Determination Number: AA 275/03
File Number: AEA 688/03

Attention is drawn to the order set out in paragraph 36 prohibiting the publication of the names of certain individuals or information which might lead to the identification of those individuals.

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	CA (Applicant)
AND	Jetconnect Limited (Respondent)
REPRESENTATIVES	Geoff Jenkin for the applicant Megan Richards for the respondent
MEMBER OF AUTHORITY	James Wilson
INVESTIGATION MEETING	14 August 2003
DATE OF DETERMINATION	8 September 2003

DETERMINATION OF THE AUTHORITY

The employment relationship problem

1. The applicant, Ms CA, was employed as a flight attendant by the respondent, Jetconnect Limited, from February 2002 until her dismissal on Friday 13 June 2003. In a statement of problem received by the Authority on 11 July 2003, Ms CA alleged that her dismissal was unjustified and that Jetconnect had breached its obligation to act in good faith. Ms CA sought reinstatement to her position, lost wages, compensation for humiliation, loss of dignity, and injury to her feelings and costs.

2. The parties attempted to settle Ms CA's grievance through mediation. Unfortunately this was not successful and Ms CA has elected to pursue her application through the Authority.

Background

3. On 29 May 2003 Ms CA was staying at a hotel in Christchurch. She was rostered to report for duty at 5:30 a.m. the next morning for a flight which was due to depart at 6.15 a.m. According to the Company rules Ms CA was required to refrain from drinking alcohol for a period of eight hours prior to her reporting time i.e. from 9:30 p.m. Ms CA says that on that evening she went to the bar at approximately 7:30 p.m., had two glasses of wine but had stopped drinking alcohol by 9:30 p.m.. She says that at approximately 10:30 p.m. she was joined at the bar by a late night crew and subsequently by several other Jetconnect flight crew. According to Ms CA at approximately 10:30 p.m. she had ordered alcoholic drinks for two of her colleagues and a non-alcoholic drink for

herself. Subsequently a Jetconnect Customer Service Manager (CSM), Mr J., asked her what time she was due to report and whether she was drinking alcohol. Mr J., and apparently, according to Jetconnect's evidence, one of the other crew members, subsequently tasted Ms CA's drink.

4. Ms CA says that, without drinking any further alcohol, she went to her room at approximately 1:30 a.m. The next morning she reported for duty as rostered and carried out her full schedule of tasks without difficulty and without any complaints from her Customer Service Manager or anyone else.

5. On 2 June 2003 Ms CA was contacted by Ms Virginia Bryant, Jetconnect's In-flight Service Manager, and advised that the Company had received a report which contained allegations that she, Ms CA, had been drinking within eight hours of reporting for duty. Over the next 2 weeks Ms CA attended three meetings with Ms Bryant. During this process Ms CA was represented by a union official, was given access to all of the information obtained by Jetconnect and given an opportunity to respond to the allegations against her. At the final meeting on Friday 13 June 2003 Ms CA was advised that she was to be dismissed forthwith.

6. Jetconnect says that in the course of their investigation they received and considered statements from a number of people who had observed Ms CA on the evening of 29 May 2003. The statements included those of one of the Company's pilots and the Customer Service Manager who had tasted Ms CA's drank. They also interviewed and received statements from the bar staff at the hotel. Having weighed up this evidence and heard Ms CA's explanation, Ms Bryant says she came to the conclusion that Ms CA had breached the 8 hour rule, that this breach amounted to serious misconduct and that Ms CA should be dismissed.

7. Ms CA does not claim that the process leading to her dismissal was unfair. However she claims that her dismissal was unjustified for three reasons:

- That the Company had misinterpreted its own rules and the collective agreement and that Ms CA was summarily dismissed for an offence which, if proven, should have resulted in dismissal on two weeks' notice.
- That if the Customer Service Manager, who questioned her as to what she was drinking and her reporting time, had taken steps to ensure that she was stood down before commencing duty the following morning she would not have been dismissed.
- That two other employees guilty of similar breaches of the Company's rules had not been dismissed. There had therefore been a disparity of treatment rendering Ms CA's dismissal unjustified.

