

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 137/09  
5163470

BETWEEN	BARRY CHAPMAN Applicant	GRAEME
AND	GLACIER LIMITED Respondent	HELICOPTERS

Member of Authority: James Crichton

Representatives: Amy Shakespeare, Counsel for Applicant  
David Carruthers, Counsel for Respondent

Investigation Meeting: 9 July 2009 at Greymouth

Determination: 27 August 2009

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] The applicant (Mr Chapman) alleges that he was unjustifiably dismissed from his employment as a helicopter pilot by the respondent (Glacier) on 6 May 2009. Mr Chapman seeks permanent reinstatement to his position plus compensation and costs. Mr Chapman alleges he was unjustifiably disadvantaged by Glacier in its suspension process.

[2] Glacier resists those claims alleging that Mr Chapman was justifiably dismissed for misconduct and failing to comply with lawful and reasonable instructions and it particularly resists the contention that Mr Chapman be reinstated on the basis that the trust and confidence that must exist between employer and employee has irretrievably broken down as a consequence of the events leading to Mr Chapman's dismissal. Glacier deny the suspension process was unlawful.

[3] Mr Chapman was employed in September 2007 by Glacier which runs a helicopter tourist operation flying customers in and around Fox and Franz Josef Glaciers.

[4] Mr Chapman received a written warning for poor performance on 25 February 2008. This warning was expressed to be a final warning such that if there were ... *further substantiated instances of poor performance and misconduct you may be dismissed.* The warning also contains the following relevant passage:

*You have low experience and below average ability. You fail to accept advice or fault from your senior pilot or supervising pilots. Your demeanour and response to advice has created a dysfunction in communication with the senior pilot and supervising pilots.*

[5] Mr Chapman says that the warning ought not to have been a final warning and he also contends (with some justice) that his operational performance improved after that warning. Certainly, there is evidence that Mr Chapman's performance was rated by the lead pilot as satisfactory, after this warning.

[6] On 9 April 2009, Mr Chapman was involved in an altercation with a young woman (Alice Muir) employed by Glacier as a customer services officer. Glacier convened a meeting on 20 April 2009 at which Mr Chapman was invited to explain his side of the incident. Since the incident, Mr Chapman had been on suspension.

[7] By letter dated 24 April 2009, Glacier proposed to lift the suspension effective 25 April 2009. The lifting of the suspension was subject to conditions and was on the footing that non-compliance with those conditions would result in further disciplinary action being taken by Glacier.

[8] Mr Chapman was concerned about the nature of some of the conditions and was also anxious about the fact that he had not seen any of the negative evidence which Glacier had considered in relation to the Alice Muir incident. He instructed his then lawyer to approach Glacier and seek to negotiate about those matters. In particular, he told me that he was anxious about the reference to *misconduct* in the letter of 24 April and he wanted access to the written complaints about him. He felt he could not return to the workplace without those matters being appropriately dealt with.

[9] Mr Chapman's evidence is that he understood that Glacier was happy to leave matters on the basis that he need not return to work immediately, and so the 25 April

date passed without incident. On 27 April the evidence is that Mr Chapman went to the workplace to pick up his mail.

[10] The same day, Mr Chapman sent a text message to a colleague at Glacier attempting to establish who had made the reports against him which Glacier had considered, relating to the Alice Muir incident.

[11] Then, on 28 April 2009, Mr Chapman's then solicitors wrote to Glacier setting out the basis on which Mr Chapman would accept the conditions set out in the 24 April letter. On 29 April 2009, Glacier wrote to Mr Chapman raising concerns about him texting staff and entering onto company premises which Glacier described as *indicative of the concerns it has regarding his personal style* and considered constituted *a safety risk to the company*. The 29 April letter said, inter alia, *the company proposes to terminate [your] employment*. Then on 6 May 2009, Glacier's lawyer sent a fax confirming that Mr Chapman was dismissed with effect from that date.

## **Issues**

[12] A number of issues require investigation. First, it is necessary for the Authority to consider whether the suspension of Mr Chapman was properly effected, next to consider whether Glacier's investigation was sound, and finally to consider whether its decision to dismiss was the action of a fair and reasonable employer.

