

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 262/10  
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:        19 May 2010  
  
Submissions                    24 & 27 May 2010 from the applicant  
   24 & 27 May 2010 from the respondent  
  
Determination:                31 May 2010

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**DETERMINATION OF THE AUTHORITY**

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**Background**

[1]     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 the applicant, Mr Grant Fife. In response to Mr Callaghan's email Mr Fife, believing he was writing 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.

[2]     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.*

[3] On 4 March 2010 Mr Fife was dismissed for serious misconduct. On 16 March 2010 Mr Fife filed a statement of problem in the Authority alleging that his dismissal was unjustified and seeking interim and permanent reinstatement, reimbursement of all wages lost as a result of his dismissal, compensation for hurt and humiliation and costs.

### **The issues for determination**

[4] The first issue for determination is whether or not Mr Fife's dismissal was justified. In considering that question it is necessary to determine whether *the actions of the employer (Air New Zealand) and how the employer acted in dismissing (Mr Fife) were*, in the words of section 103(A) of the Employment Relations Act (the Act) *what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... took place*. If they were not then Mr Fife's dismissal was unjustified and he has a personal grievance against the company.

[5] If Mr Fife has a personal grievance, the second issue for determination is whether or not he is entitled to any or all of the remedies he is seeking, including, as the primary remedy, reinstatement to his position.

[6] Section 103A requires that the Authority examine all of the actions of the employer, including the investigation process carried out by the company and the decision to dismiss, and determine whether or not these actions were, when taken "in the round", those *of a fair and reasonable employer*.

[7] In general terms Mr Fife concedes that the disciplinary investigation carried out by Air New Zealand (*the actions of the employer*) was fair and it was carried out in terms of the relevant employment agreement provisions. However he says that the investigation was tainted, and therefore unfair, because Mr Gaskin had access to the background detail of an incident which led to a previous, now expired, written warning. Mr Fife says that Mr Gaskin's familiarity with the earlier incident unfairly prejudiced his thinking when deciding whether or not Mr Fife should be dismissed. Mr Gaskin says that in fact he was not aware of the details of the earlier incident until well after he had made the decision to dismiss Mr Fife.

[8] In respect to the decision to dismiss (*how the employer acted*), Mr Fife also says that Mr Gaskin did not give enough weight to his long service, his apology to Mr Callahan or to the fact that he had not intended Mr Callahan to see the offending e-mail.

#### **Air New Zealand's disciplinary investigation**

[9] I accept that the disciplinary investigation carried out by Mr Gaskin met the basic standards of fairness and was consistent with the provisions of Mr Fife's employment agreement. Appropriately Mr Gaskin carried out the investigation process himself rather than leaving it to Mr Fife's immediate supervisor who would have been at the same level of management as the recipient of the offensive e-mail. Mr Fife was properly represented throughout the investigation process and I accept Mr Gaskin's evidence that, in terms of the company's disciplinary policy, he consulted the appropriate senior managers but that the decision to dismiss was his. I also accept Mr Gaskin's evidence that he did not see the detailed report regarding Mr Fife's earlier, expired, written warning until after he had made the decision to dismiss. Mr Gaskin was adamant that he had access only to the actual written warning which did not outline the details of the incident. He was also adamant that, because the warning had expired, it was not the warning itself that he took into account but rather the

admonition in that warning that Mr Fife should *ensure that (he) comply with these policies at all times*. This distinction was made clear to Mr Fife at the commencement of Mr Gaskin's investigation.

### **The findings of the disciplinary investigation**

[10] Having determined that the investigation process carried out by Air New Zealand was fair, the second question is whether, under all the circumstances at the time, a fair and reasonable employer would have dismissed Mr Fife.

[11] Mr Fife accepts that he wrote the offending e-mail and that the e-mail was sent in error to Mr Callahan. Air New Zealand accepts that Mr Fife did not intend to send the e-mail to Mr Callahan. Mr Gaskin says that in carrying out his investigation he had four areas of concern:

- (i) The e-mail communication from Mr Fife had serious personal consequences for Mr Callahan as the manager who was the subject of the statements.
- (ii) There would be a likely detrimental impact on the relationship between Air New Zealand and FARSA, of which Mr Fife was a senior representative,
- (iii) Statements and communications of the nature of Mr Fife's e-mail degrade and demean the position of the managers in the company, and
- (iv) Mr Fife's actions in sending the e-mail were damaging of the relationship between colleagues in the company, particularly given the respective positions held by the employees involved in these particular circumstances.

[12] Mr Gaskin says that, based on the information he had at the time, he discounted the second of these concerns, concluding that there was unlikely to be any lasting detrimental or negative impact on the relationship between the company and FARSA as a result of Mr Fife's e-mail. However he says that his other three concerns each had a bearing on his final decision to dismiss Mr Fife.

*The impact on Mr Callahan*

[13] Mr Gaskin says that it is apparent that Mr Callahan was deeply questioning the genuineness of the relationship he believed he had had with Mr Fife for some 18 years. There was, on Mr Callahan's part, a real sense of betrayal. Mr Gaskin says he discussed with Mr Callahan the possibility of a meeting between him and Mr Fife (as suggested by Mr Fife) and Mr Callahan responded that:

*Given the content of the e-mail and the language used, it clearly showed that there wasn't any type of relationship that (Mr Callahan) would want to foster...*

When questioned at the Authority's investigation meeting, Mr Gaskin said that, while contact between Mr Callahan and Mr Fife was infrequent, the way in which the organization is structured means that such contact could not be avoided completely.

*Comments degrade and demeaned the position of managers?*

[14] Mr Gaskin says that he concluded that Mr Fife's comments did degrade and demean the position of managers in the company. He says it was not simply the offensive words themselves, but how those words have been used, their destructive nature, the context and the fact that these sentiments were intended to be expressed about Mr Callahan but invisible to him.

*Comments damaging of the relationship between colleagues in the company*

[15] Mr Gaskin says that he *concluded with no difficulty* that Mr Fife's e-mail was damaging of the relationship between colleagues within the company, particularly given the respective positions of Mr Fife and Mr Callahan.. He says that although the words were not intended to be received by Mr Callahan there was no doubt that they were directed at him, or about him, with a view to belittling, intimidating and/or undermining him.

[16] Mr Gaskin says that having completed his investigation and reflected on his findings and concerns he concluded, by a very significant margin that there had been serious misconduct on Mr Fife's part. I concur with that finding.

### **The decision to dismiss**

[17] In summary Mr Fife says that his dismissal was unfair because:

- a. Mr Gaskin predetermined the decision to dismiss.
- b. Mr Gaskin took the 2007 adverse report into consideration in his decision-making and withheld the fact that he had read that report thereby denying Mr Fife the opportunity to comment on that report.
- c. Mr Gaskin did not attempt to reconcile matters between Mr Fife and Mr Callahan.
- d. Mr Callahan failed to give sufficient weight to the fact that he, Mr Fife, had tendered a full apology to Mr Callahan and was prepared to undertake whatever remedial action the company saw as appropriate.
- e. Mr Gaskin may have failed to consult with the appropriate senior managers as required by the company policy.
- f. Mr Gaskin failed to give sufficient weight to Mr Fife's length of service and standards of performance as a flight attendant.

[18] I have already dealt with a number of these concerns in the foregoing paragraphs. In particular I accept that Mr Gaskin had not seen the 2007 adverse report and did consult with the appropriate senior managers prior to making his decision to dismiss Mr Fife. There is no evidence, other than Mr Fife's "feeling", that Mr Gaskin predetermined the decision to dismiss. Mr Gaskin did, albeit a relatively early stage, discuss with Mr Callahan the possibility of a reconciliation between him and Mr Fife -- Mr Callahan forcibly rejected that possibility. Mr Gaskin says that he did take into account Mr Fife's service record but argues that an employee of such seniority (in terms of his length of service) should have known the importance of maintaining good relationships and that his behaviour was totally inappropriate.

[19] Mr Fife did make several attempts to apologise to Mr Callahan. The first of these was by e-mail directly to Mr Callahan shortly after he had been advised of Mr Callahan's complaint. In this e-mail, dated 18 September 2009, Mr Fife said:

*The e-mail in question was a personal e-mail sent in a private capacity... in the heat of the moment. It was mistakenly sent to you and I sincerely*

*apologize for that. It was not intended for you or anyone else's consumption other than who I thought I was speaking to....*

*I would appreciate the opportunity to meet you in person at any time at your convenience to offer my most sincere apology.*

Mr Gaskin was aware of this apology. He points out that Mr Fife expresses regret that the e-mail was sent to Mr Callahan but does not directly apologize for the content of that e-mail or for the distress it caused Mr Callahan. On about 14 October 2009 (the letter is undated) Mr Fife wrote a much fuller apology to Mr Callahan in which he said:

*May I offer my unreserved apologies firstly for the utter inappropriateness of the language used in the e-mail, but most importantly the effect this had on you in thinking my comments where a direct attack on you personally or your professional ability. I would like at sometime soon to be able to give my apologies in person so that you may judge my sincerity for yourself and also to give you the opportunity to respond to me accordingly.*

This letter was said, by Mr Fife, to be *without prejudice to the current investigation*. It seems that Mr Gaskin was aware of this apology but that Mr Fife did not give him a copy as he *did not want it to be used to influence the company's investigation*. A copy of the letter was given to Mr Gaskin after he had made his preliminary decision (that Mr Fife's actions amount to serious misconduct and that dismissal was a likely result) but before he made his final decision to dismiss. Mr Gaskin says that he considered both the apologies conveyed to Mr Callahan and Mr Fife's offer to apologize in person but:

*As to the conduct which I found to have occurred in this case, it is very difficult to see how an apology could mitigate the conduct in this case. The simple point is that Grant Fife made this statement, he knew he was making the statement (albeit not to the actual recipient) and can have been in no doubt that the statement was about Phil Callahan, it was vitriolic and offensive and was intended to demean or undermine Phil Callahan. In other words, there are some actions where it is very difficult to mitigate the outcome with an apology.*

And:

*The much later "without prejudice" apology was deliberately, by Grant Fife, kept out of the investigation until the very last minute. While that letter is more fulsome, given the actual words used in the original e-mail and the reference to Phil Callahan, the apology itself is somewhat hollow given that Grant Fife intended to say what he said in the first place...*

...

*Overall, to me it does seem that Grant Fife did not appreciate, and still does not appreciate that some matters cannot be "fixed" by an apology.*

[20] In simple terms Mr Fife's argument is that, taking into account all of the circumstances, Mr Gaskin's decision to dismiss him was extremely harsh and that a fair and reasonable employer would have given more weight to his length of service and his willingness to apologise to Mr Callaghan and made more efforts to repair the relationship with Mr Callahan. He suggests that a more appropriate penalty would have been a further written warning with perhaps some requirement to attend EAP services.

[21] I have spent a good deal of time pondering the question *what would a fair and reasonable employer have done in all of the circumstances?* In support of Mr Fife's position, it is true that the e-mail he sent was not intended for Mr Callahan. However that appears to be the only real argument in his favour. Had this e-mail been deliberately sent to Mr Callahan there is absolutely no doubt that Mr Fife's dismissal would have been justified. Alternatively had this e-mail come to light by, for example a routine review of internal e-mail correspondence, the language it contains would have breached any employer's standards and, again would, in all probability, have resulted in the author's dismissal. Irrespective of Mr Fife's intentions, the e-mail itself reveals what can only be described as a disdainful and destructive attitude toward a more senior manager. Mr Fife was a long-standing employee, active in union affairs who knew the high standards expected of all employees. Despite that he chose to describe a senior manager in terms which can only be described as grossly offensive. Once Air New Zealand became aware of Mr Fife's attitude, even by accident, the trust and confidence they had in Mr Fife was destroyed. I agree with Mr Gaskin's assessment that no apology, no matter how fulsome or sincere could repair the harm done to Mr Callahan nor restore Air New Zealand's trust and confidence in Mr Fife.

**Determination**

[22] I am satisfied that Mr Gaskin carried out a full and fair investigation, considered all of the arguments put to him in mitigation and came to conclusion that nothing could be done that would restore the company's trust and confidence in Mr Fife. **The decision to dismiss Mr Fife was what a fair and reasonable employer would have done in all the circumstances and was therefore justified. Mr Fife does not have a personal grievance and is not entitled to the remedies he seeks.**

**Costs**

[23] Costs are reserved and the parties are urged to attempt to resolve this issue between themselves. If they're unable to do so Air New Zealand may file and serve submissions in respect to costs within 28 days of the date of this determination. FARSA, on behalf of Mr Fife, will then have 14 days in which to file and serve a response

James Wilson

Member of the Employment Relations Authority