Legal considerations

8. The Court of Appeal in *Wilson and Horton Newspapers Limited v. Oram* [2000] 2 ERNZ 448 said:

> *The burden on the employer is not that of proving to the Court the employee's serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct. This distinction is highlighted in cases involving alleged dishonesty by employees. An employer can justify dismissal without having to prove the dishonesty by showing that, after a full and fair investigation, it was at the time of the dismissal justified in believing that serious misconduct had occurred.*

And later:

> *The Court has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer we prefer to express this in terms of "could" rather than "would", used in the formulation expressed in the second BP Oil case.*

9. A major issue raised by Mr Jenkin in this case is whether Ms CA's dismissal was unjustified due to the disparity of the treatment she received compared to other staff found to have committed similar acts of serious misconduct. The law relating to disparity of treatment was canvassed recently by Judge Colgan in the Employment Court in *Riddell v Commissioner of Police* (AC 40/03 20 June 2003), where the Court said:

> *[50] There is no dispute between the parties about the law of disparity of treatment of employees as it relates to justification for dismissal. The law is long and authoritatively established including in judgements of the Court of Appeal and this Court and only needs to be restated shortly in this judgement.*
>
> *[51] As was written in the Rapana versus Northland Co-op Dairy Co Ltd [1998] 2 ERNZ 528, 537:*
>
> > *Where, in the course of an inquiry which may lead to dismissal of an employee (or indeed to other disadvantage in employment) a question of parity of treatment of employees is in issue, the reasonable and fair treatment of the employee may involve consideration by the employer of relevant prior incidents and the consequences of them for other employees. A fair and reasonable employer will treat employees in a fair and reasonable manner. Reasonable consistency is one facet of fairness. To arbitrarily impose consequences for materially similar breaches and/or in respect of employees whose circumstances are materially similar, may not be fair and reasonable treatment. Where, in the Tribunal, an employee bringing a personal grievance raises the issue of the disparity of treatment and the Tribunal considers that there is substance to the issue (a prima facie case of disparity), it will be incumbent upon the employer, who or which has the onus of persuading the Tribunal of the justification of the dismissal, to address the parity/disparity issue and to satisfy the Tribunal that its decision to dismiss was, in this regard, fair and reasonable.*
>
> *[52] On appeal in Northland Co-op Dairy Company Limited v Rapana [1999] 1 ERNZ 361, the Court of Appeal noted that there was no challenge to the way in which this Court had recorded the applicable legal principles on the question of parity of treatment.*
>
> *[53] Other principles applicable include that if there is an adequate explanation for apparent disparity, that the disparity will not be a factor supporting a conclusion of unjustified dismissal. An employer is not required to be bound by a mistaken or overgenerous treatment of a particular employee on a particular occasion. These principles are taken from the judgement of the Court of Appeal in Samu v Air New Zealand Limited [1995] 1 ERNZ 636.*

The Company's rules

10. Ms CA, according to the minutes of the meeting at which she was dismissed, was dismissed for *drinking within eight hours of her duty*. Ms CA accepts that she was fully aware of this rule and its

importance. However, on her behalf, Mr Jenkin argues that Jetconnect have misconstrued the level of punishment which should be imposed for breach of the rule. In this regard the Jetconnect cabin crew manual says:

> ***Alcohol and Drug Usage:***
>
> *Operating, or attempting to operate as flight deck or cabin crew under the influence of alcohol or drugs will be deemed as a serious misconduct.*
>
> *No crew member is to consume any alcoholic beverage for a period of eight hours prior to commencing any duty period, or during any duty period.*

The Jetconnect cabin crew interim administration manual similarly states:

> *You are not permitted to:*
> - *Supply alcohol to ground staff*
> - *Consume alcohol while you are in uniform*
> - *Consume alcohol during the eight hour period prior to planned departure of the aircraft on which you will be operating*

The applicable collective employment agreement (CEA), under the heading *Termination and Related Matters* says:

> *17.1 …either the Company or a Cabin Crew Employee may terminate their employment relationship by giving the other party two weeks written notice. The Company may elect to pay the Cabin Crew Employee in lieu of notice for any part of that noticed period. If either party gives more than two weeks notice, the other party is not required to accept such notice or be liable to pay or accept more than two weeks salary.*
>
> *17.3 Nothing in this agreement affects or limits the Company's right after due process to summarily dismiss a Cabin Crew Employee without notice for serious misconduct. Serious misconduct includes but is not limited to:*
> *(a) unauthorised possession, or attempted removal of the property of the Company, its Customers or of other Cabin Crew Employees;*
> *(b) breach of any applicable statutory or regulatory requirements including, without limitation, the Civil Aviation requirements of any jurisdiction in which Cabin Crew Employees are required to work;*
> *(c) being in a state of intoxication or in a state of health in which the Cabin Crew Employee's capacity to act would be likely to be impeded by reason of the Cabin Crew Employee having consumed or used any intoxicant (including alcohol), sedative, narcotic, stimulant drug or preparation prior to or whilst on duty (including standby duty)*

And:

> *17.5 Nothing in this Agreement shall prevent the Company from terminating its employment relationship with a Cabin Crew Employee with two weeks written notice for valid grounds, including but not limited to:*
> *(a) misconduct; or*
> *(b) poor performance; or*
> *(c)…etc*

11. On behalf of Ms CA, Mr Jenkin suggests that the Company rules outline two types of misconduct in respect to alcohol –one rule prohibits crew from being under the influence of alcohol while on duty and the second is the eight hour rule. He also suggests that a breach of the first of these rules is more serious misconduct than the breach of the eight hour rule. Mr Jenkin argues that CEA clause 17.3, which provides for instant dismissal for serious misconduct, refers to being *in a state of intoxication etc.* He suggests that breach of the 8 hour rule is not necessarily *being in a state of intoxication while on duty* and is not therefore automatically serious misconduct. Mr Jenkins suggests that such a breach should in fact be classified in terms of clause 17.5 and result in termination on two weeks notice.

12. Jetconnect argues that breach of the 8 hour rule is, by implication, a breach of an *applicable … regulatory requirement.* They submit that, in order to hold an airline operating license the Company is required to submit its rules to the regulatory body. These rules, including the eight hour rule, are then deemed to be part of the *regulatory requirements.* Breach of this rule is therefore serious misconduct. In any event, the Company says, Ms CA was aware of the importance of the rule and it was within the Company's discretion to hold that a breach of this rule was serious misconduct.

13. Clause 17.3 includes the statement *serious misconduct includes but is not limited to:* Taking into account the totality of the Company's rules and the fact that Ms CA was aware of and accepted the importance of the rule, I find that the Company was entitled to find that breach of this rule amounts to serious misconduct in terms of clause 17.3 of the collective agreement.

Should Ms CA have been "stood down"?

14. In answer to questions from the Authority, Ms Bryant (Jetconnect's Inflight Service Manager) conceded that, had CA been stood down, i.e. instructed not to board the aircraft, for her rostered flight on the morning after she was alleged to have broken the eight hour rule, she would not have been found to have committed serious misconduct. Jetconnect's policy in this regard is apparently based on the premise that it is better that the employee be stood down than to jeopardise the safety of the aircraft. Mr Jenkin submits that the Customer Service Manager (CSM) who challenged Ms CA in the bar on the night in question should have advised the Company of his concerns and arranged for her to be stood down. Ms Bryant argues that the CSM was not Ms CA's CSM and had no direct responsibility for Ms CA's behaviour.

