Determination Number: AA 460/05
File Number: AEA 799/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Shane Waldron (Applicant)
AND	Air New Zealand Limited (Respondent)
REPRESENTATIVES	Andrew Flexman, Counsel for Applicant Andrew Caisley, Counsel for Respondent
MEMBER OF AUTHORITY	R A Monaghan
INVESTIGATION MEETING	4 November 2005
SUBMISSIONS RECEIVED	14, 18 and 29 November 2005
DATE OF DETERMINATION	1 December 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Air New Zealand Limited ("Air New Zealand") employed Shane Waldron as an aircraft engineer in its line maintenance section, to carry out routine maintenance of aircraft at the domestic terminal at Auckland International Airport. In that capacity Mr Waldron worked on aircraft operated by Jet Connect, a subsidiary of Qantas and a client of Air New Zealand's as far as the provision of engineering services was concerned.

[2] Mr Waldron was dismissed because of a text message he sent to a Jet Connect employee. Air New Zealand considered the message amounted to a threat to airline safety and security. Mr Waldron says the dismissal was unjustified and seeks reinstatement.

[3] Mr Waldron has also raised a personal grievance in that his employment was affected to his disadvantage by an unjustifiable act of the employer. The act in question was Air New Zealand's suspension of his employment while it investigated the threat.

The text message

[4] The Jet Connect employee was a member of the cabin crew, and a former girlfriend of Mr Waldron's. Mr Waldron had been under the impression there was a chance the relationship would resume. His being informed that was not going to happen, and an associated disagreement with the young woman concerned, led to his sending the message. It was sent on or about the night of 17 February 2005 and read:

> "U used me, played on me, had no respect 4me, knife me in my back, called me a nasty engineer. I remember these things when signing your aircraft of. I knew u. The Melbourne thing was full of shit, 2nd stand up. I c why u have enemies and few friends. U hv had your laugh. I hope I have one 2. U were nasty to me. Goodbye …"

[5] The young woman referred the message to Jet Connect, which in turn, so Air New Zealand believed at the time, referred it to the Police at Auckland Airport. It later transpired the employee had approached the Police herself, on advice from her employer.

[6] The constable on duty contacted Air New Zealand. The Duty Co-ordinator at the time, David Westcott took the call. In turn, on the evening of 19 February 2005, Mr Westcott contacted the Manager Line Maintenance Airport Services, Greg Fowler. Mr Westcott told Mr Fowler there had been a complaint about a text message Mr Waldron had sent to his former girlfriend, that the complaint was safety-related and that it contained an implied threat to Jet Connect's operations. Mr Westcott did not provide the content of the message.

[7] Mr Fowler took the information very seriously, making a number of phone calls including one to the duty constable at the airport. According to his evidence he was told there had been 'a domestic' and Mr Waldron had sent a text message, that Jet Connect had approached the Police with a formal complaint of an implied threat, and that Qantas intended contacting Air New Zealand to say Mr Waldron was not to go near its aircraft. Further to the last of these, there was no direct evidence Qantas had such an intention, and it made no such contact. Mr Fowler was also told the Police wished to speak to Mr Waldron, so he telephoned Mr Waldron to advise him of that.

[8] Mr Waldron duly contacted the Police and an interview date was arranged for the following Wednesday, 23 February. The meeting was subsequently postponed and Mr Waldron gave his explanation by telephone in early March. Eventually, by letter dated 27 April 2005, the Police issued Mr Waldron with a warning.

[9] Returning to the events of 19 February, Mr Waldron telephoned Mr Fowler to advise the date of the meeting with the Police, and to query why Air New Zealand had a concern since the matter arose from a domestic break-up. He even said he had contemplated suicide as a result of the break-up, in response to which Mr Fowler provided him with contact details for the company's Employee Assistance Programme. By then Mr Fowler was still unaware of the content of the text message.

The suspension

[10] During one of the conversations with Mr Waldron on 19 February, Mr Fowler told Mr Waldron he was being stood down on full pay pending an investigation. For safety reasons, he wished to investigate whether Mr Waldron was a fit and proper person to work on aircraft line maintenance.