### **Was the suspension fair?**

[13] Mr Chapman says that he was telephoned by Mr Sowman who is Glacier's operations manager on 14 April 2009. Mr Chapman says that Mr Sowman simply told him that he was to be suspended with immediate effect.

[14] Mr Sowman effectively accepted Mr Chapman's view of the suspension telephone call. Mr Sowman told me that he remembered the telephone call and that although he had had no difficulty communicating with Mr Chapman in the past, he found that on this particular occasion he could not communicate with Mr Chapman. Mr Sowman said that he tried to engage Mr Chapman in conversation, tried to ask him about the altercation with Alice Muir or *if he [Mr Chapman] had any problems*, but was simply *stonewalled* by Mr Chapman. In the result, Mr Sowman decided to proceed and tell Mr Chapman that he was suspended.

[15] The following day, Mr Chapman was instructed to ring Mr Sowman and, when he did so, Mr Sowman confirmed that Mr Chapman had been suspended from all duties. Mr Chapman says that he got no new information from this telephone discussion than he already had and in particular was not told why he had been suspended. Mr Sowman's evidence is different. He says that he thought better of the earlier telephone discussion and sought to engage with Mr Chapman again and that in particular, he told Mr Chapman in the second telephone discussion what the suspension was about. Mr Sowman followed that telephone discussion up with a letter dated 16 April 2009 in which Glacier confirmed that the *allegation of misconduct relates to communications between yourself and A. Muir on 9/4/09 and other matters*.

[16] Mr Chapman was dissatisfied with the reference to *and other matters* and instructed his then solicitor to take the matter up with Glacier. In response to that request, Glacier confirmed that the only issue was the altercation with Alice Muir. Furthermore, Glacier also made clear in its response that the upcoming meeting to consider the issue was not a disciplinary meeting but an investigatory meeting at which it was hoped that Mr Chapman would provide information about his point of view on the matter. As a consequence, Mr Chapman prepared a report which was provided to Glacier.

[17] I consider the meeting of 20 April and its consequences in the next section of the determination, but at this point want to deal with the question of whether the suspension was fair or not. I am satisfied it was fair. The initial discussion between Mr Chapman and Mr Sowman on 14 April clearly did not meet the requirements of the employment agreement in that Mr Chapman was given no opportunity to comment on the nature of the suspension or indeed even to understand why he was being suspended. I accept Mr Sowman's evidence that Mr Chapman made it impossible for him to address those matters effectively during that telephone discussion, and I think that it is a measure of Mr Sowman's commonsense that he sought to talk again with Mr Chapman the following day and, on his evidence, make clear to Mr Chapman what the suspension was all about.

[18] I was impressed with Mr Sowman as a witness and I accept his evidence that on 14 April Mr Chapman was simply impossible to communicate with. I think there must be circumstances where, despite the best efforts of a party, it is not possible to

communicate appropriately with the other protagonist and I hold that this is one of those cases. I am satisfied that Mr Sowman did his best to fulfil his legal obligations in respect of providing a lawful suspension but, in the event that I am mistaken about that, I am satisfied that Mr Sowman took active steps to remedy any default in the original telephone discussion by having a second discussion the following day. I prefer Mr Sowman's evidence that he told Mr Chapman what the suspension was all about on this occasion; I note Mr Chapman said in evidence that there was no communication about the nature of the suspension and I make it clear I prefer Mr Sowman's evidence on this point.

[19] I am satisfied then that the suspension of Mr Chapman by Glacier was lawful.

### **Did Glacier conduct a proper investigation?**

[20] Having clarified that the meeting held on 20 April 2009 was exclusively an investigation meeting and not a disciplinary meeting, Glacier proceeded to convene its meeting at Greymouth to enable Mr Chapman to present his side of the story in respect of the Alice Muir altercation.

[21] On 24 April 2009, Mr Chapman received Glacier's letter which lifted the suspension subject to certain conditions. Glacier's evidence was that this letter was (in the words of Mr Sowman) ... *an interim letter without any consequences*. By this Mr Sowman meant that Glacier was still considering its response to the Alice Muir incident, but in the meantime wished to lift the suspension (subject to conditions) in order that Mr Chapman could return to the workplace.

