

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 433/09
5143410

BETWEEN RANDALL WULFF
 Applicant

AND AIR NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Paul Wicks for Applicant
 Kevin Thompson for Respondent

Investigation Meeting: 23 February 2009, 24 February 2009, 4 May 2009

Submissions received: 22 May 2009, 30 June 2009 from Applicant
 22 May 2009, 30 June 2009 from Respondent

Determination: 4 December 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 7 November 2008, after 14 years of employment, almost seven months of suspension and a protracted disciplinary process, Mr Wulff lost his job as a flight attendant. The respondent airline summarises the reasons for dismissal by saying that it could no longer rely on Mr Wulff to follow standard operating procedures. Specifically it concluded that Mr Wulff had signalled an intention to take his seat and fasten his seatbelt when the seatbelt sign came on, rather than complying with the procedures by continuing normal duties pending an instruction to do otherwise. It also found that on one occasion he had carried through with this intention.

[2] Mr Wulff's position is that he understood and accepted that a blanket policy of sitting down whenever the seatbelt light came on was unacceptable. He notes however that it is not disputed that the standard procedures are subject to a proviso that cabin

crew may take their seats if they feel unsafe. Mr Wulff asserts that all he ever intended to convey was that he would sit down if he felt unsafe. He also notes that he did not in fact adopt a blanket policy of sitting down whenever the sign came on. In the period after the issue arose he spent many hours in the air and was frequently on his feet working when the seatbelt sign was on. As it turned out, he said, he felt the need to sit only twice, and on both occasions others felt the same way, which he said gave credence to his assertion that his safety concerns were genuine.

[3] He also says that the airline's actions were wrongly influenced by what it called the "*overarching consideration*" of his senior leadership role within the Flight Attendants and Related Services Association (FARSA.) Mr Wulff believes he was penalised because of actions taken in his capacity as Vice President and Acting President of FARSA (including actions taken on the issue of turbulence management.) He claims both that he has been unjustifiably dismissed and that he has been discriminated against on the basis of his union activity.

Determination

[4] I have determined that the airline did not have a sufficiently firm foundation for its conclusion that Mr Wulff could not be relied upon to follow standard operating procedures. I have also concluded that the decision maker in the disciplinary process, Phil Callaghan, erred in taking into consideration Mr Wulff's role in FARSA as well as specific statements made by Mr Wulff on behalf of that union.

[5] It follows that the dismissal is unjustified. However I am not able to conclude that an independent finding of discrimination is warranted. My reasons, and an assessment of the degree to which Mr Wulff contributed to the circumstances giving rise to his personal grievance, follow.

Reasons

[6] The circumstances which led to Mr Wulff's dismissal began on 11 March 2008 when FARSA issued an "Alert" to its members which contained the following :

“FARSA is recommending that on all occasions that the seatbelt sign is illuminated to refrain from all activities unless assisting in a life threatening situation and secure your harness immediately to minimise the chances of injury to yourself and others.”

[7] This was a departure from what were, in effect, standing instructions to all crew. The Airline’s Safety and Emergency Procedures (promulgated in compliance with Civil Aviation Authority rules) provide that flight attendants will take their seats at certain specified times (such as take off and landing) and that *“additionally flight attendants will be seated and secured whenever the PIC¹ considers it necessary.”* The *“General turbulence procedures”* provide that:

“Turbulence management Quick Reference Charts should remain as a reference, so that if the SEATBELT sign is not illuminated, the FAI (DSFA)² can provide an objective assessment to the flight crew when recommending that the SEATBELT sign be switched on.

Seat belt PAs should be delivered by the flight crew. If the flight crew do not make a PA FAI should make the PA.”

[8] Separate Quick Reference Charts set out the crew actions required in circumstances of light, moderate and severe turbulence respectively. In the first situation, characterised by *“liquids shaking but not splashing out of cup”* the flight crew are to put the seatbelt sign on and make a PA instructing passengers to be seated. Cabin attendants are then to verify that passengers have their seat belts fastened and to secure loose cabin and galley items, but may continue service with caution. As the Authority was told, the threshold for switching on the seatbelt sign is set at a level to meet the needs of the least able passengers (such as the old and disabled.)

[9] In moderate turbulence (characterised by liquids splashing out of containers) the flight crew will put on the seatbelt sign and make a PA instructing flight attendants as well as passengers to be seated and to fasten their seatbelts. Flight attendants are to discontinue service, secure items including carts, if possible verify

¹ Pilot in Charge

² Senior cabin attendant

that passengers have fastened their belts, and take a seat in the nearest available seat, or sit on the floor and hold on.

[10] In some circumstances flight attendants are required to use their own judgement as to whether and when to seat themselves. The “*Unanticipated turbulence*” procedures provide:

- *“the SEATBELT sign will be illuminated*
- *If necessary (moderate to severe turbulence) and if the situation permits:*
- *Flight Attendants should secure equipment as best they can,*
- *sit down in the nearest available passenger seat and fasten the seat belt or*
- *wedge themselves between seat rows and hold on.”*

[11] The 2004 IATA Threat Analysis of Cabin Crew Turbulence-related Injuries identified that:

“The majority of injuries were sustained when cabin crew were lifted off the floor or lost their balance while standing unrestrained during turbulence...”

unanticipated turbulence is an unexpected event and cabin crew have no prior warning to manage it. For example: if cabin crew are conducting the meal service and unanticipated turbulence is encountered, carts and other service items may become airborne before the crew have the opportunity to restrain them.