[11] A grievance has been raised in respect of the suspension on the ground that it was presented to Mr Waldron as a fait accompli, and he was not given an opportunity to comment on it. This was said to be contrary to the company's disciplinary policy, which reads:

> "Following or during an investigation, if the Manager believes that it would be wiser for the employee not to remain at work, the employee may be suspended on pay. The employee must be told that suspension is being contemplated and the reasons for this, and given an opportunity to comment prior to any decision being made. The employee's responses should be taken into account."

[12] Mr Fowler's evidence was that he explained to Mr Waldron that "company policy would be to stand him down on full pay pending the outcome of the investigation. Shane did not make any comment to me about this." I do not accept that exchange was enough to provide Mr Waldron with an opportunity to be heard on the matter, or that Mr Waldron failed to take the opportunity. I agree the suspension was in reality a fait accompli, especially as Mr Fowler had already taken steps to ensure Mr Waldron could not access safety-sensitive areas.

[13] When giving evidence, Mr Fowler seemed to believe the policy did not apply if the investigation had not commenced. In an employment law sense at best it was dangerous for Mr Fowler to impose a suspension without first giving Mr Waldron an opportunity to be heard on the matter, and at worst a breach of the policy. However I take into account that, as Chief Judge Colgan pointed out in **Graham v Airways Corporation of New Zealand Limited** (AC 40/05, 14 July 2005), imminent danger to an employee or others, or an inability to perform safety-sensitive work, are examples of circumstances when it might not be appropriate to delay a suspension in order to give an employee an opportunity to be heard. I conclude that, in general, if circumstances of that kind led to an immediate decision to suspend even in the face of a policy such as Air New Zealand's, the decision could nevertheless be justifiable.

[14] There was enough in the information Mr Fowler had at the time to support a conclusion that it would not be appropriate to delay a suspension. A possible threat to airline safety and security had been reported to the Police. Air New Zealand was entitled to take that matter very seriously. The matter required investigation, and it was appropriate to suspend Mr Waldron while more information was obtained. I therefore find the suspension was justified.

The meeting of 24 February 2005

1. Notice of the meeting

[15] A member of Air New Zealand's human resources staff arranged a meeting of the parties for 24 February 2005. Mr Waldron did not receive notice of the meeting until 23 February. He was in Christchurch at the time, and had instructed a Christchurch-based solicitor. The meeting was to be held in Auckland.

[16] Mr Fowler was apparently unaware there was a delay in notifying Mr Waldron of the meeting, and of the reason for the delay. He believed or assumed more timely and direct contact had been made with Mr Waldron than was the case on Mr Waldron's evidence, which I accept. Inevitably, Mr Waldron's solicitor was unable to attend a meeting if it was to be in Auckland, and she suggested Mr Waldron seek union assistance. Mr Waldron did so, but neither the site representative nor the union's secretary was available. By mid-morning on 24 February the solicitor had indicated to the human resource officer by email that the late notice meant neither another lawyer nor the union's site representative could attend, and asked whether the officer could suggest someone else. The officer replied that the choice was Mr Waldron's.

[17] Since the union was to represent Mr Waldron, shortly after midday the union secretary contacted Mr Fowler to seek an adjournment because of the unavailability of a suitable representative. His evidence was that Mr Fowler said under no circumstances would he adjourn the meeting. For his part Mr Fowler said he had been told Mr Waldron would be attending with a representative. If he was told that, then the information was inaccurate since at best the identity of the representative was unresolved.

[18] Mr Fowler said in evidence that if he had been given an emphatic statement to the effect that no-one was available to represent Mr Waldron, the meeting would not have gone ahead. That was not a prudent position to take, not least because the company's disciplinary policy required that reasonable time be allowed to an employee to prepare for a meeting.

[19] By the time the adjournment was sought the company knew about the delay in notifying Mr Waldron of the meeting, and the associated difficulties had also been pointed out. The position regarding precisely who would represent Mr Waldron had not been confirmed, although the possibility of union representation had been raised. The approach from the union secretary should

have been treated as confirmation that the union sought to represent Mr Waldron and that suitable representatives were not available for the meeting. The union's position was reasonable. Mr Fowler should have given favourable consideration to the secretary's request for an adjournment.

[20] Because Mr Fowler told the union secretary the meeting would go ahead, it is not surprising the union then did what it could to ensure someone assisted Mr Waldron. Thus a senior aircraft engineer and former union delegate acted as Mr Waldron's representative at the meeting. Although Mr Fowler told Mr Waldron at the start of the meeting that Air New Zealand would not require a meeting to proceed if Mr Waldron was unable to obtain representation, the die was already cast as far as the 24 February meeting was concerned. The statement came too late.

[21] Unfortunately this was not the first error in a seriously flawed disciplinary process.

2. Discussions during the meeting

[22] During the meeting, Mr Waldron was asked to explain what had happened with the Jet Connect employee. Since Mr Waldron was aware the focus of concern was the text message, he read out its content. Mr Fowler became aware for the first time of that content. He said in evidence that when he heard them he considered the words to be consistent with what he had heard before, in that they contained an implied threat to the security of Jet Connect's operations. He pointed in particular to the sentences: "I remember these things when signing your aircraft off" and "U hv had your laugh I hope I have one 2". While that wording might be construed as a threat, it is clear from the evidence overall that Mr Fowler never believed the wording might have some other meaning.

[23] Mr Fowler acknowledged that Mr Waldron then said the message was sent because the former girlfriend had called him a 'nasty engineer', but said Mr Waldron did not explain what was meant by the words used in the text.

[24] However, at the time Mr Waldron was not asked for such an explanation. He was asked to explain what happened and he did so by saying there was a domestic dispute and he sent the message because he was hurt and upset. He was not asked to elaborate. Instead Mr Fowler went on to speak of the young woman's actions in reporting to Jet Connect and Jet Connect's contacting the Police, before asking about Mr Waldron's arrangements for meeting with the Police, and moving on to other matters. Overall a feature of Mr Fowler's questioning was that it focussed on matters such as what Mr Waldron understood his role to be, and what he understood of security obligations and communication standards. Underlying Mr Fowler's questioning was the conclusion he had already reached to the effect that the words used in the text were a threat.

[25] In addition a great deal of third hand information was put to Mr Waldron during the meeting, and some of it was inaccurate. That sort of approach at such an early stage of an investigation is not necessarily fatal to the justification for subsequent disciplinary action, as a good investigation will check and confirm the accuracy and veracity of such information before a final decision is reached. Unfortunately I do not believe this was a good investigation.

[26] It is of concern that Mr Fowler did not recognise the extent of the hearsay nature of the information he was putting to Mr Waldron, or take note of the inaccuracies in it. He put it to Mr Waldron as fact, which was unfair to Mr Waldron. He also used it in forming his view that Mr Waldron was indeed guilty of making a threat against a client airline and the Police and the client thought so too, to the extent that I believe his mind was closed to any proper consideration of what Mr Waldron had to say.

[27] Even worse, once more accurate information became available it was not considered in its proper context. I do not believe this was deliberate or even that Mr Fowler was aware of what he was doing. I consider it likely that, having been told in advance that the message contained a threat, when he saw the content of the message he was unable to view it in any other light.

[28] At the end of the meeting Mr Waldron was told he remained suspended on full pay, pending a further meeting.

The subsequent investigation

[29] By letter dated 4 March 2005 Mr Waldron's solicitor wrote to Mr Fowler. By then she had seen the minutes of the 24 February meeting, and noted with concern that Mr Waldron had not been asked to explain what was meant by the text message. I do not accept the submission for Air New Zealand that Mr Waldron had failed to take an opportunity to explain during the 24 February meeting. The solicitor was correct to note with concern that Mr Waldron was not asked about the matter. It is not his fault that he did not initiate such an explanation, and this applies even more so because he had been forced to attend the meeting with a representative who was not necessarily trained to identify and act on such omissions.

