New Zealand Employment Relations Authority Decisions

Davidson v Great Barrier Airlines Limited (Auckland) [2016] NZERA 546; [2016] NZERA Auckland 362 (4 November 2016)

Last Updated: 2 December 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 362
5604449

BETWEEN ANNA DAVIDSON Applicant

AND GREAT BARRIER AIRLINES LIMITED

Respondent

Member of Authority: Robin Arthur

Representatives: Greg Bennett, Advocate for the Applicant

Margaret Robins, Counsel for the Respondent

Investigation Meeting: 22 September 2016

Determination: 4 November 2016

DETERMINATION OF THE AUTHORITY

A. The end of the employment of Anna Davidson by Great Barrier

Airlines Limited was not a constructive dismissal. B. Costs are reserved.

C. **An issue regarding possible imposition of a penalty under s 134A of the Employment Relations Act 2000 is also reserved for further information and submission.**

Employment Relationship Problem

[1] Anna Davidson resigned from her job with Great Barrier Airlines Limited (GBAL) and raised a personal grievance on 18 October 2015. By email that day her advocate alleged Ms Davidson's resignation was a constructive dismissal brought about by actions of GBAL that "destroyed the trust and confidence she has in her employer".

[2] Ms Davidson had worked for the small airline business, based at Auckland Airport, for around ten years. Her employment by GBAL, its most recent owner, was under the terms of an employment agreement dated 6 November 2014. GBAL's purchase of the business was completed in late October 2014.

[3] Ms Davidson's job title was logistics and security manager. Her role also involved a range of administrative tasks including banking, accounting and some general office duties. The relative proportion of time Ms Davidson spent on duties related to logistics and security became relevant to the dispute between the parties over how her employment by GBAL ended.

[4] Her application to the Authority identified two events leading to Ms

Davidson's resignation and claim of constructive dismissal.

[5] The first relevant event occurred on 8 or 10 September 2015 when GBAL's owner and managing director Graham

Reynolds and chief executive Mike Foster put a proposal to Ms Davidson to reduce her hours from 40 to 30 a week. The proposal included an 80-cents-an-hour increase in her hourly rate, offsetting some of the reduction in salary that would result from reduced hours. The reduction was around

$13,000 a year on her annual salary of $57,000 – that is about 23 per cent.

[6] The change proposed was said to be due to arrangements to outsource accounting work previously done within the business.

[7] The previous owner of the business, Mark Roberts, had stayed on as an employee after its sale to GBAL was agreed. His employment was to continue until GBAL completed its air operation certification process with the Civil Aviation Authority (CAA). Mr Roberts carried out the accounting work. Ms Davidson's duties included assisting Mr Roberts with that work.

[8] In late July 2015 Mr Reynolds began making arrangements for an external accounting firm to carry out the role done by Mr Roberts once he left GBAL's employment. By mid-August 2015 Mr Reynolds confirmed those arrangements, which he expected would include Ms Davidson continuing to provide accounting support. In early September, according to Mr Reynolds, the accounting firm's

principal recommended an arrangement whereby one of his staff would do GBAL's

accounting administration rather than Ms Davidson.

[9] Mr Robert's employment at GBAL ended on 9 September 2015 although arrangements were made for him to provide some 'as required' assistance to the accounting firm in the following months. The date of his departure was agreed quite quickly against a background of tension between Mr Reynolds and Mr Roberts on business-related matters.

[10] It was not until those arrangements for Mr Roberts to depart were confirmed that week that Mr Reynolds and Mr Foster told Ms Davidson about the idea for her accounting tasks to be done by the external accounting service as well as Mr Roberts' former accounting work. It was not clear from the evidence whether that discussion occurred on 8 or 10 September. Whichever day it was, Ms Davidson was asked to think overnight about the proposed resulting reduction in her hours and salary.

[11] The following day she asked for a copy of the proposed amended employment agreement showing changes to her hours and salary. She said Mr Foster gave her the agreement and told her to sign it and give it back to him. She did not. Through her advocate she then raised a personal grievance, on 12 September 2016, about the proposal and lack of consultation over it.