Service duties (e.g. handing out head sets...) are a threat because cabin crew often remain standing and perform these tasks while the seatbelt sign is illuminated...

...

The following errors were identified in the analysis:

- *Cabin crew do not secure themselves in turbulence;*
- *Cabin crew standing during critical phases of flight for non-safety related reasons;*

- *Handling errors: leaving service equipment unrestrained and handling hot liquids in turbulence.*”

[12] It can be seen that the standard emergency procedures provide for the management of hazards arising from these errors: crew must take their seats upon an instruction to do so or, in the event of unanticipated moderate or severe turbulence, at their own discretion. Either way they must first “*secure equipment as best they can.*”

[13] If crew had followed the ALERT it would (at the least) have disrupted service and (at worst) have presented an actual risk to the safety of passengers and crew. Even signalled non-compliance with standing instructions would cause pilots in charge to question whether they could meet their legal responsibility for the safe operation of the aircraft in flight, the safety and wellbeing of all passengers and crew and the safety of the cargo carried.

[14] On 13 March Capt. David Morgan (GM Airline Operations and Planning) and Rob Fyfe (CEO) wrote to FARSA requiring the withdrawal of the Alert on the basis that it was at odds with the company’s standard operating procedures. The letter pointed out that literal compliance with FARSA’s recommendation could result in crew seating themselves without first checking passengers as secured, thus putting passengers at risk and the operator in a non compliance position. On 14 March, after discussions with the airline in which Mr Wulff was a participant FARSA issued the following notice to its members:

“FARSA wishes to notify all members that the Alert Update relating to the recommendations around turbulence and seating of cabin crew issued on the 11th of March 2008 was issued without sufficient consideration of CAA regulations and compliance.

*All members **must** continue to comply with the current Standard Operating Procedures and CAA regulations as set out in SEP manuals. These are all approved by CAA and must be complied with...*

FARSA will in future address inconsistencies and concerns relating to turbulence management directly with Air New Zealand, all Airlines it represents, and the CAA itself.”

[15] To ensure that there could be no confusion about turbulence management, Capt. Morgan issued a notice on 20 March 2008 which stated:

“Recently there has been discussion and correspondence around best workforce practises for turbulence encounters and the appropriate actions during these events.

This may have led to some confusion on the line.

Just to clarify: Air New Zealand has a turbulence management policy and consequent procedures. These are detailed in the safety and Emergency Procedures Manual These procedures meet the needs of both our customers and crew and [are] in conformance with both NZ Civil Aviation rules and industry best practice.

Can I also emphasise that with regard to operational issues there is a single source of authority for issuing operational instructions or changes to procedures. This responsibility sits with Airline Operations and Safety...AOS has specific cabin crew standards, operating procedures and cabin safety specialists and is tasked to consider, test and promulgate any new or revised procedures.”

[16] On 24 March 2008 Mr Wulff found himself rostered to fly to Melbourne and back on a flight piloted by the B747 fleet manager, Capt. Keith Pattie. When Capt. Pattie arrived at the aircraft, he was met by Flight Service Manager, John Baldwin who told him that during the crew briefing Mr Wulff had informed the crew that if it became turbulent he would be sitting down. It was not therefore, a complete surprise to Capt.. Pattie when on both the outward and return trips Mr Wulff went up to the flight deck and engaged Capt.. Pattie in conversation on the subject of cabin crew taking their seats when the seatbelt sign came on.

[17] What Mr Wulff had to say about his intentions regarding turbulence management left Capt. Pattie feeling very uneasy about whether he could be relied on to comply with standard procedures. As it turned out, the flight that day was very

smooth and no issues arose about Mr Wulff or any other member of crew taking a seat.

[18] Although the Pilot in Charge may stand down³ a crew member if conduct issues risked compromising safety, Capt. Pattie did not do so in this instance. Instead, the next day Capt. Pattie told Cabin Crew Performance and Development Managers Megan Hopkins and Chris Wallace of his concerns about what Mr Wulff had said to him during these conversations. Within another day or two he also spoke briefly with Mr Callaghan about the issue.

[19] There was no immediate follow-up however. Mr Callaghan told me that on or about 1 April (in his capacity as FARSA vice president) Mr Wulff happened to call him and he took the opportunity to remind Mr Wulff that cabin crew must not take their seats when the seatbelt sign came on. However Mr Callaghan agrees that he did not make any direct reference to Capt. Pattie's concerns (or anything else about the Melbourne flight.) For his part, Mr Wulff has no recollection of this call or conversation.

[20] On 4 April 2008 Mr Wulff left Auckland to crew on a return trip to Vancouver. Several issues were to arise out of his conduct on this tour of duty. It was subsequently alleged that Mr Wulff had (as with the Melbourne flight) used the crew briefing to state that he planned to take his seat when the seatbelt sign came on, and had encouraged his fellow crew members to do the same. It was also alleged that on the flight to Vancouver he had actually seated himself when conditions did not warrant it.

[21] As well, the company later alleged that he had been a protagonist in disagreements which arose amongst the cabin and flight crew about conditions on the outward flight. Several members of the cabin crew, including Mr Wulff, considered that in moderate to severe turbulence flight crew delayed in illuminating the seatbelt sign and making a PA to them to take their seats. The flight crew disagreed that the conditions were as described by the cabin crew. Heated exchanges on the subject were

³ The Pilot in charge is entitled to stand down a crew member in circumstances where there are concerns about whether the individual can safely fly. A typical example might be a case of impairment through drug or alcohol use. The ability to stand down crew is delegated to the Flight Service Manager where appropriate.

alleged to have taken place within the vicinity of people who were not crew members (on a crew bus and near an air bridge.) As well, flight crew alleged that they saw Mr Wulff push a catering cart with force and intentionally into the flight crew rest module.

[22] Subsequently Mr Wulff and other cabin crew submitted Operations Occurrence Reports (“OOR”) about these events. The airline later developed concerns that Mr Wulff’s OOR, along with others, may have contained inaccurate information about the level of turbulence on the outward flight.

[23] No issues arose about turbulence on the return flight and there is no suggestion that SOPs or SEPs were breached on that flight.

[24] Meanwhile, on 11 April 2008 Capt.. Pattie escalated his concerns by reporting his conversation with Mr Wulff in an email to “GGM” Edward Sims. Capt.. Pattie told me that he did so because, on reflection, he considered Mr Wulff’s stated intention to amount to a refusal to be bound by standard operating procedures. He told Mr Sims:

“I have subsequently decided that if we were rostered on any flight where turbulence was forecast I would be talking to [Mr Wulff] again and unless I got agreement from him that he would not sit down as soon as I put on the seatbelt sign and would wait until I did a PA if I felt it was going to get too rough for the CC then I would ... not take him as part of my crew.”

[25] Capt. Pattie told me that he did not think it was serious misconduct for Mr Wulff to have approached him to discuss these issues. However he said that he was concerned that his conversation with Mr Wulff had ended without him having convinced Mr Wulff and considered it would have been serious misconduct if Mr Wulff had done what he proposed to do.

[26] Capt.. Pattie’s email led to a meeting on 15 April between Mr Wulff and Phil Callaghan, Performance and Development Manager for the Airline’s Auckland-based long-haul flight attendants. In turn that led to Mr Wulff’s suspension and the commencement of a disciplinary inquiry into the matters Capt. Pattie had raised, as

well as additional allegations arising out of the Vancouver flight. These can be summarised as follows:

- i. that during crew briefings before a flight to Melbourne on 24 March 2008 and one to Vancouver on 4 April 2008 Mr Wulff stated that he would take his seat whenever the “SEATBELT” light came on;
- ii. that when the seatbelt light was illuminated on the flight to Vancouver, in the absence of an instruction to do so and while other flight attendants continued service, Mr Wulff did take his seat;
- iii. that (on the flight to Vancouver) he had pushed a catering cart with force and intentionally into the flight crew rest module, and
- iv. that in relation to the Vancouver flight he submitted an Operations Occurrence Report (“OOR”) containing misleading and overstated information about the level of turbulence on the flight, and
- v. finally (and again in relation to the Vancouver flight) he participated in inappropriate behaviour (angry exchanges between crew members) within the vicinity of people who were not crew members (on a crew bus and near an air bridge.)

[27] Responsibility for the investigation, and the authority to make decisions as to the outcome, rested with Mr Callaghan. After his first substantive meeting with Mr Wulff (on 23 June 2008) Mr Callaghan wrote to him outlining two further aspects on which he sought his response and submissions. These were the significance of any leadership role that Mr Wulff had in relation to the seatbelt issue and/or whether his actions and involvement in correspondence and notices and his actions on the Melbourne and Vancouver flights, all to the extent that they involved his acting as a FARSA official, may have called into question his suitability to operate as a flight

attendant and/or to bring the airline's name into disrepute with its customers and the Civil Aviation Authority.

[28] Mr Callaghan's investigations were extensive. He told me he:

"received and considered some 15 or so reports and conducted some 25 or so interviews. I had five separate meetings with Randall and his representatives, including the first meeting to discuss suspension. I also received and considered written submissions from Randall and his representative."

[29] He decided that he was not satisfied that there had been misconduct in the briefing before the Vancouver flight or in relation to the completion of the OOR and associated crew interaction on that issue. Nothing more needs to be said, therefore, about those matters.

[30] However Mr Callaghan found that the other allegations had been made out and that three out of four amounted to serious misconduct. His findings (delivered to Mr Wulff by letter dated 28 October 2008) were as follows:

[31] Mr Callaghan accepted that the views and concerns expressed by Capt. Pattie in his email were validly held. He concluded that what Mr Wulff had said was:

"...completely inappropriate and left Capt. Pattie in the impossible position of being in command of an aircraft and not having the confidence that a crew member would follow appropriate procedures. Your suggestion to Capt. Pattie that you thought he felt threatened by the issue being discussed was also highly inappropriate.

Your comments to Capt. Pattie were inconsistent with, and contradicted, what you said at our meetings in relation to the letter to Rob Fyfe and the FARSA ALERT being a mistake...

...