[22] However, Mr Chapman objected to those conditions and he instructed his then lawyers to take the matter up with Glacier and (in his words) ... *say that I needed some time to think about whether I would accept those conditions ... the company said they were happy with that, and I could come back to work when I was ready*. Mr Chapman seemed particularly anxious about the finding of misconduct in the letter. In addition, Mr Chapman sought to read the three reports which Glacier had received about the Alice Muir incident, additional to his own.

[23] Glacier's position was that there was reference to misconduct in the letter because that was the employer's finding and it was reasonable to make such a finding in all the circumstances. Mr Sowman also told me that in relation to the release of the three reports on which Glacier relied, he felt that the areas where the company

operated were ... *a small community and I was not comfortable releasing the reports when emotions were still a little charged.*

[24] Mr Chapman says that he had been found guilty of misconduct based on reports that he had not even seen and which he had never had an opportunity to confront head on and that was why he sought to have those particular matters (the reference to misconduct and access to the three reports) resolved before he accepted the lifting of the suspension subject to conditions.

[25] Before there could be any resolution of the issues raised by Mr Chapman, he took two steps which resulted in his instant dismissal. Both of these events happened on 27 April 2009. The first in time was a text that he sent to a work colleague seeking to find out who had forwarded the reports about him in respect of the Alice Muir incident. Then later on the same day, he attended at the workplace to collect mail, having been told that there was personal mail waiting there for him.

[26] Of course, both of these actions were reported to Glacier and Mr Sowman told me that he took a dim view of both actions. He describes the events of that day as *the last straw*. Mr Sowman was convinced that both of these actions were designed to *intimidate the staff involved in the matter* (he means the Alice Muir matter) and that on that basis Glacier *decided to immediately terminate* [Mr Chapman's] *employment*. Glacier argued that Mr Chapman's actions were, at the very least, a breach of the conditions set out in the 24 April letter because those conditions had never been accepted by Mr Chapman, and thus the suspension had never been lifted.

[27] The timeline of this argument is important. Glacier's letter dated 24 April entitled Mr Chapman to return to the workplace on 25 April subject to him accepting the conditions set out in that letter. Had Mr Chapman accepted those conditions promptly, it would have been difficult for Glacier to base its dismissal on these same matters. But in fact, of course, Mr Chapman never accepted those conditions. He instructed his then lawyers to write to Glacier and quarrel with the conditions.

[28] Even as late as the day after Mr Chapman took the actions which resulted in his dismissal, his then lawyers were writing to Glacier formally seeking amendments to the conditions imposed by Glacier in the 24 April letter.

[29] Given the nature of the complaint against Mr Chapman, and the history of the employment relationship, and particularly the incident which resulted in the final

written warning given to him in February 2008, it seems to me inevitable that a fair and reasonable employer would reach a conclusion that the only possible consequence of the behaviour that Mr Chapman exhibited on 27 April was dismissal.

[30] Mr Chapman had been found guilty of misconduct twice within a short period of time at a sufficient level of seriousness on the first occasion to justify a final warning, and on each occasion the nature of the misconduct was best described as confrontational behaviour directed at other work colleagues. The particular straw which broke the camel's back on 27 April was behaviour by Mr Chapman which Glacier determined was in the same general context, that is, it was illustrative of Mr Chapman's desire to try to collect evidence about who had complained about him on the one hand and, by his appearance on site before he was cleared to be there, by potentially intimidating work colleagues by his very presence.

[31] Mr Chapman complains that the finding of misconduct against him in the 24 April letter is misconceived. That cannot be right. Even at the most neutral view of his behaviour, his verbal altercation with Ms Muir was a straightforward breach of the employment agreement provision which required him to take up those matters, not with an employee at Ms Muir's level in the organisation but with her superior. Mr Chapman's failure to do that is clearly, in my judgement, misconduct within the meaning of the employment agreement. Furthermore, it is misconduct of the sort which he had been guilty of in the past and which Glacier had tried manfully but unsuccessfully to address with him throughout the employment.

[32] The only issue which requires further consideration is the question of whether, by the decision Glacier made to exclude access to the complaints about Mr Chapman, it prejudiced Mr Chapman's rights and behaved unfairly and unreasonably and not in a manner consistent with the actions of a good and fair employer whose behaviour is informed by the good faith principle.