[12] The second event relevant to Ms Davidson's constructive dismissal claim occurred on 16 October 2015, while she was away from work on annual leave. Ms Davidson said GBAL's operations director Mike Reddington told her by telephone that day that GBAL's quality assurance manager, Nikki Anaru-Hill, was to take over her role as security manager.

[13] Ms Davidson's statement of problem, lodged in the Authority on 21 January

2016, said she decided to resign because she was, after thinking about it, no longer able to trust GBAL, given the manner in which its managers tried to change her hours and salary without consultation and took away her security role.

[14] GBAL's statement in reply denied Ms Davidson had grounds for her resignation to be deemed a constructive dismissal. It said plans to have its accounting support functions carried out by a staff member of an accountancy consultancy rather than Ms Davidson were made for reasons of efficiency. It denied pressing Ms

Davidson to agree to varied terms of employment. Instead GBAL said it was still waiting for a response from her to the proposals as late as 16 October. It said a CAA representative had asked to interview GBAL's security manager on 19 October. GBAL nominated Ms Anaru-Hill to assume the role and to attend the interview because Ms Davidson was on annual leave and it understood she had told Mr Reddington she was not available for the day the CAA representative had set to conduct the interview. It said the arrangement would not have prevented Ms Davidson continuing to perform the security aspects of her role on her return to work.

The Authority's investigation

[15] On 11 March 2016 the Authority set an investigation meeting date of 1 June. On 30 May the meeting was postponed after a request made on behalf of Ms Davidson's representative, for health reasons. A witness statement had been lodged in Ms Davidson's name on 21 April. Her representative had been expected to also lodge statements from two other witnesses but did not. GBAL had then lodged statements from Mr Reynolds, Mr Foster and Mr Reddington. In early June Ms Davidson advised the Authority she had not previously seen the witness statement lodged in her name. It also appeared her representative had not told her about the investigation meeting notified for 1 June.

[16] At a subsequent case management conference on 22 July a new investigation meeting date was set. Ms Davidson was given an opportunity to lodge witness statements from herself, Mr Roberts and Ms Anaru-Hill. The directions made also

allowed for GBAL to provide new or updated statements from Mr Reynolds, Mr Foster and Mr Reddington. I reserved for later consideration how the delay and the need for further witness statements might be addressed in any award of costs and, under s 134A of the Employment Relations Act 2000 (the Act), liability to a penalty for obstruction and delay to an Authority investigation.

[17] A witness statement was lodged from Ms Davidson on 5 August along with two other statements, labelled as a "will say statement", in the names of Mr Roberts and Ms Anaru-Hill. GBAL then lodged further statements from Mr Reynolds and Mr Foster.

[18] Ms Davidson, Mr Roberts, Mr Reynolds and Mr Reddington attended the investigation meeting. Ms Anaru-Hill did not. Ms Davidson said Ms Anaru-Hill was

unwell. She accepted what was lodged as Ms Anaru-Hill's "will say" statement had

to put aside as its contents could not be tested in the absence of Ms Anaru-Hill.

[19] Mr Foster was also absent. He was said to be en route from a work-related flight to Australia but was expected to return in time to attend some part of the investigation meeting that day. He did not arrive. It was not necessary to take account of his two witness statements, which were unsworn and untested, as most matters of relevant evidence he might have been able to give were available through the evidence of Mr Reynolds and Mr Reddington.

[20] Under oath or affirmation all witnesses present answered questions from me and, if asked, from the representatives. Ms Davidson, Mr Reynolds and Mr Reddington each confirmed the contents of their witness statements. Mr Roberts had not previously seen the "will say" statement lodged in his name but said he knew "something along these lines was to be lodged". The representatives provided closing submissions on the issues for determination.

[21] As permitted by 174E of the Act this written determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[22] The issues for investigation and determination were:

(i) Did the actions of GBAL regarding the future of Ms Davidson's

employment or aspects of her role breach duties owed to her?

(ii) If GBAL's actions did breach duties owed to her, was it reasonably foreseeable Ms Davidson would resign in those circumstances?

(iii) If so, was her resignation an unjustified constructive dismissal?

