

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 192/10
5299300

BETWEEN GRANT FIFE
Applicant
AND AIR NEW ZEALAND LTD
Respondent

Member of Authority: James Wilson
Representatives: Lisa Keys for the applicant
Kevin Thompson for the respondent
Investigation Meeting: 20 April 2010
Determination: 28 April 2010

ORAL DETERMINATION OF THE AUTHORITY

The oral determination

[1] On 26 April 2010 I advised the parties that Mr Fife's application, that he be reinstated to his position as flight attendant on an interim basis, was declined. This determination sets out the reasons for that oral determination.

Background

[2] On 15 September 2009 a Performance and Development Manager with Air New Zealand, Mr Phil Callahan, sent an e-mail to Mr Dale Kiely a flight attendant and member of the Executive of the Flight Attendants and Related Services (NZ) Association (FARSA), seeking further information from Mr Kiely about a crew member's insurance claim. A copy of this e-mail was also sent to Mr Fife. In response to Mr Callahan's email Mr Fife, believing he was writing only to Mr Kiely,

sent an e-mail describing Mr Callaghan in highly derogatory and offensive terms. Unfortunately Mr Fife sent his email to Mr Callahan.

[3] When he received Mr Fife's e-mail Mr Callahan filed a formal complaint with his manager Mr Alan Gaskin. Mr Gaskin immediately commenced a formal disciplinary investigation process. After several meetings with Mr Fife and his representatives and considering submissions from FARSA, Mr Gaskin, according to Air New Zealand's statement in reply...

... considered representations about the applicant's service of 21 years which had been raised by the applicant as a matter which should be considered favourably in terms of the outcome. Mr Gaskin advised that long service in employment provides time for employees to become familiar with workplace expectations and rules. The applicant was not a new employee who could claim unfamiliarity with expectations and rules. The 2006 incident was also found to be significant as the warning issued in 2007 required the applicant to be familiar with policies relating to employee behaviour.

[4] On 4 March 2010 Mr Fife was dismissed for serious misconduct and on 16 March 2010 Ms Keys, on behalf of Mr Fife, lodged a statement of problem with the Authority seeking interim and permanent reinstatement and other remedies. The parties attended mediation on 7 April 2010 without success. Following discussions with the parties, an investigation meeting, to consider Mr Fife's substantive claim for reinstatement, has been set down for 19 May 2010. However Mr Fife has requested that I consider his application for interim reinstatement on an urgent basis.

Application for interim reinstatement

[5] As required by s 127 of Employment Relations Act (the Act), an undertaking has been given by Mr Fife to abide by any order that the Authority may make in respect of damages.

[6] In considering interim reinstatement applications, the Authority is required to apply the law relating to interim injunctions and also have regard to the objects of the Employment Relations Act. The law requires that four recognised tests be applied to the circumstances of each case. In relation to the objects of the Act, the Authority must have regard to the principle that productive employment relationships are founded on good faith behaviour and also on mutual trust and confidence. Another relevant object of the Act, at s 101C and s 125, is the recognition of reinstatement as the “primary remedy” for any personal grievance.

[7] I have received affidavit evidence from Mr Fife and Mr Gaskin. That affidavit evidence must necessarily remain untested until the substantive investigation of the grievance claim. Any findings of fact in this determination must therefore be provisional until that evidence has been properly tested as part of my substantive investigation.

[8] The standard tests or questions the Authority must consider in determining applications for interim reinstatement are:

- Is there an arguable case?
- Where does the balance of convenience lie?
- Are other adequate remedies available?
- Where does the overall justice of the case lie?

Is there an arguable case

[9] Before I determine whether or not Mr Fife should be reinstated to his position I must first determine whether or not he has a personal grievance (i.e. whether or not he was unjustifiably dismissed). Section 103A of the Act requires that, in determining whether or not Mr Fife has a personal grievance, I must consider whether the actions of Air New Zealand and how Air New Zealand acted *were what a fair and reasonable employer would have done in all the circumstances at the time....*

[10] Mr Fife has little dispute that Air New Zealand carried out a full and fair inquiry before dismissing Mr Fife. Rather Mr Fife says that, given his 21 years of

service, dismissal was too harsh a penalty. Air New Zealand says that it took account of Mr Fife's length of service but also considered the nature of the language used, the deliberate construction of the e-mail and the vitriol apparent in that e-mail. Air New Zealand argues that, following a full and fair inquiry, it reached a reasonable decision to dismiss Mr Fife and that, if there is a case to answer then that case is weak.

[11] The wording of section 103A suggests that Mr Fife does have an arguable case. Without properly testing the evidence and any submissions which may accompany that evidence it is difficult to assess the strength or weakness of Mr Fife's arguments. At first blush it seems that any Air New Zealand did carry out a full inquiry and in that respect Mr Fife's case would seem to be weak. On the other hand the e-mail was not intended to be seen by Mr Callahan and Mr Fife has apologized to Mr Callahan for any offense that he may have caused. Again at first blush to dismiss a long serving employee for what Air New Zealand accepts was an error, does appear harsh.

[12] Mr Fife has an arguable case.

The balance of convenience

[13] Mr Fife argues that if he is away from his job for any extended length of time he will lose currency with such issues as health and safety requirements and changes to procedures. Air New Zealand says that, should Mr Fife be reinstated following my substantive investigation these factors would not inhibit his returning to duty. They say that his annual health and safety recertification is not due until July and that any changes to procedures will not preclude his return.

[14] At the time of the termination of his employment Mr Fife was paid outstanding leave equivalent to several months' salary. In addition he received a substantial amount in accumulated superannuation. While I accept Ms Keys submission that Mr Fife should not be expected to eat into his superannuation the same cannot be argued for the leave payment. In effect Mr Fife is financially no worse off at the present time than he would have been had he either continued to work or taken paid leave for an extended period.

[15] On the other hand, should I order Mr Fife's interim reinstatement he would be obliged to reimburse the substantial amounts paid and be re-integrated into the cabin crew roster. Should I then determine that his dismissal was justified the whole

process would have to be repeated. As already stated, an investigation meeting is scheduled for 19 May 2010 and a substantive determination should issue within, at maximum, a few weeks of the date.

[16] Taking all of the above into account the balance of convenience in this matter clearly favours not reinstating Mr Fife in the interim.

Are adequate alternative remedies available?

[17] Should I find that Mr Fife has a personal grievance, the "primary remedy" of reinstatement is available to him, subject only to the statutory test of whether or not such reinstatement is practicable. (I note for the record that Air New Zealand say that, in that event, they will oppose Mr Fife's reinstatement.) He would be entitled to receive reimbursement of any wages lost and in addition will almost certainly be entitled to receive monetary compensation for the hurt and humiliation his dismissal has caused him. If I find that Mr Fife was unjustifiably dismissed, reinstating on an interim basis will make little, if any, difference to those remedies. There is an adequate alternative remedy available to Mr Fife.

Overall justice

[18] Standing back I find that the overall justice of this situation is best served by maintaining the current status quo i.e. not reinstating Mr Fife on an interim basis. My investigation meeting into Mr Fife's claim will take place in just over three weeks and I hope to be able to provide the parties with a substantial determination within a few weeks of that meeting. In the meantime Mr Fife, having been paid the equivalent of his full salary until well beyond that date, should not suffer financial stress. The delay will make no difference to the practicability of reinstatement.

Determination

[19] For the reasons set out above, Mr Fife's application, that he be reinstated to his position pending the outcome of the Authority's investigation of his substantive claims, is declined.

Costs

[20] Costs are reserved to be dealt with at the completion of the Authority's investigation.

James Wilson

Member of the Employment Relations Authority