Given the importance of safety, the chain of command during flight and the requirement to follow established SEP and standard operating procedures I have

found that your actions and conduct in relation to your conversations with Capt. Pattie comprise serious misconduct.”

[32] In relation to the crew briefing prior to the Melbourne flight Mr Callaghan concluded that the statement:

“was inappropriate and in effect could have been regarded, given that it was made by you in your capacity as FARSA representative, as countermanding known procedures. Further, by this stage you were well aware of the company’s position in relation to the FARSA ALERT, and you had received Capt. Morgan’s announcement concerning the authority to issue instructions concerning procedures...

it was not your place to make any statement to the effect that cabin crew were to operate other than in accordance with procedures...

...

Overall, I find your actions in making the statement you did prior to NZ123, viewed in the context of the earlier FARSA communications and letter and then your discussion with Capt. Pattie during this flight, comprise serious misconduct.”

[33] In relation to the next concern, Mr Callaghan found that upon illumination of the seatbelt light Mr Wulff interrupted his duties and took his seat (with harnesses) without completing cabin and passenger safety checks. All but one of the cabin crew continued service meanwhile. During his investigation Mr Callaghan had interviewed that crew member as well as others who remained on their feet. He also assessed the level of turbulence at the time from the Operational Integrity Report. This included recorded flight data which indicated a turbulence measure of 0.9 to 1.2 “G.”⁴ From all of this information he concluded that the level of turbulence was light, and not sufficient to warrant Mr Wulff’s actions. Mr Callaghan concluded:

“I do not consider there was a genuine basis, at this phase of the flight, for you to have had ... sufficient concern for your safety so as to warrant the actions you took. Rather than relating to any concern you had in relation to your personal safety or the

⁴ With 1.0 the norm and moderate to severe turbulence being 1.5 to 2.0.

safety of your fellow crew or passengers under your care, I have concluded that your actions were far more likely to be in keeping with your earlier stated intentions. Again, given the importance of consistent adherence to procedures, the safety aspects involved in a Flight Attendants role and the potential for disrepute I find your actions to have been serious misconduct.

Further, I also conclude that the leadership role you took within FARSA had the added potential for your actions to be regarded as something of an example to other Flight Attendants.”

[34] In relation to the fourth concern, Mr Callaghan found that Mr Wulff manoeuvred a catering cart into the side of the crew rest module creating sufficient noise and disruption to bring the Captain out of the crew rest and that this manoeuvre was overly forceful. Mr Callaghan concluded that this action amounted to misconduct.

[35] Mr Callaghan also came to the following conclusions in relation to the “overarching consideration” he had raised previously:

“ I am unable to ignore the fact that you have a senior leadership role in FARSA and that other Flight Attendants, particularly FARSA members, will look to you for leadership. I find that you were significantly involved in the letter to the company dated 8 January 2008 and in the issue of the FARSA ALERT. You also confirmed with the Captain, and cabin crew, on both the Melbourne flight and the Vancouver flight your role as a FARSA representative and, in your discussions with Capt.. Pattie, introduced FARSA’s position into a discussion during the flight.

While I accept that you have described the letter to the company dated 8 January, and also the ALERT, as mistakes, given that you are an experienced Flight Attendant aware of the significance of following procedures I cannot accept that the mistake made was a reasonable mistake.”

[36] For Mr Callaghan, the overriding question in the inquiry was whether he could have trust and confidence in Mr Wulff to follow SOPs. Capt. Pattie had told Mr Callaghan (when interviewed) that he would fly with Mr Wulff provided he received assurances to that effect from Mr Wulff. It was not acceptable to Mr Callaghan,

however, that Capt. Pattie or other pilots should be put in the position of having to verify the reliability of their crew. Mr Callaghan wanted to be certain that any pilot could have total confidence in any cabin crew member with whom they were rostered to fly, without having to first secure any special undertakings from them.

[37] At more than one point during the investigation process, Mr Wulff reiterated to Mr Callaghan that he could be relied on in this way. He also asked Mr Callaghan to give him an opportunity (before proceeding to make his decision as to the final outcome of the process) to address the GM Cabin Crew, Alan Gaskin, on this point. This request was granted and Mr Wulff met with Mr Gaskin to confirm that he would always abide by SOPs and SEPs and that after “*14 years of unblemished service*” he could be relied upon to do so. Mr Gaskin had no questions for Mr Wulff and responded simply by thanking him for his statement.

[38] None of this reassured the decision maker, Mr Callaghan. He told me that he could not accept that Mr Wulff’s actions arose out of ignorance or confusion since Mr Wulff was particularly well informed of the Company’s position on the issue and knew how seriously the Company viewed it. He had, after all, been present at the meetings where the issue was discussed between the company and the union, and had had the benefit of hearing Capt. Pattie’s views. Mr Callaghan told me that he had concerns:

“around Randall’s conduct as a FARSA office bearer demonstrating that Randall may no longer be able to demonstrate the attributes required of an Air New Zealand flight attendant...”

It appeared clear to me that regardless of the rights or wrongs of what FARSA or Randall had proposed to do, Randall was allowing the FARSA agenda to influence not only the performance of his work as a flight attendant, but also potentially the performance of others...

...