(iv) If Ms Davidson was constructively dismissed, what remedies should be awarded to her, considering:

(a) Lost wages; and

(b) Compensation under s123(1)(c)(i) of the Act

(v) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Davidson that contributed to the situation giving rise to her grievance?

(vi) Should either party contribute to the costs of representation of the other party?

Had GBAL breached duties owed to Ms Davidson?

[23] A worker's resignation may be deemed to be a 'constructive dismissal' where it resulted from the employer breaching its obligations to the worker. In that sense the employer's conduct is said to have compelled the worker to leave the employment.

[24] Two questions must be answered affirmatively to reach the conclusion that what appeared to be a resignation was really a constructive dismissal. The first is whether there was a breach of duty on the part of the employer that caused the resignation. The second is whether the breach of duty was sufficiently serious to make it reasonably foreseeable to the employer that the worker would not put up with that situation or circumstance.1

[25] In alleging her resignation occurred in such circumstances Ms Davidson bore the onus of establishing GBAL had breached duties owed to her that caused her resignation. In closing submissions Ms Davidson submitted there were two relevant breaches of duties owed to her – an "initial breach" in the process followed in talking to her about a reduction of

hours, in September, and then a “more serious breach”, in October, by taking away her security role.

Proposed change of role, hours and salary

[26] In his oral evidence Mr Reynolds admitted the way in which he and Mr Foster

raised the topic of changes to her duties with Ms Davidson was “poorly handled”. On

2 September the external accountant had recommended a member of his own staff could more efficiently do the accounts administration duties that Ms Davidson had undertaken to assist Mr Roberts. Mr Reynolds had talked with Mr Roberts about whether Ms Davidson might be able to develop skills sought by the external accountant but, according to Mr Reynolds, Mr Roberts had said that was not possible. Mr Reynolds said Mr Roberts had worked with Ms Davidson over many years and

had a better idea than him of her abilities.

1 *Auckland Electric Power Board v Auckland Provincial District Local Authorities IUOW* [1994] 1

ERNZ 168 (CA) at 172.

[27] Mr Reynolds had also talked with Mr Foster after 2 September about how they might broach the subject with Ms Davidson. The need to do so came more rapidly than Mr Reynolds anticipated because Mr Roberts’ departure, which had been under discussion privately between him and Mr Reynolds for several weeks, came more abruptly than expected when it happened on 9 September.

[28] No change to Ms Davidson’s duties had been anticipated prior to the external accountant’s recommendation of 2 September. The accountant had visited GBAL’s premises several times from late July to talk with Mr Roberts about work on the business accounts. At that stage, when the changes were expected to affect only the work that Mr Roberts did, no obligation to consult Ms Davidson arose. However from 2 September, when Mr Reynolds began thinking about the external accountant’s recommendation, the potential effect on the continuation of a significant portion of Ms Davidson’s duties meant GBAL was obliged to provide her with information

about that proposal and give her an opportunity to comment on it.2

[29] Mr Reynolds and Mr Foster raised the topic in an impromptu meeting with Ms Davidson, that occurred on either 8 or 10 September. Ms Davidson alleged that a change to her hours and salary was effectively presented as a fait accompli. I was not persuaded the evidence supported that description of what was said in their discussion. Rather Ms Davidson was asked to think about what Mr Reynolds and Mr Foster proposed and provide her thoughts. She chose not to do so. Her only direct response was to request a copy of the proposed varied employment agreement, which Mr Foster drafted when asked. He had not already prepared the document.

[30] Ms Davidson said she provided no response to the proposal on the advice of a family member who she understood had some knowledge of legal matters. If that was the advice she received, it was not helpful. Ms Davidson, as did GBAL, had a statutory obligation to be responsive and communicative in that situation.3 Soon after talking to Mr Foster and Mr Reynolds that day, Ms Davidson told Mr Roberts she was “not happy”. Mr Roberts had passed on that comment to Mr Reynolds but discussed

it no further with him. Apart from that indirect comment, Ms Davidson provided no

further feedback to Mr Foster and Mr Reynolds. The first GBAL really knew of her

2 Employment Relations Act 2000, s 4(1A)(c).

3 Employment Relations Act 2000, s 4(1A)(b).

concerns came by way of a letter raising a personal grievance on 12 September. The letter alleged her hours and salary had been “reduced arbitrarily” under a contract that had “been forced upon her”.