[30] The solicitor went on to explain the intended meaning as follows:

> "… Mr Waldron … strongly advises that he did not intend any harm to his former partner or to Jet Connect. He has advised us that in using the words 'I remember these things when signing your aircraft of [sic]' he simply meant that when he saw his former partner's aircraft, it brought back memories of the things she had said and allegedly done to him. In addition, when he stated, 'U hv had your laugh. I hope I have one 2' he simply meant that he hoped she would one day experience the same things he has experienced as a result of her actions.'

[31] The letter also referred to the solicitor's assessment of Mr Waldron as a serious and conscientious person, and attached a number of references to similar effect. Mr Waldron said in evidence and on several other occasions during the company's investigation that he takes his job very seriously and strives to be professional. I accept that evidence.

[32] Mr Fowler did not find the explanation convincing. He said in evidence it did not sit well with the words used. That is not a good reason for declining to accept the explanation. The words were not so clear and unequivocal on their face that such a peremptory rejection of the explanation was justified, and evidence about the surrounding circumstances rendered such rejection even less justified.

[33] By memorandum dated 15 March 2005, an aviation medical examiner recorded the result of a visit from Mr Waldron. The doctor described as open and honest discussions about the text message. According to the memorandum, Mr Waldron acknowledged the foolishness of his action and expressed his sorrow. The doctor concluded:

> "I would therefore suggest that this young man has acted unwisely and irrationally but is genuinely sorry for that and that given an appropriate period of stand down and perhaps other surveillance measures, I do not consider that he would pose a threat as was suggested in the unfortunate text message."

[34] In a note dated 16 March 2005 Mr Waldron's own GP effectively concurred with a view that the message could be read as a threat, but considered the problem was one of a momentary lapse of common sense.

[35] Neither of these reports was drawn to Air New Zealand's attention at the time. However they support information that was available. On 16 March Mr Fowler received a report from the Air New Zealand doctor Mr Waldron had consulted, Sara Souter. With Mr Waldron's permission, she

advised that she had discussed aspects of his occupational, medical, personal/social, relationship and family history. From information she received, and her own observation, she concluded Mr Waldron was a well-balanced young man with no evidence of a physical or mental health concern and no problem that would impact on his ability to work in a safety sensitive role.

[36] When conducting her assessment Dr Souter contacted a clinical psychologist Mr Waldron had consulted under the Employee Assistance Programme. Mr Waldron had advised Air New Zealand of the psychologist's name and contact details during the 24 February meeting, but the matter was not followed up. A letter dated 26 March 2005 from the psychologist to Mr Waldron, while acknowledging the assessment was based on Mr Waldron's self-reporting, expressed the view that the message was not intended as a threat and was sent impulsively without thought as to the consequences. The psychologist also referred to his discussion with Mr Waldron about how the text might be misinterpreted as threatening. In addition he recorded Mr Waldron's expressions of remorse and embarrassment over what he had done.

[37] That letter, too, was not made available to Air New Zealand at the time, but I infer that the psychologist conveyed a view of that kind to Dr Souter.

[38] Mr Fowler said he considered Dr Souter's report carefully, and it suggested to him Mr Waldron knew what he was doing when he sent the message. Mr Fowler was concerned that the message was not acceptable from someone who was normal and well balanced. I believe his conclusion on this was the product of a closed mind, and the conclusion was not warranted. It failed to give due weight to what by then was becoming very obvious – namely that Mr Waldron was a well-balanced but young man who in a fit of hurt and anger over a rejection by a young woman had acted very unwisely. A more realistic reading of Dr Souter's report was that, despite what he had done, Dr Souter did not believe there was anything in Mr Waldron's mental or physical state to indicate he posed a threat.

[39] On 21 March Mr Fowler met with a representative of Jet Connect, and spoke to the representative again by telephone on 22 March. He was told Jet Connect had interviewed the young woman, but declined consent for Air New Zealand to interview her. As Mr Fowler put it in a letter to Jet Connect dated 29 March, the young woman's view as advised to him was:

> "… in the event Shane and herself were to interface in the course of their normal duties there will be no complications from her perspective."