15. Of itself this issue i.e. and the failure to stand Ms CA down, does not render the dismissal unjustified. It is perhaps unfortunate that the CSM did not take steps to prevent Ms CA from reporting for duty the following morning. His failure to do so does not negate the fact that Jetconnect, having carried out a full and fair investigation, came to the conclusion that Ms CA had breached the eight hour rule and that this breach amounted to serious misconduct. However this point does impact on the question of disparity of treatment. In at least one of the two cases drawn to the Authority's attention the failure to stand down was a factor in the Company's decision not to dismiss – albeit not the only factor.

Disparity of treatment

16. Mr Jenkin has drawn my attention to two cases in which Jetconnect chose not to dismiss the employees concerned despite the fact that they had, according to Mr Jenkin, been found to have committed serious misconduct similar to that alleged to have been committed by Ms CA.

Case # 1

A flight attendant, Mr H, arrived only minutes before his flight was due to depart. Due to the lateness of his arrival the CSM did not at first notice Mr H's state of health. However, some time into the flight, his CSM noticed that he smelt of alcohol and looked unwell. The CSM instructed him to sit out the flight and arranged for him to be offloaded at the end of the sector. This incident was investigated by Ms Bryant who told the Authority that she had come to the conclusion that there was no direct evidence that Mr H. had breached the eight hour rule. While Mr H. had initially agreed that he had been drinking well within the eight hour limit he later changed his story, saying that he had not breached the eight-hour rule. He also stated that his condition when he boarded his flight was partly due to fatigue caused by additional hours he had worked and the "sleeping pill" he had been given by his CSM the day before. (This "sleeping pill" was a homoeopathic/herbal across the counter medication purported to assist in obtaining a good night's sleep. It was not prescription medication). Ms Bryant says she also took into account the fact that the CSM had not stood him down at the commencement of the flight. Taking all these things into account, Ms Bryant issued Mr H with a final written warning which said *inter alia*:

> *You were stood down from operating as a Flight Attendant following your admission of drinking alcohol and as such you have been found to be in breach of clause at 1.62 (c) of the Flight Attendant Individual Employment Agreement:*
>
> *"being in a state of intoxication or in a state of health in which your capacity to act would be likely to be impeded by reason of your having consumed or used an intoxicant (including alcohol), sedative, narcotic, stimulant drug or preparation prior to or whilst on duty (including standby duty)"*

Case # 2

A CSM (Ms L.) received a complaint, late one evening, from a female flight attendant that she had been harassed by her CSM, Mr J. Ms L. confronted Mr J. who, she says, *could not stand still and was swaying from side to side. S*he also says he *had very red eyes and his breath reeked of alcohol.* Ms L arranged for Mr J. to be stood down from his scheduled flight the next morning and she took his place. This case was also investigated by Ms Bryant. In their statement in reply Jetconnect said that *this matter did not involve any accusation that the employee had consumed alcohol within eight hours of commencing duty. Instead, there were allegations of inappropriate behaviour towards a cabin crew member and this employee was disciplined accordingly*. Mr J. received a final written warning which said:

> *As detailed in a phone call on 24 September 2002 with yourself it has been decided that due to actions occurring in this incident you have breached the Standards and Conduct section of the Interim Administration Manual, which states as follows:-*
>
> *1. Harassment of either employees or members of the general public is not permitted. Managers are accountable for ensuring proper standards of conduct are maintained in the workplace and that harassment in any form is not tolerated or accepted.*

17. Jetconnect argue that, because they are not *materially similar*, there is no disparity of treatment between the employees given final written warnings as outlined above and the dismissal of Ms CA. While it appears that alcohol may have played a part in the behaviour of Mr J. in case # 2, it is true that his warning was for *inappropriate behaviour* rather than the consumption of alcohol or

breaches of the eight hour rule. I therefore accept that Mr J.'s case is not *materially similar* to that of Ms CA. (*Rapana v. Northland Co-op Dairy Co Ltd,* supra).

18. The same cannot be said for the first case i.e. that of Mr H. Both Ms CA and Mr H. were alleged to have consumed alcohol inappropriately – Ms CA within eight hours of reporting for duty Mr H at a time which rendered him unfit for duty. Despite evidence from the CSM and his initial admission that he had breached the eight hour rule, in Mr H's case Ms Bryant took into account several factors which led her to the conclusion that he should not be dismissed. Instead she gave him a final written warning because he *admitted drinking alcohol* and for *being in a state of intoxication or in a state of health in which your capacity to act would be likely to be impaired by reason of your having consumed or used an intoxicant (including alcohol),* etc. In Ms CA's case Ms Bryant, as she was entitled to do, reached the conclusion after a full and fair inquiry that Ms CA had breached the eight-hour rule. Ms CA produced evidence that, even if this was the case, she was not stood down -- a factor which in Mr H's case was a contributing factor to his not being dismissed. There was no suggestion that Ms CA's consumption of alcohol in any way affected her performance. Ms Bryant found reasons to reduce the sanctions imposed on Mr H from dismissal to final written warning. She accepted his statements (despite their inconsistency) and his reassurance that such behaviour would not reoccur. In Ms CA's case Ms Bryant went to the trouble of travelling to Christchurch to interview the bar staff at the hotel (they supported Ms CA's version of events) and subsequently chose not to accept either Ms CA's assertions of her innocence or pleas to be allowed to keep her job. Ms CA was dismissed for breaching the rule that cabin crew should not consume alcohol within eight hours of commencing a duty.

19. In the *Riddell* case (supra) the Employment Court when comparing the treatment of Constable Riddell with that of other constables said:

> *[62] But the significant feature of the comparison is not in the numbers or types or severity of the charges faced or other such detail. Rather, it is in the outcome of each case. The circumstances of Constables S. and C. were, although less serious than Constable Riddell's, not of such lesser severity as to have justified the substantially more severe sanction imposed in this case. In effect Constables S and C were subjected to quite minimal sanctions whereas Constable Riddell had the maximum penalty imposed upon him.*

20. Ms Bryant, on behalf of Jetconnect, carried out the disciplinary investigation in each of the cases outlined above. She told the Authority that there had been no change in the Company policy between the time she chose not to dismiss Mr H. and her decision to dismiss Ms CA. Nor did she seek to suggest that her treatment of Mr H. *was overgenerous or mistaken*. The reasons she advanced for the apparent disparity of treatment between Mr H. and Ms CA were:

> *I am aware that dismissing an employee is a very serious thing to have to do, and I had to be certain, on the evidence, before imposing the ultimate sanction of dismissal. In H's case the allegations regarding a breach of the eight hour rule were simply not substantiated.*
>
> *I also believed that a combination of factors were responsible for H's physical state when he reported for duty. He had consumed a large amount of alcohol prior to the eight hour period starting. While I do not condone that behaviour, he was also fatigued resulting from:*
>
> *(a) working 2 extra sectors the previous day at Jetconnect's request (making a total of nearly 12 hours operating); and*
>
> *(b) the sleeping pill given to him by Ms L. the day before.*

21. Jetconnect's attempt to differentiate between Mr H. and Ms CA relies on a pedantic comparison of the detail of the two cases. Ms Bryant found that Mr H. had *admitted drinking alcohol* and *had been in a state of intoxication or state of health… in which your capacity to act would be likely to be impeded.* She gave him a final written warning . She found that Ms CA had breached the eight-hour rule and dismissed her. I find that, taking a broad view of all of the circumstances of the two cases, this amounts to a disparity of treatment which renders Ms CA's dismissal unjustified.

Determination

22. By way of summary of the discussion and findings set out above, I find that:

- Jetconnect carried out a full and fair investigation and reached the reasonable conclusion, on the balance of probabilities, that Ms CA had consumed alcohol within eight hours of reporting for her rostered duty.
- Jetconnect were entitled to reach the conclusion that Ms CA's breach of the eight hour rule amounted to serious misconduct.
- That taking into account the treatment of another staff member in a broadly comparable situation, Jetconnect's decision to dismiss Ms CA. amounted to a disparity of treatment which rendered that dismissal unjustified.

23. Because her dismissal was unjustified Ms CA has a personal grievance against her employer, Jetconnect. This is not to suggest that I condone any breach of the Company's rules – particularly where these relate to the consumption of alcohol. These rules are in place for good reason and I have already found that it was reasonable for Jetconnect to find that a breach of the eight hour rule amounted to serious misconduct. The issue in this case is not the validity of these rules or even whether or not Ms CA breached the rules. Rather the issue is the requirement that these rules be applied consistently and that any breach of the rules results in a parity of treatment of the offending employees. Ms CA was entitled to be treated consistently when compared to her fellow employees. She was not.

Remedies

Reinstatement

24. I have found that Ms CA. has a personal grievance against here employer, Jetconnect. She has requested reinstatement. The Employment Relations Act 2000, at section 125 says:

> ***Reinstatement to be primary remedy***
> *(1) This section applies where –*
> *(a) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(a)); and*
> *(b) it is determined that the employee did have a personal grievance.*
>
> (2) *If this section applies the Authority must, whether or not it provides for any of the other remedies provided for in section 123, provide, wherever practicable, for reinstatement as described in section 123 (a).*

25. Jetconnect have advanced two reasons why they believe that it is not practicable to reinstate Ms CA – that they have lost confidence and trust in her and that the question of safety must be paramount.

Loss of trust and confidence

26. Jetconnect accept that prior to the incident which led to her dismissal, Ms CA had an unblemished record. In fact she had recently achieved the necessary qualifications and training to allow her to be promoted to Customer Service Manager. Had she not been dismissed she would have been promoted to this position when an appropriate vacancy became available. While I can accept that Jetconnect may have lost trust and confidence in Ms CA I cannot accept that this is to any greater extent than that applicable to Mr H. He was found to have reported for duty *in a state of intoxication or in a state of health in which (his) capacity to act would be likely to be impeded …* Jetconnect were prepared to continue to allow him to work and trust that he would not repeat the offence.

Safety considerations

27. The Company have rightly pointed out that safety is an issue to be taken into account when deciding both questions of disparity of treatment and the practicability of reinstatement. However, in this instance Jetconnect's argument in this regard focuses on their loss of trust and confidence in Ms CA. As with those arguments it is difficult to reconcile how it could be unsafe to reinstate Ms CA. while allowing Mr H. to continue to work.

Practical considerations

28. In response to questions from the Authority, Jetconnect indicated that, apart from the loss of trust and safety considerations, there was little practical reason to stop Ms CA from returning to work. They did indicate some small measure of refresher training may be necessary but this is neither onerous nor impractical.

29. Under all of the circumstances I can see no reason why Ms CA's reinstatement is not practicable. I am required, in terms of section 125 of the Employment Relations Act (the Act) to provide for her reinstatement. **I therefore order that the applicant, Ms CA, is to be reinstated to her former position as flight attendant with the respondent, Jetconnect Ltd, as soon as practical.** Her reinstatement is to be on the same terms and conditions as applicable at the time of her dismissal and her service is to be deemed to be continuous for any service related benefits. The parties are to confer on the arrangements for Ms CA's reinstatement. If they are unable to reach agreement they should seek the assistance of an Employment Relations Service mediator in the first instance. If they are still unable to reach agreement, I will, after hearing from the parties, make appropriate directions as to the arrangements for her reinstatement.

Contribution

30. Section 124 of the Act provides that:

> *Where the Authority or the Court determines that an employee has a personal grievance, the Authority or the Court must, in deciding on both the nature and the extent of the remedies to be provided in respect of that personal grievance,--*
> *(a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and*
> *(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.*

Jetconnect carried out a full and fair inquiry and came to the conclusion that Ms CA was guilty of serious misconduct. It is not for the Authority to express an opinion as to the veracity or otherwise of Jetconnect's conclusion. There is no doubt that, if Jetconnect's conclusion was correct, then Ms CA did make a major contribution towards the situation that gave rise to her personal grievance. While this contribution was not such as to render impracticable her reinstatement it must be taken into account when assessing other remedies. The extent to which this contribution should reduce the remedies due to Ms CA. is set out below.

Reimbursement of lost wages

31. At the time of my investigation meeting (14 August 2003) Ms CA had not found alternative employment and I have not been advised to the contrary since. As a direct result of her dismissal Ms CA has been unemployed from 13 June 2003 and appears likely to continue to be unemployed until the time of her reinstatement. **Jetconnect is ordered to reimburse Ms CA. for wages lost from the date of her dismissal to the date of her reinstatement.** Should Ms CA have gained employment of any kind during her absence from Jetconnect any income derived from that employment is to be declared to Jetconnect and deducted from any reimbursement due to her. It is not appropriate to take into account Ms CA.'s contribution (see clause 30 above) to reduce the amount of the reimbursement due.

Compensation for humiliation, loss of dignity etc

32. It is in this area that it is appropriate to take into account Ms CA's contribution to the events that led to her personal grievance. Ms CA. did suffer humiliation, loss of dignity etc, and gave evidence to this effect to the Authority. Without the degree of contribution which I have found Ms CA to have made I would have looked to compensate her for this humiliation etc. However, Ms CA. indicated to the Authority that her main concern was the loss of a job and career which she greatly valued. Taking into account her reinstatement to that position, the reimbursement of wages lost and the level of her contribution it is not appropriate to award Ms CA. further compensation under this head.

Name suppression

33. The parties have requested that I prohibit the publication of the names of employees whose employment circumstances were the subject of evidence to the Authority. In particular they have asked that I prohibit the publication of the names of Ms L., Mr H. and Mr J. Each of these employees was peripheral to my investigation and it is not appropriate that their future employment or reputation should be affected in any way by this decision. It is appropriate therefore that their names be suppressed.

34. Mr Jenkin has requested that Ms CA's name also be suppressed. He argues that in a relatively small industry it is not appropriate that her future prospects of employment be jeopardised by the publication of details of her dismissal. Jetconnect on the other hand opposes the suppression of Ms CA's name. Ms Richards quotes at some length from the Employment Court decision in *Anderson v. Employment Tribunal* [1992] 1 ERNZ 500. In particular the Court said:

> *In most cases the Tribunal will find it safe to use as a test the question posed by Penlington J in R v. Patterson [1992] 1 NZLR 45 at p 50: "Are there exceptional circumstances which*

reveal a real risk that the administration of justice would be frustrated or rendered impracticable if the evidence is published?"

35. In this case I think that there are exceptional circumstances which suggest that to publish Ms CA's name would run the risk that justice would be *frustrated or rendered impracticable*. I have ordered that Ms CA be reinstated. I have been assured by Jetconnect that to date other staff of the airline are aware only that Ms CA has left and are not aware of the circumstances surrounding her departure. For her name to be now published would no doubt make it more difficult for her to return to work thereby risking the possibility that her reinstatement might be jeopardised. For this reason it is appropriate that I prohibit the publication of her name.

36. In terms of section 10 of schedule 2 of the Employment Relations Act 2000, the publication of any information which may lead to the identification of the applicant, or of Ms L., Mr H. or Mr J., is prohibited.

Costs

37. Costs are reserved in the hope that the parties may be able to resolve this issue between themselves. If they are unable to do so the applicant may file and serve a submission in respect to costs within 21 days of the date of this determination. The respondent will then be given 14 days in which to file and serve a response.

James Wilson
Member of Employment Relations Authority