[31] Communication between Ms Davidson’s advocate and GBAL’s counsel over following days did not resolve the concerns raised. GBAL then formally responded to the 12 September grievance letter on 5 October. Its response, made by its counsel, included the following summary that accurately set out the factual and legal situation to that point:

In your letter you rightly point out that neither an employer nor employee can unilaterally alter an employment agreement. There must be consultation. So far as the company is concerned, they are still in that consultation period but [Ms Davidson] has chosen not to participate. You say that as an employer GBAL should have at least provided [Ms Davidson] with a copy of the intended agreement under discussion – they have done so. While [Mr Reynolds] and [Mr Foster] did not specifically advise [Ms Davidson] of her right to seek independent advice, the draft document that she was offered at her request included precisely that advice and the fact is she had done so and she is being given a reasonable opportunity to seek that advice. You say, correctly, that the employer must also “consider any issues that the employee raises and respond to them”.

Certainly the employer is expecting to do that.

It will be clear from the above that the company has not "forced [any contract] upon [Ms Davidson]" and that her hours and salary have not been reduced arbitrarily. It is proposed that part of her role be taken from her and the company is going through a consultation process in accordance with its obligations of good faith and in accordance with the Employment Relations Act.

[32] Ms Davidson provided no response to the proposal before, through an email sent by her advocate's administrative assistant, she resigned "with immediate effect" on 18 October and raised a grievance for constructive dismissal. From 4 October she had not attended work. One week of her absence was described in the 18 October email as being "stress leave". In her oral evidence at the Authority investigation meeting Ms Davidson said she was away from 4 October due to bronchitis, from which she typically suffered around that time of year, although she thought the stress of events at work had contributed to its onset that year. In the following week she was then absent on previously booked annual leave, approved by Mr Reddington, that was due to run until 27 October.

[33] GBAL had made a clumsy and inadequate start to its discussion with Ms

Davidson about the effect of changes resulting from the departure of Mr Roberts and

the external accounting firm and its staff. However her evidence did not establish, particularly in light of GBAL's subsequent attempts to get and consider her views, that it was conducting itself in a manner calculated or likely to destroy her relationship of trust and confidence with it as her employer. Mr Foster and Mr Reynolds had begun their conversation with her by emphasising that they were "really happy" with her work. Their proposal indicated they wanted to continue her employment with GBAL. As Mr Reynolds confirmed in his evidence, Ms Davidson was well-known to the airline's customers due to her years of service and he assumed she would continue in a "more operational" role.

[34] Ms Davidson had real doubts about the likely effect of the proposal on her duties because she considered GBAL had underestimated the actual proportion of her job that involved the work it also wanted 'outsourced' to the accountancy firm. She considered her accounting-related work comprised more than 75 per cent of what she did, not the 25 per cent that Mr Foster and Mr Reynolds had estimated. However she did not take the opportunity to talk to them about that view or discuss whether the proposed amendments to her duties, set out in the job description attached to the proposed varied employment agreement given to her, would result in sufficient work. Her description of the 'logistics' element was significantly narrower than that of Mr Reddington. He described Ms Davidson's work as including a range of 'hands on' activities, including taking telephone calls, helping checking in passengers and luggage and taking passengers out to aircraft as well as dealing with flight and crew scheduling matters.

[35] The reality was also that, by the time of Ms Davidson's resignation, no change of hours and salary had been made. In that respect no breach of duty had yet occurred. There was, arguably, a breach of consultation duties but those shortcomings had been remedied by the 5 October request for further input and ideas from her. The

earlier error was corrected.4 In light of that request, and Ms Davidson's subsequent

non-participation, it could not be relied on as a cause of her resignation

Removal of security manager role

[36] Ms Davidson said the security manager role was removed from her while she was on annual leave. It was an allegation relying on the notion that the position (and

4 *Rankin v Attorney-General (No. 2)* [2001] NZEmpC 118; [2001] ERNZ 476 at [132] and [151].

job title) had been given to Ms Anaru-Hill and that Ms Davidson would no longer carry out the duties associated with the role, assuming that she returned to work at the end of annual leave on 27 October. While Ms Davidson may have not understood what GBAL was doing in relation to arrangements for the CAA interview scheduled for 19 October, and had become apprehensive about what the arrangements made meant for her on-going role at GBAL, the evidence did not support her allegation that she was to be permanently removed from carrying out the security management work she did. In that respect there was no breach of duty on which she could found her claim of constructive dismissal.

[37] In October 2015 GBAL was awaiting completion of CAA's certification process for a recently-purchased 12-seat aircraft. It required an Air Operator Certificate (AOC) for medium aeroplanes, referred to as a "Part 125 AOC". At the time GBAL was operating under an AOC for the category of small aeroplanes, up to nine seats, referred to as a "Part 135 AOC". Under the Part 135 AOC requirements, and until a Part 125 AOC was granted, three passenger seats had been removed from the new aircraft. GBAL was anxious, for business reasons, to get the new Part 125

AOC as soon as possible so it could operate its new aircraft at its full 12-seat capacity, with obvious benefits for revenue and profitability of flights.

[38] The Part 135 AOC did not require the operator to identify a security manager on the certification documentation. A Part 125 AOC did. For that reason a CCA representative had to carry out an interview with an identified manager as part of the certification process. When a CAA representative advised GBAL that the interview was to be conducted on a particular day, 19 October, Mr Reddington tried to arrange for Ms Davidson to attend the interview. GBAL did not try to change the date of the interview because it did not want to delay the process.

[39] While Ms Davidson was on leave Mr Reddington had contacted her several times by text about work matters. On 15 October Mr Reddington sent Ms Davidson a text that read:

Hi Anna, are U able to come in on Monday to do the security manager interview? I know U are away but he will want to interview someone.

[40] Ms Davidson replied: “got an breast screening on the Tuesday the 20th so can’t make it on that date”. Mr Reddington responded: “Ok thats Tuesday. Will let U know”.

[41] Mr Reddington found Ms Davidson’s response unclear. On one reading it suggested she could not attend on the Monday date because she had a medical appointment on the Tuesday. He discussed the text with Mr Foster who told him to arrange for Ms Anaru-Hill to attend the interview with the CAA representative if Ms Davidson could not do it. Although such an arrangement may have resulted in Ms Anaru-Hill being identified on the Part 125 AOC as GBAL’s security manager, Mr Reynolds and Mr Reddington said the company would have been able to continue to have Ms Davidson carry out the functions of the role.

[42] On 16 October Mr Reddington spoke by telephone with Ms Davidson and told her that Ms Anaru-Hill would attend the interview. Ms Davidson said Mr Reddington told her that Ms Anaru-Hill would be “taking over” the security manager role. In his oral evidence, Mr Reddington insisted he had referred only to the interview, not the role. He also said he told Ms Davidson, when she asked what work she still had left to do, “you still have your duties to do”.

[43] Ms Davidson said her belief that the security manager role had been removed from her was confirmed when Ms Anaru-Hill also telephoned her to talk about preparing for the CAA interview.

[44] I have preferred, as more probable, the evidence of Mr Reynolds and Mr

Reddington that, had Ms Davidson returned to work at the end of her annual leave on

27 October, GBAL intended her to continue to carry out duties and tasks associated with the security manager role. These included matters such as ensuring GBAL staff had correct IDs and airport security paperwork to work ‘airside’, arrange ‘airside’ driver permits for staff who needed them, and arrangements to ensure baggage was not left unattended.

Was Ms Davidson’s resignation really an unjustified constructive dismissal?

[45] Ms Davidson submitted the combined effect of the two alleged breaches by

GBAL was sufficiently serious to make it reasonably foreseeable she would resign.

In light of the finding that her evidence did not establish GBAL had breached duties owed to her in the way that she alleged, her claim of constructive dismissal could not succeed.

[46] There was an issue that the parties needed to be address in September 2015, if Ms Davidson was not prepared to accept on-going employment on a lower salary but GBAL proceeded with the proposal to ‘outsource’ her accounting administration duties. Her employment agreement did not include any express terms providing for redundancy compensation. She would have faced the choice of resigning, without any payment, or accepting what was, in effect, GBAL’s offer of continuing to work in a reduced role on a reduced salary. Ms Davidson argued the remaining duties were not as substantial as GBAL estimated. However Mr Reynolds had the view that she would have continued to do “all she did” in which he considered was “quite a busy position” and included “a lot of customer relations”. It was a matter that clearly required further discussion between the parties at the time. What outcome could have been achieved if Ms Davidson, to use the phrase her advocate used in closing submissions, had “engaged in a more meaningful way” over her hours of work and salary, is now speculative.

Costs and further investigation of a possible penalty

[47] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and the Authority were asked to determine costs, the parties could expect an assessment of costs to start from application of the usual notional daily rate, adjusted upward or downward for

particular circumstances or factors.5

[48] One other issue is also reserved for further investigation and determination by the Authority, whether or not the parties resolve any issue of costs between themselves. It concerns whether certain actions or omissions of Ms Davidson’s

representative, and his assistant, delayed or obstructed the Authority's investigation, without sufficient cause, and render them liable to a penalty. Such matters are appropriately dealt with separately from determination of Ms Davidson's application,

which had to be considered solely on its substantive merits.

5 *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC

135 at [106]-[108].

[49] After postponement of the first notified investigation meeting, a further case management conference was held to set a new meeting date and timetable directions. A Member's Minute issued after that conference explained the prospect of a penalty would be considered at a later stage:

I have noted GBAL's objection. I advised the representatives that the question of **costs and penalties** in relation to the delay and witness statements lodged under earlier timetable directions was **reserved** to be dealt with either following the substantive investigation or, if the matter was settled prior, separately. Ms Davidson will need to be aware that if her application is successful, costs (which normally follow the event of success) may need to be adjusted in light of those circumstances. I will also consider whether any penalty (in respect of the representative's actions) would be appropriate under s 134A of the Employment Relations Act 2000, for obstructing or delaying an Authority investigation. The Authority has the power to consider such a penalty of its own motion. Mr Bennett said he would take steps to provide health information that may be relevant to such consideration.

[50] Three circumstances may render Mr Bennett, and his assistant Sonia Ryder,

liable for a penalty under s 134A of the Act, on the Authority's own motion:

(i) An apparent failure to advise Ms Davidson of the timetable directions and investigation meeting set for 1 June 2016 at the first case management conference on 11 March; and

(ii) The lodging of a witness statement, in the name of Ms Davidson, on 21

April 2016, which Ms Davidson subsequently said she had not seen or approved before it was lodged; and

(iii) Information given to Ms Davidson on 29 May that it was "incorrect" that an

investigation meeting was to be held on 1 June.

[51] This third circumstance resulted from an email query made by Ms Davidson to Ms Ryder on 29 May. Ms Davidson had learned from "a source" at GBAL that the investigation meeting was scheduled to be held on 1 June. Ms Ryder replied on 29

May that Ms Davidson was "incorrect re the date". No application for postponement of the notified investigation meeting had been made to the Authority by 29 May. Contrary to what Ms Ryder told Ms Davidson, it was correct at that time that Ms Davidson 'case' was 'to be heard' on 1 June, under a Notice of Investigation Meeting issued on 14 March.

[52] By Minute to be issued separately from this determination, Mr Bennett and Ms

Ryder will be advised of the opportunity (either in person or in writing) to provide

information and submissions on whether or not the Authority should, on its own motion, impose a penalty on one or both of them under s 134A of the Act. GBAL will also be provided with an opportunity to provide any relevant information or submissions as the effect on it of any delay or obstruction, if established, is a factor relevant to assessment of the need for a penalty and its level. GBAL may also wish to seek a portion of any penalty awarded as a result.

[53] The level of penalty imposed, if any, may also be relevant to what order of costs might be made against Ms Davidson, if the Authority was required to determine costs. A penalty awarded against her representative, and paid to GBAL, might be more appropriate than an order for Ms Davidson to pay costs for actions or omissions by her representative of which she was unaware and for which she was not responsible.

[54] As the issue of penalty arises on the Authority's own motion, it is not

amenable (without the Authority's consent) to resolution between the parties.

Robin Arthur

Member of the Employment Relations Authority