[40] The Jet Connect representative replied by letter dated 1 April 2005 accepting that position but adding:

> "When I advised you of the outcome of our discussion with our employee I also advised you that Jet Connect would be concerned if Air New Zealand were to reinstate Shane Waldron immediately back to working in support of our aircraft, and that a period of 'rehabilitation' on duties other than the Qantas/Jet Connect contract work, might well be a more appropriate course of action. …'

[41] Those communications can be read as an indication that neither Jet Connect nor the young woman considered themselves or their interests to be under any real threat, although Jet Connect considered Mr Waldron should be given an opportunity to calm down. Significantly, Jet Connect did not say it did not want Mr Waldron working on its aircraft at all.

The meeting of 23 March 2005

[42] There was a further meeting on 23 March 2005. This time Mr Waldron attended with his solicitor. Mr Fowler should have used the meeting to advise Mr Waldron of the content of his conversations with Jet Connect on 21 March - as confirmed in the correspondence to which I have

referred - and discuss them if necessary. Instead he told Mr Waldron the next stage was to talk further with Jet Connect. Mr Waldron was not told a conversation had already occurred, or of its content, and was not shown the correspondence prior to the dismissal.

[43] Mr Fowler should also have informed Mr Waldron of the content of the report from Dr Souter, and put to Mr Waldron the view he was taking of it. Instead he merely commented that the assessment had been received.

[44] Otherwise Mr Waldron was asked whether he had anything to add to his explanation. He repeated his account of the disagreement with his former girlfriend, and both he and his solicitor again explained what was meant by the words used in the text. The meeting ended with an indication that a decision would be provided shortly.

The decision to dismiss

[45] In his deliberations about what to do, Mr Fowler identified the following as facets relating to the sending of the message:

> . did the message suggest or imply any threat to the recipient?
> . did the message have a potential impact in a safety sensitive area?
> . did the employee compromise his role as a responsible person working within line maintenance?

[46] His conclusions in respect of each of those three facets were:

> . the Jet Connect employee considered the message to be a threat, and in the circumstances it would be expected that she would take it as threatening;
> . the impact of the message caused the Police to approach Air New Zealand and voice a concern about a threat to the Jet Connect operation, and a message of that type, sent to an airline employee in the circumstances it was, could pose a threat to airline safety;
> . Mr Waldron intended to convey a threatening message, and in doing so compromised his role.

[47] There was a final meeting on 19 April 2005. By letter of the same date Mr Fowler confirmed his conclusion that Mr Waldron's action comprised serious misconduct, and that he should be dismissed with immediate effect.

The justification for the dismissal

[48] There were few conflicts in the evidence, and the question is one of whether Mr Fowler acted fairly and reasonably in the way he addressed Mr Waldron's explanation of the meaning and intent of the text message.

[49] My view of Mr Fowler's conclusions follows.

1. Suggested or implied threat to the recipient

[50] There was no dispute that the message could be read as a threat of some kind, but I do not accept that the company was entitled to stop there. The possibility of an alternative reading of the message was not properly addressed, and the intended meaning as explained was rejected unduly peremptorily.

[51] As for the recipient's own view, the conclusion that she considered the message to be a threat is based on the fact that she approached her employer about it, and on her employer's advice she approached the Police. Air New Zealand did not interview the young woman, and had no direct information about how she interpreted the message when she received it or exactly what kind of threat she perceived in it. For example did she perceive a threat against her personally, or a threat against an aircraft, or was she just upset about receiving such an angry message?

[52] It was unfair of Air New Zealand to purport to rely on Mr Waldron's acknowledgement at the 23 March meeting that the young woman may have perceived a threat. It had no information about her actual perception, and was asking Mr Waldron to speculate about it. A fairer interpretation of the acknowledgement was that Mr Waldron recognised that on its face the message could be read as a threat.

[53] Not only that, even if the young woman had perceived a threat initially, by late March she had reportedly indicated that there would be 'no complications' if she and Mr Waldron were to 'interface' at work. This should have been a factor in Mr Waldron's favour.

2. Potential impact in a safety sensitive area

[54] There was no dispute in principle that a message containing an apparent threat against an aircraft is a serious safety and security matter with a significant impact. The task for Air New Zealand was to identify the true nature of the message here and react appropriately.

[55] Instead an assumption was made at the outset that the message amounted to a threat, even before the content was available. The assumption was adhered to in the fact of growing evidence as to its true nature – namely that it was not a threat to airline safety and security but rather a personal expression of hurt and angry feelings.

3. Compromise of Mr Waldron's role

[56] The conclusion that Mr Waldron intended to convey a threat was not supported by the evidence available to Mr Fowler or to the Authority. There were no reasonable grounds for that conclusion.

[57] For all of the above reasons I do not believe the decision to dismiss was open to an employer acting fairly and reasonably. Accordingly I conclude that Mr Waldron was unjustifiably dismissed. He has a personal grievance.

Remedies

[58] Mr Waldron seeks the following remedies:

(a) reinstatement;
(b) reimbursement of remuneration lost as a result of his personal grievance;
(c) compensation for injury to his feelings; and
(d) compensation for other losses.

1. Reinstatement

[59] Having found Mr Waldron has a personal grievance, the Authority is obliged under s 125(2) of the Employment Relations Act 2000 to provide wherever practicable for his reinstatement to his former position or one no less advantageous to him.

[60] There was no evidence to suggest reinstating Mr Waldron to his former position would not be practicable, and during the investigation meeting I was told there was a vacancy. Mere statements of a view that trust and confidence has been lost are not in general sufficient to amount to impracticability, and they are certainly not sufficient here. While in a state of distress over a relationship breakup Mr Waldron acted foolishly, and has accepted that. That kind of action ought not to be held against him to the extent that his employer says it can no longer have trust and confidence in him.

[61] At the same time, given the importance of safety and security in the aviation industry, it may be appropriate for Air New Zealand to monitor Mr Waldron's behaviour for a reasonable period upon his reinstatement. Mr Waldron should acknowledge and accept this, particularly as one of the witnesses called on his behalf effectively offered to carry out a supervisory role in that respect in the event that Mr Waldron was reinstated.

[62] I therefore order that Mr Waldron be reinstated to his former position immediately.

2. Reimbursement of lost remuneration

[63] It was common ground that Mr Waldron's base rate of pay was significantly enhanced by the overtime payments he usually received, although there was some discussion about the extent of the enhancement. In all of the circumstances I consider Mr Waldron's total gross earnings for his last year of service to be an appropriate starting point. The figure was $95,093.79.

[64] On that basis, in the 28 weeks from the date of dismissal to the date of the investigation meeting Mr Waldron would have earned 28/52 x $95,093.79 = $51,204.34. During the same period he actually earned NZD9,437.25 plus AUD7,584.20 = NZD17,352.30 (incorporating a currency exchange). The total loss is $51,204.34 - $17,352.30 = $33,852.04.

[65] Since his dismissal was not justified Mr Waldron should not have had to incur that loss of remuneration. I order its reimbursement.

3. Compensation for injury to feelings

[66] Although Mr Waldron's dismissal was not justified, his own impulsiveness and thoughtlessness meant an investigation was necessary and disciplinary action short of the level imposed could be justified. That kind of contribution is best reflected by declining to make an order compensating him for any injury to his feelings.

4. Additional losses

[67] Mr Waldron also sought the reimbursement of various travel costs relating to attendance at mediation, briefings with counsel, and attendance at the Authority's investigation meeting. Section 123(c)(i) was cited as the basis for such entitlement, but I am not satisfied that the provision extends to claims such as these. I decline to order the reimbursement of the travel costs sought under s 123(c)(i).

Summary of orders

[68] My orders are summarised as follows:

(a) Mr Waldron is to be reinstated to his former position immediately;

(b) Air New Zealand is to reimburse Mr Waldron for remuneration he has lost as a result of his personal grievance, in the sum of $33,852.04.

Costs

[69] Costs are reserved.

[70] The parties are invited to agree on the matter. If they are unable to do so and seek a determination from the Authority, they may file and serve memoranda within 28 days of the date of this determination.

R A Monaghan
Member, Employment Relations Authority