I know that during the employment investigation, Randall assured me that he would at all times comply with SOPs/SEPs. However, I thought that Air New Zealand already had that assurance from Randall following the urgent exchange resulting from the

ALERT and my own discussions with Randall, but this proved not to be the case because of how Randall then acted...

even the ALERT and subsequent correspondence and retraction should not have been necessary. Randall should never have signed off on the letter to the CEO on 8 January 2008”

[39] Mr Callaghan also regarded it as significant that between the Melbourne and Vancouver flights he had taken the opportunity to remind Mr Wulff of the position regarding sitting when the seatbelt sign came on. He told the Authority that Mr Wulff’s persistence in the face of this reminder was a factor in his decision to dismiss.

[40] The respondent accepts that cabin attendants may take their seats if they genuinely feel unsafe. Mr Wulff’s defence was that this is all he ever did or said he would do. Mr Callaghan did not believe him, and doubted that Mr Wulff genuinely felt unsafe on the occasion when he did take his seat. Overall, he concluded that he could no longer have trust and confidence in Mr Wulff to adhere to standard operating procedures. He dismissed him with one month’s pay in lieu of notice.

Issues

[41] Section 103A sets out the test for justification of dismissal as follows:

“Whether a dismissal ...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 occurred.”

[42] Mr Wicks has pointed out in submissions for Mr Wulff that this test requires the Authority to take the standpoint of a neutral observer and to weigh the employer’s actions against the standard of a fair and reasonable employer. The enquiry into justification must focus on all the circumstances which were relevant at the time of the enquiry and the dismissal.⁵

⁵ *Air New Zealand Limited v Hudson* [2006] ERNZ 415 and *Angel v Fonterra Cooperative* [2006] ERNZ 1060

[43] Mr Wicks argues that in this case the airline failed to give proper weight to relevant circumstances (including Mr Wulff's long and blameless employment record and the undertakings he gave about future conduct) while at the same time irrelevant matters (such as Mr Wulff's role in FARSA and statements he had made on FARSA's behalf) were improperly taken into consideration in making the decision to dismiss. Mr Wulff challenges the airlines decision to dismiss him on a number of bases, as follows:

- i. that some of Mr Callaghan's factual findings were not open to him on the information he had and that none of his conduct amounted to serious misconduct;
- ii. that the undertakings he gave about future conduct showed that the respondent could have trust and confidence in him;
- iii. that his union role should not have been taken into consideration by Mr Callaghan in the way it was, which tainted the decision making process and amounted to discrimination;
- iv. that the outcome of the disciplinary process was predetermined, and
- v. that there was a disparity in the treatment of Mr Wulff and the other crew member who seated herself on the Vancouver flight.

[44] These matters, along with the questions of contributory conduct and remedies, constitute the issues for determination.

(i) Factual findings and assessment of seriousness of conduct

The exchange with Capt.. Pattie

[45] Mr Callaghan concluded that Mr Wulff had told Capt.. Pattie that he would be sitting down in the event that the seatbelt sign were turned on. However, Mr Wicks

asserts that, on closer reading, Capt. Pattie's email to Mr Sims does not support this finding.

[46] In the email Capt. Pattie noted (with reference to Mr Wulff):

"He ...asked if I knew what was going on with the FARSA action that required the CCMs to be seated during turbulence. I informed that I had been sent the letters that FARSA had put out to its members and that it was my understanding that the initial letter had been withdrawn.

He informed that this was not the case and that the second letter had just informed the members that there was CAA requirements and Company SOPs that should be followed and there was no intention in the first letter to suggest that these should not continue to be followed.

I asked him what he would do if I turned on the fasten seatbelt signs and he stated that he would be sitting down immediately and fasten his seatbelt and would remain seated until it was turned off...I asked how he would be able to complete the cabin preparation for landing if the seat belt sign remained on and he ...said that as it was a requirement to prepare the cabin for landing he would carry that out..."

[47] The discussion continued with Captain Pattie responding that if this were to be the practice, then every time the pilots put the seatbelt sign on, they would:

"need to make a PA saying that it was ok for [cabin crew] to continue their service (or take their seats if it was not.) He said that if he felt unsafe he would sit down anyway..."

On the return leg... [Mr Wulff] came to the F/D and said "I know what this is all about, you feel threatened!"

[48] Mr Wicks submits that the email records Mr Wulff's acknowledgement that SOP's were to be followed and that sitting down was referred to only in the context of safety concerns. This, he says is consistent with what Mr Wulff subsequently told the

company rather than a finding that Mr Wulff would effectively sit down whenever the seatbelt sign was on.

Determination

[49] Although much was made in submissions of the need for me to make credibility findings in relation to the exchange between the two men, I do not accept that this is necessary.⁶ I am satisfied that Capt.. Pattie's email is the best record available of the conversation between him and Mr Wulff during the Melbourne flight. Read in its entirety it does not support a factual finding that Mr Wulff took a clear and unequivocal stance that he would sit whenever the seatbelt light came on. The short extracts quoted above indicate that, even by Capt.. Pattie's account, Mr Wulff made contradictory and confused statements. At one point he said that he would sit down when the light came on, at another that he would get up if it was necessary to do other duties, and at others he referred to the relevance of safety considerations.

[50] The confused and inconsistent nature of his statements do however give rise to legitimate and serious concerns that the airline might not be able to rely on Mr Wulff to exercise sound judgement in relation to the issue. These concerns justified further inquiry into the question whether the airline could repose full trust and confidence in Mr Wulff. The first step in that process should have been to ensure that Mr Wulff had a complete and correct understanding of the application of the SEPs (that is, that he understood the airline's view of their application.) Once this had been spelt out to him his commitment to compliance with the SEPs (applied in that way) could be sought.

[51] If he had not been prepared to give a commitment at that point, the employment relationship would have been deeply impaired. However the airline did not proceed on that basis and matters did not arrive at that point. I cannot therefore conclude that what Mr Wulff said to Capt.. Pattie amounted to serious misconduct in itself.

The Melbourne flight briefing

⁶ After the investigation meeting Mr Thomson sought to present a note from Capt. Pattie which apparently went to the issue of credibility between the two men. Mr Wicks opposed its introduction in this informal way. The document was sealed without my having sighted it. Since I have concluded that credibility is not a key issue, it remains so.

[52] Out of thirteen to fourteen people at the pre-flight briefing Mr Callaghan spoke to three: Flight Services Manager (FSM) John Baldwin, Mr Wulff himself and (seven months after the event, at Mr Wulff's request) cabin attendant Trudy Parlane. Mr Wulff, again, asserts that his comments about sitting down and belting himself in were made in the context of safety considerations. In his interview, Mr Baldwin told Mr Callaghan:

“Randall said... he was part of the Farsa union and he would answer any questions from crew on Farsa issues.

And then he said, just to let you know, re the communications going around about seatbelts, he said ‘I will be sitting down when the seat belt sign is on’ that is exactly what he said. At that point, he ceased his comments it was obvious he had said what he had wanted to say.”

[53] Ms Parlane was “ISC” on the flight which required her to give a standard briefing on safety, service and emergency. She told Mr Callaghan:

“After [John Baldwin] had done his briefing and after I had done mine [Randall Wulff] said if the seatbelt sign does come on during the flight he’ll be sitting down for his own safety. That’s all he mentioned. ...

I remember flight well-remember the briefing and next day I flew with Randall as well ...

I worked with him twice and remember his input into the briefing – informing the crew that if the seatbelt signs came on he’d sit down for his own safety...

that stood out because normally crew members don’t have input into briefings

[54] Mr Callaghan felt that this did not contradict Mr Baldwin's account. He told me that Mr Baldwin was a very senior, experienced, and trustworthy cabin attendant and that what he said was consistent with what Mr Wulff discussed with Capt. Pattie later in the flight. He concluded that he preferred Mr Baldwin's account.

[55] In relation to the Vancouver briefing, Mr Callaghan had spoken to a much wider group of people. What he heard did not support a conclusion that Mr Wulff's comments about sitting down were divorced from safety concerns. On Mr Wulff's behalf Mr Wicks submits that information gathered about what Mr Wulff said at the Vancouver briefing (in particular that his references to taking a seat were made within a context of safety concerns) should have been taken into consideration in weighing the information about what he said at the Melbourne briefing. If I have understood the submission correctly, it is that the interviews and comments about the two briefings (looked at in totality) were consistent in showing that Mr Wulff's *position* (even if it was not exactly what he said at the Melbourne briefing) was that he would take his seat, when the seatbelt light was on, if he had concerns for his safety.

[56] Mr Wicks also notes that although FSM Baldwin relayed Mr Wulff's comments to Capt. Pattie, he did not take up the issue with Mr Wulff on the spot nor did he stand him down. In his submission this undermines any finding that Mr Wulff's comments constituted serious misconduct.

Determination

[57] Had this been a situation where only two or three witnesses were available to be interviewed, it would have been open to Mr Callaghan to find Mr Baldwin a more credible informant than Mr Wulff, and to accept that Mr Wulff did not qualify his statement about sitting down when the seatbelt sign came on. (Ms Parlane's account being equivocal.) However, thirteen or fourteen others were present at the briefing. The failure to interview them undermines the factual finding on this point.

[58] It is also difficult to reconcile the proposition that Mr Wulff stated clearly that he would flout SOPs with the fact that Mr Baldwin did not take it up with him on the spot. Mr Baldwin's response, like that of Capt. Pattie, was consistent with Mr Wulff having made a statement which gave rise to serious concerns about *whether* Mr Wulff could be relied upon, but not with a definite conclusion that he could not be.

[59] In addition I do not accept that one comment, on one occasion, is sufficient basis for a finding that Mr Wulff's intention was to flout SOPs. As Mr Wicks points

out, the evidence is that when Mr Wulff spoke about sitting down, he more often than not linked it to safety considerations.

[60] In summary I am not satisfied that it can be said, objectively and with certainty, that the comments made at the crew briefing were sufficiently clear and irrevocable as to amount to serious misconduct.

The Vancouver flight

[61] At times when the seatbelt sign was on during this flight Mr Wulff continued normal duties. On two occasions when the seatbelt sign was on he took his seat. Each lasted a few minutes. The second was during turbulence that was the subject of contention about its severity and was noted in OORs from several of the crew who took their seats along with Mr Wulff. Mr Callaghan felt that in these circumstances he could not come to a conclusive view about what happened and so made no adverse findings about Mr Wulff's conduct in relation to the second seat taking incident.

