

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 234  
3079292

BETWEEN	LEIGH DUNN Applicant
AND	AIR NEW ZEALAND LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Victor Corbett, advocate for Applicant Kevin Thompson, counsel for Respondent
Investigation Meeting:	17 June 2020
Submissions Received:	17 June 2020
Further information received:	18 June 2020
Oral Determination:	18 June 2020
Written Record Issued:	18 June 2020

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**ORAL DETERMINATION OF THE AUTHORITY**

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- A. One or more conditions of Ms Dunn’s employment were not affected to her disadvantage by the unjustified actions of Air New Zealand Limited.**
  
- B. Air New Zealand Limited did not breach its statutory obligations of good faith.**
  
- C. Costs are reserved.**

### **Employment relationship problem**

[1] Ms Dunn is employed by Air New Zealand Limited as a flight attendant for Air NZ's B787 aircraft fleet, a position she has held for about five years. The terms and conditions of Ms Dunn's employment are set out in a collective agreement between Air NZ, The Flight Attendants and Related Services Association and E Tu. Ms Dunn is a member of E Tu.

[2] On 16 March 2019 Ms Dunn was travelling from Houston to Auckland while on a period of approved leave. During the flight, serious allegations were made by a passenger about Ms Dunn's conduct. Ms Dunn had taken prescribed medication in combination with consuming alcohol before and during the flight.

[3] Air NZ undertook an investigation into the allegations made by the passenger which resulted in a finding that the passengers' allegations were unsubstantiated although Air NZ was concerned Ms Dunn had consumed alcohol while taking medication and that this may have impacted on her judgment and behaviour.

[4] The employment investigation resulted in Ms Dunn being subject to a six month period where she was not able to access her staff travel privileges, a letter of expectations was issued and EAP services were made available to her as a result of personal issues she was dealing with at the time.

[5] Ms Dunn claims the letter of expectations was wrongly taken into account during her performance review and resulted in her being paid a lesser bonus than she would otherwise have received. Ms Dunn claims the withdrawal of her staff travel privileges and the impact on her bonus payment were unjustified actions leading to one or more conditions of her employment being affected to her disadvantage. Ms Dunn also claims Air NZ breached its statutory duty of good faith and has asked the Authority to make recommendations.

[6] Air NZ denies the claims.

[7] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered everything.

### **Unjustified disadvantage**

[8] Ms Dunn claims her employment was affected to her disadvantage when Air NZ:

- a) removed her staff travel privileges for six months as a response to a disciplinary investigation; and
- b) took into account the issuing of the letter of expectations to negatively influence the level of her annual bonus.

[9] The onus of establishing whether one or more conditions of her employment were affected to her disadvantage lies with Ms Dunn in the first instance. If she establishes disadvantage the burden moves to Air NZ to establish on the balance of probabilities that the disadvantage Ms Dunn suffered was justified.

[10] The justification test in s 103A of the Act is to be applied by the Authority in determining justification of an action. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether Air NZ's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

### **Background**

[11] Ms Dunn has been taking prescribed medication for at least six years. The medication is taken once a day, usually in the morning.

[12] In November 2018 Ms Dunn suffered from a work related injury and she commenced a period of three months sick leave.

[13] On 1 March 2019 Ms Dunn received medical clearance to return to work. Before she could return to normal duties Ms Dunn had to undertake Emergency Procedures training. This is an annual requirement for all flight attendants and the next course was scheduled to be held about two weeks later.

[14] Air NZ provides staff travel privileges under its "Staff Travel Policy" and "Staff Travel Scheme". Staff travel privileges are only provided to certain defined "eligible employees". Ms Dunn is an "eligible employee".

[15] When using the travel privileges employees are expected to conduct themselves in accordance with the Air NZ code of conduct and other relevant policies. This includes a prohibition on using Air NZ uniform items including Air NZ branded luggage and disclosing to passengers that they are an Air NZ employee.

[16] Ms Dunn commenced a period of leave without pay on 1 March and travelled to Houston utilising her staff travel privileges.

[17] On the return flight from Houston on 16 March Ms Dunn travelled in the premium economy cabin and was subject to the rules of staff travel. She was using her Air NZ branded hand luggage. The passenger allocated to the seat next to Ms Dunn recognised the Air NZ logo on the luggage and asked Ms Dunn if she was a staff member. Ms Dunn acknowledged that she was. These actions by Ms Dunn were a breach of the staff travel policies.

[18] Ms Dunn had taken her prescribed medication at about 6 am in the morning on 16 March and then again 14 hours later at 8 pm before her flight departed from Houston. Normally there would be about 24 hours between doses. Taking her medication the way she did meant Ms Dunn had taken twice her usual daily dose within one 24 hour period. Ms Dunn then consumed alcohol while waiting for the flight to depart, on take-off and when having dinner.

[19] During the flight the passenger seated next to Ms Dunn made a serious complaint about Ms Dunn's conduct. Steps were taken during the flight to move Ms Dunn to the back of the plane and on arrival in New Zealand both the passenger and Ms Dunn were interviewed by the Police. These steps are the standard protocols engaged by Air NZ where serious allegations have been made during a flight.

[20] Ms Dunn was also met by senior managers who were there to provide support to her and to ensure she was able to get home. She was offered EAP support and returned to sick leave.

### **Air NZ's investigation**

[21] Air NZ's investigation was undertaken by Ms Alison Cross, Cabin Crew Team Manger and Ms Jacqueline Carson, Senior Project Manager for Ground Operations.

[22] Ms Dunn had advised Air NZ that she was dealing with a number of personal issues and so to ensure she was able to participate in an employment investigation without putting her health at risk Ms Dunn was referred to Air NZ's Chief Medical Officer (CMO).

[23] The CMO advised Air NZ Ms Dunn was medically fit to participate in the investigation. He stated that Ms Dunn had explained her recollection of the event and the circumstances leading up to the event. The CMO's opinion was that the medication taken by Ms Dunn at the time very likely played a significant role in the event.

[24] Ms Dunn attended a meeting on 5 April to discuss the upcoming employment investigation and her status during the investigation. It was agreed she would be stood down in the interim. Ms Dunn attended investigation meetings on 16 April and 2 May.

[25] After each meeting Ms Dunn received copies of the minutes of the meeting and was invited to feedback any omissions or other issues she had with the content of the minutes. Ms Dunn requested amendments to the minutes from the 16 April meeting which were subsequently amended but provided no feedback on the minutes from the meetings on 5 April and 2 May.

[26] Throughout the process Ms Dunn was also provided with copies of the notes taken during interviews with crew members.

[27] After the investigation meeting on 16 April Ms Cross sought further advice from the CMO. He had previously received Ms Dunn's consent to discuss his medical opinion with Ms Cross and on 18 April sent her an email setting out his opinion.

[28] The CMO advised Ms Cross that Ms Dunn had adjusted the timing of the doses of her prescribed medication to account for her flight times. He told Ms Cross that unfortunately the doses ended up being too close together. Because of that it was plausible that her medication could have had a significant impact on Ms Dunn's thinking, behaviour and judgement.

[29] The CMO stated that it was likely that the changed timing of the doses would have increased her susceptibility to the effects of small amounts of alcohol with side effects including mild confusion, elevated mood, behaviour which is out of character,

poor judgement or decision making and exaggerated effects from small amounts of alcohol which could include sedation.

[30] Air NZ had concerns about the effect on Ms Dunn of mixing medication and alcohol. The email from the CMO was provided to Ms Dunn and she was requested to attend a further meeting which was scheduled for 2 May 2019.

[31] Ms Cross told me the purpose of the meeting was to gather further information from Ms Dunn about the effects on her of taking medication combined with the consumption of alcohol. Ms Cross also wanted to check whether Ms Dunn had any better recall of what may have happened during the flight and what may have caused the passenger to make the complaint.

[32] Minutes of the 2 May meeting were provided to Ms Dunn for her feedback but none was forthcoming. Ms Cross deliberated on the findings from her investigation. She found that the allegations made by the passenger were not substantiated but she continued to have concerns about Ms Dunn's behaviour. In particular the mixing of alcohol with her medication and the likely impact this had on Ms Dunn's judgment, thinking and behaviour. Ms Cross took into account that Ms Dunn was not on duty at the time of the allegations arising but she had identified herself as an Air NZ employee to the passenger which was a breach of the staff travel policies.

### **Withdrawal of staff travel privileges**

[33] A final meeting was scheduled for 6 May. At that meeting Ms Cross provided Ms Dunn with a document setting out her conclusions and took her through the document. Ms Cross was satisfied the passenger complaint was unsubstantiated and no disciplinary action would be imposed. However, Ms Cross remained concerned about Ms Dunn mixing her medication with alcohol and that she did not have a strong recall of events on the flight.

[34] Ms Dunn was represented at the meeting and was invited to provide feedback on what she thought would be an appropriate outcome. Ms Dunn suggested a letter of expectations along with continued EAP assistance would be appropriate.

[35] The meeting was adjourned and Ms Cross considered the proposal. When the meeting reconvened Ms Cross agreed to provide a letter of expectations and explained

what the letter would likely need to cover. Ms Cross also proposed a 12 month suspension of travel privileges.

[36] After some toing and froing a second break was taken. When the meeting reconvened Ms Dunn, through her representative proposed reducing the suspension of the travel privileges to six months. Ms Cross agreed.

[37] On 7 May 2019 Ms Cross sent Ms Dunn and her representative the letter of expectations, a copy of the document discussed at the meeting on 6 May, and the minutes from that meeting. Ms Dunn and her representative were invited to raise any questions or make any comments on the documents. No questions or comments were received.

[38] The withdrawal of staff travel privileges is a disadvantage for Ms Dunn. However, I am satisfied that at the meeting on 6 May when Ms Dunn negotiated the term of the withdrawal of travel privileges she was accepting the fact that the withdrawal was an appropriate sanction with only the term to be agreed. It was at Ms Dunn's request that the term was reduced from 12 to six months.

[39] The offer of six months withdrawal of privileges came from Ms Dunn's representative after they had consulted privately during a break in the meeting. Air NZ was entitled to accept that offer and rely on it. This was an action an employer acting fairly and reasonably could take. Accordingly Ms Dunn's application for remedies is declined.

### **Performance bonus**

[40] Clause 8.7 of the collective agreement provides for the payment of a performance based bonus calculated in accordance with rules set and/or amended by Air NZ from time to time. The clause provides for the amount payable to be determined at Air NZ's discretion and is capped at a maximum of \$2,000 gross per annum per employee.

[41] Air NZ and E Tu have agreed to the criteria to be used to assess whether a bonus will be paid and the amount to be paid. The payments are based on performance levels which are rated using Air NZ's "Performance Management Cycle Toolkit". This process includes input from individual employees who rate their own performance.

[42] Ms Dunn received regular reminders to complete her 2019 performance review but failed to do so.

[43] Ms Dunn says Mr Manuel De Marco, Ms Dunn's Manager recorded in her review that "...you were involved in an incident with a customer that was unfortunate, but it could have been avoided..." Ms Dunn says this comment influenced her manager to rate her as "developing performance" which resulted in a bonus payment of \$500.

[44] Mr De Marco was not involved in the investigation of the complaint against Ms Dunn but as her manager was responsible for Ms Dunn's performance review. He told me his assessment of Ms Dunn's performance for the financial year ending 30 June 2019 was unusual in a number of respects including:

- a) The performance process requires an assessment of someone's performance over the whole of the financial year. Ms Dunn had been on long term sick/injury leave for three and a half months and then for another two months off work due to her leave without pay and the investigation process. This left a relatively short window of work activity that could be assessed.
- b) Employees are all provided with regular reminders emphasising the importance of them providing their own input and assessment of their performance. Ms Dunn provided no input.
- c) Most cabin crew receive on average between 15 and 25 separate comments and feedback from their colleagues and customers which assists in providing an additional perspective. In Ms Dunn's case there were four pieces of feedback, which was extremely low. He put this down to Ms Dunn's absences during the year in review.

[45] Mr De Marco told me that he did mention in his review comments there was the issue involving a customer and he commented that the situation could have been avoided through better management by Ms Dunn. Mr De Marco told me that the employment investigation process resulted in Ms Dunn receiving a letter of expectations, which in itself is a general signal that improvement is required and is necessarily a reflection on an employee's performance.

[46] Ms Dunn told me that during the meeting on 6 May she specifically asked Ms Carson whether the letter of expectations would have an impact on her performance bonus. This discussion has not been documented in the minutes.

[47] Ms Carson told me that she did recall there being a conversation but does not recall the specifics. Ms Carson told me that normally disciplinary matters are not taken into account because they have been dealt with but that it was up to a manager to decide and a manager may take such things as a letter of expectation into account when deciding the performance rating.

[48] I have assessed the evidence relating to Ms Dunn's performance review and find that while the letter of expectations was a factor in determining her performance rating, it was only one of a number of factors taken into account. Other factors such as her failure to provide input or provide any other feedback from colleagues, managers and customers were also considered. The final ratings are subject to a calibration process against all employees. This process includes a meeting of all managers where they discuss their ratings and must substantiate why employees are rated very highly or lowly. None of the managers raised any concerns about Ms Dunn's rating and it was not discussed. On that basis it was seen as being within the accepted range of ratings.

[49] While receiving a rating which provided a lower bonus payment may be a disadvantage to Ms Dunn I am satisfied the actions of Air NZ in rating Ms Dunn as "needing improvement" and paying the applicable bonus was an action an employer acting fairly and reasonably could take in all the circumstances. Accordingly Ms Dunn's application for remedies is declined.

### **Breach of good faith**

[50] Ms Dunn claims the actions of withdrawing the staff travel privileges and her performance rating were also breaches of Air NZ's obligations to act in good faith. In particular Ms Dunn says the withdrawal of her staff travel privileges for six months was a unilateral decision by Air NZ. I do not agree. The parties reached agreement that Ms Dunn's staff travel privileges would be withdrawn for a period of six months after they had discussed possible sanctions as a result of the outcome from the employment investigation.

[51] It was always open to Ms Dunn to refuse to discuss any withdrawal of the benefit. She did not. Rather, her representative, on her behalf, offered to have the benefit withdrawn for six months and this offer was accepted by Air NZ.

[52] I am not satisfied Ms Dunn has established any breaches of good faith and her application for penalties is declined.

### **Recommendation**

[53] A recommendation may be made by the Authority if it finds any workplace conduct or practices are a significant factor in the personal grievance.<sup>1</sup> Ms Dunn has not been successful in establishing a personal grievance. Accordingly no recommendations are necessary.

### **Costs**

[54] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Air NZ shall have 7 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Dunn shall have a further 7 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[55] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority

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<sup>1</sup> Employment Relations Act 2000, s 123(1)(d).