New Zealand Employment Relations Authority Decisions

Stevens v Air New Zealand Limited [2011] NZERA 10; [2011] NZERA Auckland 8 (11 January 2011)

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Last Updated: 4 February 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 8 5279160

BETWEEN BRIGIT STEVENS
Applicant

AND AIR NEW ZEALAND LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Lisa Keys for Applicant
Kevin Thompson for Respondent

Investigation Meeting: 23 September 2010

Submissions Received: 8 and 22 October 2010 for Applicant
15 October from Respondent

Determination: 11 January 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Brigit Stevens was made redundant from Air New Zealand Limited (Air NZ) in May 2009. She lodged a statement of problem in the Authority on 3 September 2009. The parties attempted to resolve the matter between them but were unable to and a directions conference was held on 30 April 2010 where I sought clarification as to the claims needing investigation by the Authority.

[2] It was pointed out to Ms Keys that the statement of problem did not allege a personal grievance of a type contemplated by section 103 of the Employment Relations Act ("the Act"). During the conference call it was agreed that Ms Stevens would lodge an amended statement of problem in the Authority, which she did.

[3] The amended statement of problem sets out six causes of action which are:

- alleged contractual breaches of clauses 19.3.2 and 19.3.5 of the applicable collective employment agreement. Ms Stevens says she should not have been entered into a selection process for redundancy which had a starting point of "last on first off";
- alleged breach of clause 19.3.3 of the collective employment agreement regarding the misapplication of the "skills and experience" criteria in selecting Ms Stevens for redundancy;
- Ms Stevens claims the excelerator score was incorrectly calculated and not applied in a consistent, fair and transparent manner;
- alleged breach of the statutory duty of good faith during the time Ms Stevens transferred from London to the Auckland base and/or during the consultation stage of the redundancy process;
- alleged representation falling within the ambit of section 6 of the Contractual Remedies Act 1979 (CRA); and
- Air NZ is estopped from making a decision to dismiss because:

o There was an unambiguous representation by one party to another; o The applicant relied on that promise to such an extent that it would be unconscionable to allow the company to resile from that promise; and o Applicant has suffered detriment.

[4] Air New Zealand denies Ms Stevens' claims and in an email to the Authority on 22 September 2010, Air NZ raised concerns that other than the claim for breach of good faith, the claims specified in the amended statement of problem sought to challenge Ms Stevens dismissal without claiming a personal grievance.

[5] Air NZ referred the Authority to section 113 of the Act which states that the only way to challenge a dismissal or any part of it can only be done by way of a claim of personal grievance.

[6] In her closing submissions Ms Keys, on behalf of the applicant, acknowledged that the claims set out in the original and amended statements of problem were not sustainable. Ms Keys requested the Authority to consider only one claim, that there had been a breach of good faith by Air NZ.

[7] In her submissions Ms Key reminds the Authority that section 160(3) allows the Authority to concentrate on resolving the employment relationship problem, however described, and is not bound to treat a matter as being a matter of the type described by the parties.

[8] Ms Keys seems to be asking the Authority to ignore the causes of action pleaded in the statement of problem and instead investigate and determine two personal grievances, one for unjustified disadvantage and the other for unjustified dismissal.

[9] The deficiencies with the original statement of problem were raised with both parties at the conference call in April. Ms Keys was directed to lodge an amended statement of problem to deal with the deficiencies. As with the first statement of problem, the amended statement of problem does not specify a personal grievance.

[10] Section 160(3) does not operate to rectify fundamental errors in pleadings, but rather, allows the Authority the discretion to find an alternative grievance to that which is stated. By way of example the Court has been known to find that a personal grievance is a disadvantage grievance rather than an unjustified dismissal grievance, but a personal grievance none the less.

[11] The only live claim is the claim for breach of Air NZ's statutory duty of good faith. This claim cannot be used as a vehicle to challenge the dismissal or any aspect of it because that is prohibited by section 113.

[12] The issue for determination therefore, is whether Air NZ complied with its statutory obligations of good faith, when Ms

Stevens moved from London to Auckland and/or made Ms Stevens redundant.

Background

[13] Ms Stevens was employed by Air NZ from 1998 to 2005 when she left New Zealand and travelled to London. Ms Stevens was the holder of dual passports, a New Zealand passport and an Irish passport.

[14] From October to December 2005 Ms Stevens worked for Air NZ at its Heathrow base. She then rejoined Air NZ, while still in London, in September 2007 as a Flight Attendant. Ms Stevens was keen to return to New Zealand and applied for an Auckland based position with Air NZ in 2008.

[15] In April 2008 Ms Stevens travelled to New Zealand and was interviewed by Ms Marnie Saywell, Flight Service Manager, for an initial interview. Ms Saywell attempted to arrange for a second interview while Ms Stevens was in NZ but was unsuccessful. On her return to London Ms Stevens was advised by email that the

Senior Manager of Human Resources, Ms McManus, wanted to run a reference check. Ms Stevens supplied the names and contact details of two referees. These people were contacted immediately.

[16] On 14 May Ms Stevens was called to a second interview with her London Performance and Development Manager, Mr Tim Kitching. Mr Kitching advised Ms Stevens that she had the job and that his input was simply paperwork.

[17] On 15 May Mr Alan Gaskin, General Manager International Cabin Crew sent Ms Stevens a formal offer of employment for the permanent position of long haul flight attendant commencing on 28 August 2008. This offer was accepted by Ms Stevens who then resigned from her position in London and returned to Auckland to commence her new employment. Ms Stevens began her Auckland induction training on 1 September 2008.

[18] Natural attrition in the flight attendant role for Air NZ usually runs at about 100 per year. As at June 2008 Air NZ employed 1039 flight attendants. International travel had increased by 9%. Projections for total crew numbers, based on expected flight schedules, indicated that by May 2009 Air NZ would require 1,011 flight attendants. Taking into account the attrition rate, Air NZ was actively employing more flight attendants to ensure it had appropriate crew numbers to deal with expected flight schedules.

[19] What hadn't been predicted by Air NZ was the rapid onset of the global financial crisis. Attrition dropped overnight to close to 0. The impact on international travel was also high with a significant deterioration in forward bookings. From predicting growth of 9%, Air NZ was faced with predicting a reduction of 11%.

[20] By November 2008 Air NZ recognised that, rather than too few flight attendants, it may have surplus capacity. Air NZ entered into discussions with FARSA. It was agreed with the union that there was to be a reduction of 100 flight attendants. FARSA and Air NZ developed criteria for redundancy and it was agreed that as far as possible the 100 surplus employees would be made up out of volunteers in the first instance.

[21] Applications for voluntary redundancy closed on 24 December 2008. Air NZ accepted 61 applications for voluntary redundancy which left a further 39 positions which would be subject to a mandatory redundancy process.

[22] On 19 January 2009 Ms Stevens was advised that she was provisionally affected by redundancy because:

- her employment with the Auckland operation had commenced on 28

August 2008; and

- her excelerater score was 3.29 which was 0.06 below the cut off point of

3.35.

Agreed selection for redundancy

[23] FARSA and Air NZ agreed on the following criteria against which flight attendants would be selected for redundancy:

- excelerator scores - recorded by Flight Service Managers for flight attendants on Tours of Duty. The Excelerator cut off score for non language speakers was determined as 3.35; and
- service - this was applied reflecting a "last on first off" criteria.

[24] The Excelerator system is described as an "Inflight Performance Management and Feedback System". Every flight

attendant is marked from 1-5 on each flight in 4 areas. These are:

- finance;
- leadership;
- performance - customer; and
- performance - operational

[25] FARSA and Air NZ agreed that only those scores attained while employed at the Auckland base would be used for all flight attendants. Air NZ says Ms Stevens had access to the excelerator scores and could check them.

Alleged breach of good faith

[26] Ms Stevens claims Air NZ breached its statutory duty of good faith during the time that she moved to the Auckland base and/or during the consultation stage of the redundancy process.

[27] The relevant statutory obligation of good faith is set out at section 4 of the Act and states:

(1) The parties to an employment relationship specified in subsection (2) —

(a) must deal with each other in good faith; and
(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything

(i) to mislead or deceive each other; or
(ii) that is likely to mislead or deceive each other. (1A) The duty of good faith in subsection (1) —

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to 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
(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.

(4) The duty of good faith in subsection (1) applies to the following matters:

(a) bargaining for a collective agreement or for a variation of a collective agreement, including matters relating to the initiation of the bargaining:
(b) any matter arising under or in relation to a collective agreement while the agreement is in force:

(u) bargaining for an individual employment agreement or for a variation of an individual employment agreement:
(v) any matter arising under or in relation to an individual employment agreement while the agreement is in force:

(c) consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees' collective employment interests, including the effect on employees of changes to the employer's business:
(d) a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business:
(e) making employees redundant:
(f) access to a workplace by a representative of a union:

(g) communications or contacts between a union and an employer relating to any secret ballots held for the purposes of bargaining for a collective agreement.

Ms Stevens move to the Auckland Base

[28] Ms Stevens says she was offered and accepted a permanent position at the Auckland base. She says that Air NZ must have known in May 2008 when it offered her the position that it would be facing possible redundancies within 2 months of her taking up her position.

[29] Ms Stevens points to information provided by Air NZ in June 2008 that it was cancelling courses to show that Air NZ was aware that things were not looking good and must have known that redundancies would be imminent.

[30] Mr Alan Gaskin's evidence on this point was equivocal. What is clear though, is that staff were advised through Air NZ's internal newsletter that all future intakes of long-haul cabin crew had been cancelled due to schedule changes. Air NZ also highlighted other issues affecting the industry at the same time including that Air Canada was looking to cut 2000 jobs and visitor arrivals to New Zealand were declining; that Air NZ had missed a tender for a charter series; and lower demand for services due to the fuel increases.

[31] Ms Stevens says all of that information, which was readily available in June means Air NZ was aware that redundancies would be necessary in the future. I am satisfied that Air NZ had cancelled the intake courses but was still relying on the expected natural attrition to balance the staff numbers. In June, the global financial crisis had not been predicted or contemplated.

[32] I am satisfied that the impact of the global financial crisis and the dramatic drop in attrition were not known and could not have been predicted at the time Ms Stevens was entering into her employment agreement to commence work at the Auckland base. Ms Stevens was offered and accepted her new position in May 2008. The information about what was happening in the industry was not known until June and even then, Air NZ had a reasonable belief it could manage the staffing numbers through natural attrition. When Ms Stevens left London in August and moved back to New Zealand, Air NZ did not know about the financial crisis about to hit and certainly was unaware of the impact that would have on the organisation.

[33] I find Air NZ did not breach its obligations of good faith when it offered Ms Stevens a position in Auckland

Access to information

[34] Ms Stevens complaint under this heading relates to her access to excelerator scores. Ms Stevens says she was unable to access the individual scores through the Air NZ intranet and that this was a breach of good faith on the part of Air NZ. On 20 January 2009 Ms Stevens advised Air NZ that she had been unable to access the scores.

[35] The use of excelerator scores as part of the criteria for identifying those who would be made redundant was an agreement between Air NZ and FARSA. Ms Stevens was at all times a member of this union and FARSA acted as Ms Stevens representative throughout the redundancy process.

[36] The excelerator scores were used to measure skill and experience and was an important aspect of the criteria for selecting those who would be confirmed as redundant.

[37] Ms Stevens alerted Air NZ to the fact that she could not access the scores in her letter of 20 January 2009, but when she met with Air NZ representatives as part of the consultation process on 21 January 2009, her scores were discussed and no issues regarding access were raised by her. Indeed the discussion centered around Ms Stevens attempts to persuade Air NZ of her value to the company, which is not contested by Air NZ, and the relative positioning of Ms Stevens on the list of employees to be selected for redundancy.

[38] I am satisfied Ms Stevens was provided with access to her excelerator scores during the process leading up to the notification that she was to be selected for redundancy. Ms Stevens, in her letter dated 20 January, disputed that her scores should be as low as advised to her given the feedback she had received from her flight service managers. This was not pursued by her in the meeting the following day when she met with Ms Kitchener as part of the consultation process.

[39] I accept Ms Stevens written evidence that while she found it necessary to make a number of phone calls to have access to her excelerator scores, she did get that access and was able to view her scores on line.

[40] I find Air NZ has not breached its statutory obligations of good faith in its process and decision to make Ms Stevens redundant.

General comments

[41] For the sake of completeness I have considered what the possible outcome of Ms Stevens claim would have been, had the

statements of problem actually raised a personal grievance. Having investigated the employment relationship problems raised by Ms Stevens, including a thorough investigation into the termination of her employment, I am satisfied Ms Stevens termination would not have been unjustified.

[42] The redundancy situation facing Air NZ was for genuine commercial reasons. The process it embarked upon was a process which an employer acting fairly and reasonably would have undertaken.

[43] The union was involved at a very early stage and agreements reached on the process and the criteria to be used. Ms Stevens was represented by the union at all steps of the process and was consulted individually once it became apparent that she would be personally affected by the redundancy process.

[44] Ms Stevens was provided with relevant information, and while she did not receive individual responses to her feedback, Air NZ did provide feedback to all affected staff through its regular updates and Q & A sheets. The Q & A sheets included many of the questions raised by Ms Stevens with the corresponding answers.

[45] Air NZ provided external facilitators who conducted a series of outplacement workshops including Career Assistance, CV Preparation, Approaching the Market and Interview skills. These workshops were conducted during Ms Stevens notice period.

[46] Air NZ also provided Ms Stevens with regular updates as to vacancies within the organisation for which Ms Stevens could apply. These vacancies were published to all staff affected by the redundancies. Ms Stevens turned down, at the last minute, an opportunity for training with Air Nelson on the basis that she did not have a confirmed start date after the training. I am satisfied, on the balance of probabilities, that it is more likely or not that had Ms Stevens undertaken the training she would have gone on to secure employment with Air Nelson.

[47] Redundancy is a difficult situation caused not by the employee, but usually by the business environment. In most situations, redundancies will arise out of circumstances which are out of the control of either party. Situations requiring the loss of jobs can, as in this case, happen very suddenly and without any prior indication. I am satisfied that in this case, Air NZ fairly attempted to balance the individual interests of 36 of its international air crew, all of whom faced the prospect of being unemployed. Unfortunately for Ms Stevens she was one of those 36.

Costs

[48] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, Air NZ may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Ms Stevens 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.

[49] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around $3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Vicki Campbell
Member of Employment Relations Authority