[62] As for the occasion earlier in the flight Mr Wulff's position is that he took his seat because he genuinely felt unsafe. Only one other cabin attendant (Jane Sullivan) did the same. She later told Mr Callaghan that she did so because the "*conditions were rough.*" Ms Sullivan's explanations were accepted and no issue taken with the fact that she sat down.

[63] However the Flight Services Manager on this flight, Holly Alderton, later reported that she had been surprised to find Mr Wulff and Ms Sullivan seated because there was no turbulence at the time. She did not approach Mr Wulff to ask why he was seated, nor did she instruct him to resume service. The issue did come up between them over lunch during their stop over. As well as being his immediate manager on that flight, Ms Alderton had been a previous president of FARSA herself, and was a good friend of Mr Wulff's wife. She told me that they discussed the turbulence issue informally and in the context of Mr Wulff's position as an office holder in the union. She told the Authority that she told Mr Wulff that his actions were "*taking him down a dangerous path.*" Nevertheless she did not consider this a situation to warrant standing him down. The return flight proceeded with Mr Wulff as part of the cabin crew.

[64] Mr Callaghan told me he preferred Ms Alderton's account over Mr Wulff's because of her level of experience and because it was backed up by flight crew and by one crew member who sat during the second episode.

Determination

[65] Once again, I find no reason why that Mr Callaghan's assessment of Ms Alderton's credibility should be disturbed. It is accepted that Mr Wulff took his seat for a few minutes when, objectively, safety issues did not warrant this.

[66] However, it is relevant to the assessment of the seriousness of this conduct that the same decision by another crew member was not challenged. It is also relevant that the Flight Services manager took no steps to address the issue with Mr Wulff at the time, effectively signalling its acceptability. In submissions the respondent pointed out that it would have been inappropriate to confront Mr Wulff in the presence of passengers. That is accepted however Ms Alderton took no initiative to speak with Mr Wulff about the issue even when the plane had landed and passengers disembarked.

[67] Against this background it cannot objectively be said that the conduct in question amounted to serious misconduct.

The catering cart incident

[68] Mr Callaghan found that this incident amounted to misconduct rather than serious misconduct. His conclusions were based on flight crew accounts of what they had seen on cockpit monitors which screen cabin activity. Their accounts were supported by the fact that the person in the crew rest (the Captain in fact) was disturbed by the cart hitting the rest and came out to see what had happened. Mr Wulff's position is that he moved the cart into position without undue force. No one else appears to have seen him manoeuvring the cart although Ms Sullivan was nearby and noted that if he had done what was alleged she would have expected wine bottles on the cart to have fallen off.

Determination

[69] I accept that it was open to Mr Callaghan to prefer the accounts of the flight crew who witnessed the incident on the monitor in the cockpit. It is also accepted that in the environment of an aircraft, this incident constituted misconduct.

(ii) Assurances

[70] Mr Callaghan formed a strong view that he could not rely on the assurances and undertakings given to him by Mr Wulff during the disciplinary process. He told the Authority that he felt this way because Mr Wulff had previously given and broken assurances that he could be relied on to adhere to Standard Operating Procedures and Standard Emergency Procedures. He said Mr Wulff gave these assurances:

- i.* in a meeting between the airline and FARSA on 20 February 2008 (subsequently breached by sending out the ALERT) and
- ii.* when the airline met with FARSA on 13 March to discuss the ALERT (subsequently breached by Mr Wulff in what he said at the crew briefing for the Melbourne flight, and the fact that he had seated himself unnecessarily on the Vancouver flight.)

[71] Mr Callaghan told me that Mr Wulff's repeated statements that he had never breached Standard Operating and Emergency Procedures inherently undermined Mr Callaghan's confidence in him because Mr Callaghan believed he *had* done so.

[72] Mr Callaghan agreed that he never put it to Mr Wulff that he had, in the past, breached assurances he had given Mr Callaghan, even though this conclusion was a significant element of the decision to dismiss.

Determination

[73] There was no basis for Mr Callaghan's view that Mr Wulff had (on 20 February and 13 March) given him assurances that he subsequently failed to keep. Anything Mr Wulff said during meetings between the airline and FARSA on those

occasions was on behalf of FARSA and not in his personal capacity. Since had given no personal assurances, he could not personally have reneged on them.

[74] Unfortunately the fact that Mr Callaghan held this view meant that he dismissed out of hand the assurances given by Mr Wulff during the disciplinary investigation. To compound his error, he did so without telling Mr Wulff why or giving him an opportunity to account for himself. Had he done so, Mr Wulff may have been able to clarify his position and perhaps even proffer fuller explanations and assurances that would have alleviated Mr Callaghan's concerns.

[75] In short, Mr Callaghan took into consideration matters which he should not have (statements made by the union) and failed to take into full consideration matters of direct significance to the question whether Mr Wulff could be relied upon (his assurances about future conduct.) He also failed to put his concerns to Mr Wulff for comment. These are serious errors going to the heart of the justification for the dismissal.