[33] As a general principle, an accused person in the employment jurisdiction is entitled to confront their accusers and to deal specifically with the detail of the allegations made against them. That is certainly difficult and arguably impossible when the employer acts to exclude access to the material on which the actual complaint is based.

[34] In this particular case, as I have already chronicled, Glacier declined to provide copies of the negative reports about the Alice Muir incident because it thought that the provision of that material would further exacerbate the already unpleasant interpersonal dynamics in the workplace. Given that Glacier regarded Mr Chapman as having weak interpersonal skills their considered view was that if the material that Mr Chapman sought had been provided to him, he would have used that material to harass the individuals who produced it. In a sense, in the actions that Mr Chapman took on 27 April (and particularly the text message in which he sought the names of the people who had complained about him), Mr Chapman was effectively confirming the employer's worst fears.

[35] The three reports that Glacier relied upon have now been disclosed as part of the Authority's investigation and the absolutely explicit nature of the complaints about Mr Chapman from co-workers is striking. Given the strong language used by the complainants (and one in particular), it is difficult not to sympathise with Glacier's decision to withhold the reports from Mr Chapman initially. On the face of it, providing him with access to this material would have potentially caused further and significant upset in the workplace.

[36] The Authority must balance the rights of the employee accused of wrongdoing with the rights of other employees who simply report to the employer the nature of that wrongdoing and seek the employer's protection from it. On balance in the present case, while I have given earnest consideration to the question whether Mr Chapman ought to have been provided with those reports at the time that the original complaints were made, I have reached the conclusion that, in the particular circumstances of this case, Glacier cannot be held accountable for seeking to protect its other staff from what it perceived to be Mr Chapman's wrath. There were, I hold, good grounds for Glacier to be concerned that Mr Chapman would over-react in any exchange that he had with those other staff as a consequence of what they had said about him.

[37] In the present case, I hold that my conclusion is supported by the safety critical imperative which informs Glacier's actions. Glacier argued, through Mr Sowman's evidence that *safety is a paramount consideration in our industry which is almost totally dependent upon the competence and character of the individuals involved in the industry .... I believe that the safety of Glacier Helicopters and its customers was*

*imperiled by [Mr Chapman's] continued employment and that considerations of safety left me with no choice but to terminate his employment.*

[38] It follows that I am not persuaded that Mr Chapman has made out his case to have been unjustifiably dismissed from his employment. I am particularly supported in that conclusion by Mr Chapman's continued pursuit of permanent reinstatement which really seems to fly in the face of the realities in the workplace. Of course, permanent reinstatement is the primary remedy when sought and the Authority has an obligation to give due consideration to the prospect of reinstatement. In the present case, however, it is difficult to see how the relationships between colleagues could ever survive Mr Chapman's reinstatement to this workplace. The lead pilot at Glacier was so anxious about the possibility that Mr Chapman might return to the workplace at one point that he intimated that if Mr Chapman was returned he would relinquish his employment. Other witnesses who gave evidence at my investigation meeting spoke eloquently about the difficulties of dealing with Mr Chapman on a one-to-one basis. One of those witnesses put the matter in these terms:

*All the staff are concerned about Barry [Mr Chapman] coming back.  
Everyone is worried about retribution.*

[39] Earlier on, the same witness told me in relation to the Alice Muir incident that it was *the most serious case* involving Mr Chapman but that there had been many incidents involving him and the Alice Muir example was *the second time I'm aware of that Barry [Mr Chapman] had made someone cry.*

### **Determination**

[40] For reasons enunciated above, I am not satisfied that Mr Chapman has made out his claim, either to have been unjustifiably dismissed or to have been disadvantaged by unjustifiable actions of his employer. I am satisfied that the suspension process which Mr Chapman objected to was appropriate in all the circumstances and that Mr Chapman's dismissal was what a good and fair employer would have done in the particular circumstances of the case at the time. I accept Glacier's view of the dismissal that Mr Chapman, by seeking to negotiate the terms of the lifting of the suspension with the employer, effectively interfered with the process being undertaken by Glacier and that before Glacier had been able to conclude its consideration of whatever the outcome would be of the finding of misconduct in

respect of the Alice Muir matter, Mr Chapman had taken further steps which effectively shattered what was left of Glacier's residual trust and confidence in him.

[41] It follows that Mr Chapman's claim fails in its entirety.

**Costs**

[42] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority