude and insubordinate treatment of others, fostering a negative attitude, a lazy, don't care attitude
- These concerns were subjective in nature and unsupported by evidence apart from that of Ms Palmer. However Ms Palmer admitted at the Investigation Meeting that following a complaint from Mr Smith about her attitude towards him, she had written to Mr Baldwin as she considered her behaviour to have been unprofessional.

[66] I find that a fair and reasonable employer would have not have raised these issues months after the time they occurred. Mr Smith's evidence was that he had provided explanations when requested to do so and had considered them closed. I consider that he was entitled to do so. There is a point at which the employee is entitled, in the situation in which there has been no further action or indications from the employer that the issue has not been resolved, to believe it has been resolved. In such a situation the employer is estopped from using these issues to support later disciplinary action.⁵

Misappropriation of monies

[67] The letter which terminated Mr Smith's employment dated 25 September 2010 cited the principle reasons for the dismissal of Mr Smith as:

...serious misconduct and in particular failure to account for money received on 24th March, disregard of acceptable standards of professionalism, failure to report on matters of safety, failure to discharge duties appropriate to the role of chief pilot, repeated failure to adhere to CAA rules and failure to supply explanations when requested, complete loss of confidence in your ability to perform in the role of Chief Pilot.

[68] The failure to account for money received by Mr Smith on 24 March 2010 was pertinent to the decision to dismiss. Ms Palmer stated that she had sent a \$100 petty cash float to the ground crew in Nelson. On 24 March 2010 the ground crew accepted a customer's payment of \$100 and gave the customer change of \$17.00. The money

⁵ *Ashton v Shoreline Hotel*[1994] 1 ERNZ 421

was handed to Mr Smith to be handed in to the company, but Ms Palmer said that Mr Smith had not handed it over to her. Ms Palmer said she had raised the matter with Mr Baldwin.

[69] Mr Smith said that he had told the reservation clerk at the time that the money had blown out of his pocket, he had offered to pay it back and that he had assumed Mr Baldwin would deduct it from his salary as had happened in the past. Mr Baldwin had not discussed the issue with Mr Smith and there had been no reference to it until Mr Smith received the letter of 16 August 2010.

[70] I find that a fair and reasonable employer would not have relied on this incident as a justification for dismissal when there had been no formal investigation at the time when the incident occurred and there had been no disciplinary outcome.

Safety Issues

[71] The other reasons for dismissing Mr Smith focus on safety issues. Judge Travis in *Fuiava v Air New Zealand Limited*⁶ observed:

Issues of safety may therefore be critical, as they are in this case, in considering whether the actions taken by the employer are those that would have been taken by a fair and reasonable employer in all the circumstances.

[72] Whilst safety issues may be critical, I find that there were no substantiated issues relating to safety outstanding at the time Mr Smith was dismissed.

Disregard for acceptable Standards of Professionalism

[73] There was some evidence presented to support this ground for dismissal. Mr Smith himself conceded that he was tardy in completing the paperwork expected of him, which included requests for comments and reports on issues raised by the CAA. However of itself, this does not constitute substantive justification for dismissal in circumstances in which Mr Smith had not been taken to task on the issue prior to the suspension meeting on 17 August 2010.

⁶ [2006] ERNZ 806

Procedural Justification

[74] I find that in dismissing Mr Smith, Air2there did not adhere to the basic requirements of procedural fairness, specifically:

- a. Mr Smith had not been provided with a job description nor provided with an outline of his employer's expectations, albeit that he had been employed under what amounted to the same terms and conditions as with www.Air2there.com Limited. Mr Smith had not had performance reviews. More significantly, Mr Smith had not been advised that his performance as Chief Pilot was unsatisfactory and his job potentially insecure prior to 16 August 2010.
- b. Mr Smith was not provided with prior notice that he might be suspended at the meeting on 17 August 2010, he was not provided with the opportunity either to have a representative present, nor given the opportunity to deflect the decision to suspend him.
- c. Mr Smith was not provided with a real opportunity to provide an explanation to refute the allegations; and
- d. There was no unbiased consideration of alternative options to dismissal.

[75] I find that Air2there departed so far from the basic requirements of procedural fairness as to render the dismissal of Mr Smith an unjustifiable dismissal.

Remedies

[76] I find that Air2there did not comply with either the basic tenets of natural justice or with the statutory good faith obligations. On an objective basis, the decision by Air2there to dismiss Mr Smith was not a decision an employer acting fairly and reasonably would have made in all the circumstances. Mr Smith has been unjustifiably dismissed and is entitled to remedies.

Reinstatement

[77] Mr Smith is seeking reinstatement to his former position. The primary remedy is reinstatement. Section 125 of the Act provides for reinstatement to be ordered, wherever practicable.

[78] Mr Baldwin in suspending and dismissing Mr Smith cited a loss of trust and confidence in him. While I have found that Mr Smith was unjustifiably dismissed, nevertheless I do find that there are some grounds justifying Mr Baldwin's lack of confidence in his Chief Pilot, as exemplified by the non-provision of an explanation requested by Mr Baldwin following the CAA investigation after the 2 May 2010 incident, and the failure to lodge in a timely manner the CA005 Incident Report requested by the CAA after the 19 May 2010 incident.

[79] Mr Smith was the Chief Pilot of Air2there, with such a position comes a heightened degree of responsibility. Mr Smith was required pursuant to the Civil Aviation Act 1990 to comply with all the relevant requirements of the Act. By not filing in a timely manner the CA005 Incident report Mr Smith, and Air2there, were in breach of compliance. Under s 13 (c) of the Civil Aviation Act 1990, compliance was the responsibility of Mr Smith as the pilot-in-command.

[80] Whilst the CAA accepted the late lodgement of the report and while Air2there did not raise these failures in communication as a performance issue with Mr Smith until some time after the fact, I find that Mr Smith's omissions to produce the responses, explanations and requested reports increased the sense of frustration felt by Mr Baldwin and reduced the degree of trust and confidence he felt he could have in Mr Smith as Chief Pilot. In these circumstances, I do not find reinstatement to be practicable.

Reimbursement of Lost Wages

[81] Mr Smith is to be reimbursed for lost earnings for a period of 3 months, pursuant to s 128 (2) of the Employment Relations Act 2000, with deductions for any monies earned by Mr Smith in the way of paid employment and/or unemployment benefit received during that period. I note that the question of quantum has yet to be resolved but I anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[82] Mr Smith is also entitled to compensation for humiliation and distress. I find that in respect of both matters giving rise to a personal grievance, these being the disadvantage grievance and the dismissal grievance, Mr Smith has experienced humiliation, loss of dignity and injury to feelings. Mr Smith also stated that there has been an adverse impact on his health, although this is unsupported by medical evidence.

[83] I further accept that Mr Smith has suffered damage to his professional reputation as a pilot.

[84] In respect of the disadvantage and dismissal grievances, Air2there is to pay Mr Smith the sum of \$12,000, pursuant to s 123(1) (c) (i).

Contribution

[85] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[86] Mr Smith by his own admission was tardy in supplying reports and responding to emails, stating at the Investigation Meeting:” *I’m slack in responding to emails*”. There were several occasions on which Mr Smith was asked to take action, but failed to do so, in particular:

- Low flying manoeuvre: on 2 May 2010: Mr Baldwin asked Mr Smith to provide an explanation by 28 May 2010 but there is no documentary evidence that Mr Smith did so.
- Occurrence Report in relation to the airspace infringement incident on 19 May 2010: Mr Smith was asked on 2 June 2010 to immediately provide a CA005 Incident report to the CAA, but this was not lodged until after 20 September 2010 and not received by the CAA until 29 November 2010.

- Landing short incidents on 21 May and 8 June 2010: Mr Baldwin passed the complaint to Mr Smith for an explanation but although Mr Smith says he discussed this matter with Mr Baldwin, Mr Baldwin disputes this and there is no documentary evidence to support Mr Smith's contention.

[87] I find contributory fault on the part of Mr Smith and reduce the figures awarded in respect of the compensation for hurt and humiliation by 30 %.

Costs

Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The respondent 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