(iii) Pre determination

[76] This issue flows directly from the last. I accept that there was an element of pre-determination in Mr Callaghan's mind insofar as he went into the investigation with his mind coloured by the fact that (in his firm view) Mr Wulff had already, by issuing the ALERT, breached undertakings that he would adhere to SOPs. Since the fundamental question for investigation was whether Mr Wulff could be trusted to follow SOPs, Mr Callaghan's state of mind amounted to predetermination of a key and determinative issue.

[77] I also accept the submission that although the respondent conceded to Mr Wulff's request to address Mr Gaskin, there was no evidence of Mr Callaghan or Mr Gaskin giving full consideration to that address.

(iv) Disparity

[78] The airline explained the difference in its treatment of Ms Sullivan by saying that it accepted that she sat because she felt unsafe and that it gave her the benefit of

the doubt because she had been on leave and may not have been clear about the withdrawal of the alert. However the evidence records that she acknowledged that she was aware of the background circumstances.

[79] I do not accept that this is sufficient explanation of the difference in treatment. I accept that there was a disparity in treatment between Mr Wulff and Ms Sullivan.

(v) Discrimination

[80] Both representatives have given me detailed submissions on the question of discrimination. For the sake of economy I do not propose to traverse every argument raised in those submissions, helpful and thorough though they were. Rather I record my conclusions as follows.

[81] The circumstances of this case would not in my view support a stand alone finding of discrimination. Mr Wulff was not, in my assessment, dismissed for being a member or office holder of FARSA. I accept that Mr Callaghan's principal reason for dismissing him was that he lost confidence in Mr Wulff to follow standard operating and emergency procedures. However, this belief was influenced by what Mr Callaghan understood of the role Mr Wulff played in the union. Mr Callaghan erred in taking into account what he called the "*overarching consideration*" of Mr Wulff's senior leadership role within the Flight Attendants and Related Services Association (FARSA.)

[82] Mr Wulff was not entitled to hide behind his office, and could expect to be disciplined and dismissed for any conduct which would have been unacceptable in his colleagues. The company was obliged to hold Mr Wulff to exactly the same standard as every other cabin attendant; no higher and no lower. When on the job, he should have been subject to the same expectations as any other crew member. However, as we see from the disparate treatment of Ms Sullivan, he was not. Mr Callaghan himself acknowledged that Mr Wulff was held to a higher standard. He said that this was because he was seen as setting an example to other cabin crew and because he was perceived to be better informed than most cabin attendants.

[83] As well, Mr Callaghan has misunderstood when and how the distinction should be made between actions Mr Wulff took on behalf of FARSA and his personal conduct. Statements and correspondence made by him on behalf of FARSA at meetings with the airline in February and March were just that and should not have been attributed to Mr Wulff personally.

[84] In summary, Mr Wulff's role in the union was not the principal reason for his dismissal, but the fact that he held office and statements he had made in that office were both improperly taken into account in a way that fundamentally undermines the justification for the dismissal.

(vii) Contributory conduct and remedies

[85] It is now over a year since Mr Wulff was dismissed from his employment. His employment relationship problem was initially the subject of an application for interim reinstatement but by agreement between the parties proceeded directly to an early substantive investigation. Despite the best efforts of both Counsel and the Authority, the investigation and determination of the matter have not been as speedy as hoped.

[86] Mr Wulff seeks reinstatement, lost earnings in the interval until this occurs, and compensation for hurt and humiliation. Up until May 2009 Mr Wulff had made no attempt to mitigate his losses. I understand that independent means have enabled him to live without employment.

[87] I was reminded by respondent witnesses that the crew of an aircraft in flight are subject to a formal hierarchy and, like passengers, must place their full trust in their pilot. The corollary of this is that pilots must be able to rely totally on their crew. There are no half measures either way. Committee procedures are in place to address matters such as concerns about turbulence management: they cannot be addressed in-flight. Cabin attendants should only join the crew of a plane on the basis that they feel able to rely on their flight crew to look after their safety.

[88] Against this background, I find Mr Wulff's approach to Capt.. Pattie and the conversation which ensued to have been highly inappropriate. This behaviour was

compounded by the quite extraordinary remark that he perceived Capt. Pattie to be “threatened” by what he had said to him. In speaking with Capt. Pattie in this way, in flight, Mr Wulff displayed poor judgement and a lack of insight. He also demonstrated something that was apparent in some of his responses during the disciplinary investigation: a tendency to trivialise the seriousness of the underlying concerns the respondent had.

[89] I am satisfied that by virtue of this conduct, Mr Wulff has contributed to the circumstances giving rise to his personal grievance. However, I do not consider his contributory conduct to be such as to preclude reinstatement. As discussed above at paragraphs [50] and [51] I accept that Mr Wulff’s behaviour gave rise to legitimate concerns about his reliability, however I do not accept that it has been established that those concerns are incapable of being addressed in such a way that the employment relationship can continue.

[90] In light of Mr Wulff’s significant contribution and his failure to mitigate his losses, I decline to make any orders for compensation pursuant to s.123 or for lost earnings between the date of the dismissal and the date of this determination.

[91] **I therefore make the following orders:**

- i. the respondent is to reinstate Mr Wulff to his former role on a date to be agreed between the parties, and**
- ii. the respondent is to pay to Mr Wulff lost earnings from the date of this determination to the date of reinstatement.**

Costs

[92] Costs are reserved. If a determination on that issue is required any application should be lodged within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority