

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 384
5421308

BETWEEN	GINA TRUDY KENSINGTON Applicant
A N D	AIR NEW ZEALAND LIMITED Respondent

Member of Authority:	T G Tetitaha
Representatives:	L Keys/M Dignan, Counsel for Applicant D France, Counsel for Respondent
Investigation Meeting:	5 August 2013 at Auckland
Submissions Received:	3 July and 7 August 2013 from Applicant 3 July and 7 August 2013 from Respondent
Date of Determination:	27 August 2013

DETERMINATION OF THE AUTHORITY

- A. Gina Trudy Kensington was unjustifiably dismissed from her employment by Air New Zealand Limited.**
- B. The parties are to advise whether there is consent to a direction to further mediation and their availability for a half day hearing to determine remedies. A teleconference is set down at 9.00 am 10 September 2013.**
- C. Costs are reserved.**

Employment relationship problem

[1] Gina Trudy Kensington was employed by Air New Zealand Limited (Air NZ) as a long haul flight attendant. She was dismissed for failing to follow her Manager's instructions and misuse of sick leave in the form of domestic leave.

[2] Ms Kensington submits she was unjustifiably dismissed because her actions did not amount to a misuse of sick leave and the disciplinary process followed by Air NZ was unfair.

[3] Air NZ disagrees. It submits Ms Kensington's employment was terminated after investigation and a finding she was untruthful and her actions amounted to serious misconduct. The dismissal was therefore justified.

Facts leading to dismissal

[4] On 8 March 2013 at 1 pm, Ms Kensington and a friend, Les Kitto, were on leave at Takapuna beach, when her sister, Vania Kensington-Morpeth (Mrs Morpeth), rang. She had recently given birth to her first child. Ms Kensington had assisted with care for the previous three weeks together with their mother, who was returning home. Her sister wasn't feeling well and felt she needed someone to be with her the following day as her husband, Andrew Morpeth, had to work.

[5] At 1.08 pm Ms Kensington sent a text message to her flight service manager, Jane Louise Rosevear seeking special leave to look after her sister. Ms Rosevear replied at 2.45 pm asking if this was a domestic leave day and enquired about her sister's health. Ms Kensington replied: ¹

oh yeah is that what they called?? she okaayyyy ... she's got a two week old bubs. Cant drive etc and her hubby is away for work all weekend and Mum cant come up. Ekkkkkkk.

[6] Ms Rosevear sent a reply doubting her eligibility for domestic leave as it *is to care for a sick spouse or dependant*. Ms Kensington replied she had a friend who had done this before and asked *shall I just go sick then?* Ms Rosevear replied *of course not as you are not sick. Let me make a call.* ²

[7] Ms Rosevear called Lyn Snell, Ms Kensington's Performance and Development Manager (PaDM). They discussed her request and determined she was ineligible for domestic leave. Ms Rosevear called Ms Kensington at about 3.12 pm telling her she was ineligible for domestic leave and required her to report for work

¹ Respondent Bundle of documents (BOD) Tab.36, 38 to 39 copies of text messages 8 March 2013

² BOD Tab.40 to 42 copies of text messages 8 March 2013

the following day. Ms Kensington was aware there was a crew shortage due to sickness.³

[8] Ms Kensington rang the Flights Attendants and Related Services (NZ) Association (FARSA). She spoke to Peter Bentley about her eligibility for domestic leave to care for her sister. At 4.46pm Mr Bentley sent an email to Ms Kensington stating *we believe you are protected to take sick leave for the care of your sister in absence of anyone available to care for her and if Lyn [Snell] has any further issues with this, then just let me know.*⁴

[9] At 5.14 pm Ms Kensington tried to contact the Air NZ PaDM on duty without success. She then contacted Air NZ Crew Control and advised she would not be coming in for work the following day.

[10] The next day 9 March 2013 at 8.48 am, Ms Kensington emailed Ms Rosevear to advise she had taken a domestic leave day because *I am entitled to it* and forwarded the above email from Mr Bentley. She added *[a]ny problem Pete [Bentley] would be happy to talk about with Lyn [Snell]*. Ms Kensington was due to report for work at 9.30 am that day.⁵

[11] Ms Rosevear saw the above email at 9.49am and forwarded it to Ms Snell expressing her unhappiness.⁶ Ms Snell decided to undertake an employment investigation and advised Ms Kensington. Ms Rosevear was interviewed on 20 March and 12 April 2013.

[12] Ms Snell wrote to Ms Kensington asking her to attend a formal disciplinary meeting on 2 April 2013. She set out Air NZ's concern she *may have falsely declared the need to look after your sister and used this reason in an attempt to secure further time off*⁷.

[13] The first investigation meeting was held on 2 April 2013. Ms Kensington provided oral responses and emailed additional information.⁸

³ Brief JL Rosevear paras. 24 to 27

⁴ BOD Tab.7 page 2

⁵ BOD Tab.7 page 1

⁶ BOD Tab.7 page 1

⁷ BOD Tab.11 page 2

⁸ BOD Tab.12

[14] A second investigation meeting was held with on 11 April 2013 and more information received.⁹

[15] In the afternoon of 11 April her sister's husband, Mr Andrew Morpeth, called Ms Snell and offered to answer questions by telephone. Ms Snell asked to interview him in person which he refused. No interview with Mr Morpeth occurred as a consequence. He provided a written statement his wife was sick, he had to work, Mrs Stapleton was unavailable and Ms Kensington was at the house on 9 March.

[16] Her sister, Mrs Morpeth, was interviewed by Ms Snell and Ms Rachel Chapman on 13 April 2013. Ms Keys emailed information including Mr Kitto's statement disputing Ms Kensington told Ms Rosevear her sister had a c-section.

[17] Between 17 April and 1 May 2013 Ms Keys forwarded further information including an email from Ms Kensington's mother, Lois Stapleton, confirming she had left to go home on 8 March 2013 around lunchtime and her daughter was not feeling 100%.¹⁰

[18] On 22 April 2013 her sisters midwife, Ms Deidre Jeffries, wrote to Air NZ giving her opinion on Ms Morpeth's health and need for a support person.¹¹

[19] A further investigation meeting was held on 8 May 2013. Ms Snell advised she had concluded Ms Kensington *had not been truthful in her explanation ... that [Mrs Morpeth] was sick to the extent she was dependant on [Ms Kensington] for care.* Her actions amounted to serious misconduct and Air NZ was considering terminating her employment. She was invited to comment on possible outcome.¹²

[20] Between 9 and 10 May 2013 the parties discussed timeframes and other matters. Air NZ sought further comment by midday 10 May 2013 with an outcome meeting at 3 pm.

[21] At 11.30am on 10 May 2013 Ms Snell received a letter from Ms Kensington's representative with written submissions.¹³

⁹ BOD Tab.15

¹⁰ BOD Tab.21

¹¹ Affidavit G Kensington 31 May 2013, Annexure G Letter D Jeffries to Air NZ 22 April 2013

¹² BOD Tab.30 pp10 – 11.

¹³ BOD Tab. 32

[22] Neither Ms Kensington nor her representative attended the 3pm meeting. Air NZ determined it *did not accept [Ms Kensington] had been truthful ... has lost trust and confidence in [her] as an employee ... [and] decided to terminate [her] employment*. The dismissal decision was sent to her care of Ms Keys at 4.10pm 10 May 2013.¹⁴

Issues

[23] The following issues arise:

- (a) Was there a full and fair investigation undertaken by Air NZ into the actions of Ms Kensington?
- (b) Could a fair and reasonable employer have concluded the conduct disclosed from the investigation amounted to serious misconduct?
- (c) Was the dismissal of Ms Kensington what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred, including an assessment of any disparity in treatment of Ms Kensington compared with other employees?
- (d) If the Authority finds that the dismissal was unjustified, what remedies should be awarded?

Legal Framework

[24] The fact Ms Kensington was dismissed is accepted. The onus falls upon Air NZ to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred*.¹⁵ In applying this test, the Authority must consider the matters set out in s103A.

[25] The Authority must not determine a dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (s103A(5)).

Was there a full and fair investigation undertaken by Air NZ into the actions of Ms Kensington?

[26] Ms Kensington submits prior to dismissal, Air NZ gave her no reasonable opportunity to comment, did not genuinely consider her responses and gave no further

¹⁴ RBD Tab.33

¹⁵ S103A(2)

opportunity to speak. It also failed to interview Mr Kitto, Ms Jeffries and Mr Morpeth.

[27] Air NZ submits Mr Kitto gave a statement so an interview was not required. Mr Morpeth refused to be interviewed in person and Ms Kensington did not provide an explanation he had no domestic leave available. The midwife, Ms Deidre Jeffries, did not visit her sister on 8 or 9 March so could not provide relevant health information. There was reasonable opportunity for comment prior to dismissal and the employer genuinely considered her responses.

[28] No issue was taken with the raising of the employers concerns (s103A(3)(b)).

[29] An employer is required to give a reasonable opportunity for employees to respond to their concerns (s103A(3)(c)). The facts leading to dismissal show Ms Kensington was given several opportunities to comment, including on the day the dismissal decision was made and provided written submissions.

[30] Air NZ had written statements from Ms Jeffries, Mr Morpeth and Mr Kitto before it. It made a decision not to seek any further information, which it was entitled to do. This restricted the evidence before it but did not result in an unfair investigation. There are consequences upon its decision-making of not interviewing people. These are considered below.

[31] Accordingly the Authority determines there was a full and fair investigation by Air NZ into Ms Kensington's actions.

Could a fair and reasonable employer have concluded the conduct disclosed from the investigation amounted to serious misconduct?

[32] Ms Kensington alleges the decision was predetermined and based upon erroneous information her conduct materially affected the ability to staff flights and her sister had a c-section. It gave insufficient weight to relevant matters about her sisters health and her dependant baby. It could not have reasonably concluded Ms Kensington was untruthful about her sister being sick given these errors and the failure to interview Mr Morpeth and Mr Kitto.

[33] Air NZ submits Ms Kensington was ineligible for domestic leave as defined in the s65 Holidays Act and Cabin Crew Policies and Procedures and the fact her sister was lived with her husband (Mr Andrew Morpeth) and not her. The test is whether

the employer could have determined on the evidence available that the employee's behaviour was serious misconduct. Mrs Morpeth's evidence did not indicate she was incapable of staying home on her own and she did not seek medical attention. Ms Kensington's actions infer she was trying to conceal her leave and prevarication.

[34] Air NZ's finding was Ms Kensington was untruthful about her sister being sick and dependent upon her for care. The investigation focused on whether Mrs Morpeth was sick in the manner claimed by Ms Kensington; did she depend on someone for care; and did she depend upon Ms Kensington for care.¹⁶ Ms Kensington's behaviour, the lack of contemporaneous medical information on her sisters' health and the availability of Mr Morpeth and her mother for care, led to the finding Ms Kensington was untruthful.

[35] This finding was not based upon the definition of 'sickness' or 'dependant' in the collective agreement, policies, Holidays Act or other applicable law.¹⁷

[36] There is no evidence of pre-determination. Pre-determination is alleged in a statement by Ms Rosevear¹⁸ and the short time period between receiving Ms Kensington's submissions at 11.30 pm and making a decision to dismiss by 3 pm. Ms Rosevear was neither the investigator or decision maker. Ms Snell was. Her statements were recorded as part of the body of evidence before Ms Snell prior to making the decision. It is not evidence of Ms Snell's 'pre-determination'. It is evidence of Ms Rosevear. Ms Snell gave evidence she considered (and the dismissal decision specifically referred) to Ms Kensington's submissions.¹⁹ Other than the suggested alternatives to dismissal, the submissions contained material that had been raised or provided previously during the two months of investigation. There was sufficient time to genuinely consider Ms Kensington's submissions.

[37] The alleged errors did not materially affect Air NZ's finding about Ms Kensington's truthfulness. Ms Rosevear admitted she had made an error in assuming her sister had a caesarean or c-section. This mistake weighed in favour of her sisters ill health, not against it. Employees taking sick leave would logically "contribute"

¹⁶ RBD tab 30 p 6

¹⁷ RBD tab 30 pp 5 – 6 Provision for Domestic Leave

¹⁸ RBD tab 32 Letter FARSA to L Snell dated 10 May 2013 paragraphs 18 to 21

¹⁹ RBD tab 33 p 2

towards Air NZ's ability to crew flights.²⁰ This was not an error. It was a conclusion that was reasonably open for her employer to reach.

[38] Ms Kensington's behaviour did not assist matters. It created confusion about her sisters' actual health and her motive for leave. At hearing she said she remained at Takapuna beach taking photos for her Facebook page as she *tried to organise domestic leave* while her sister was allegedly sick and alone. Her text that her sister was *okaayyyy* meant she was not dying, but still ill. She did not contact Ms Rosevear again *to avoid conflict*. After an unsuccessful attempt to contact the PaDM on duty she admitted taking no further steps (other than contacting Crew Control) until 8.48 am the next day – three quarters of an hour prior to the start of her duty.²¹ Although Ms Kensington's behaviour may be viewed by Air NZ as dishonest and prevarication, it must be weighed against other evidence.

[39] She had legal advice from FARSA supporting her belief (rightly or wrongly) she was entitled to domestic leave. Her sister received medical attention from a midwife on 8 March 2013. Her midwife, Deidre Jeffries followed up on an undisclosed date thereafter. Her mother, Lois Stapleton was caring for a dying relative. There was no evidence her sister's husband, Andrew Morpeth, had available leave to care for her.

[40] Air NZ gave no weight to Ms Jeffries evidence because she had not seen Ms Morpeth on 8 or 9 March and omitted to disclose any illness. This was an error. Ms Jeffries may not have seen her personally on 8 March, but a colleague did. The consultation notes would have been available to Ms Jeffries. Ms Jeffries medical opinion was Mrs Morpeth needed *to heal* possibly from *on-going ligamental pain* and/or a *complicated and traumatic labour and birth*. She concluded *[in] my opinion, it was in Vania's best interest to have her sister with her in this time of need*. She invited Air NZ to contact her if they required any further information.²²

[41] Ms Jeffries medical opinion raises a reasonable inference her sister was suffering from possible illness or injury. If Air NZ sought a clearer diagnosis or questioned the validity of her opinion, it should have taken the proffered opportunity

²⁰ Tab 30 p10

²¹ Oral evidence 5 August 2013 G Kensington

²² Affidavit G Kensington in support of application for interim reinstatement sworn 31 May 2013, Annexure G Letter D Jeffries to Air NZ dated 22 April 2013.

to make further enquiries or referred Ms Jeffries opinion to another doctor for assessment. This evidence cannot be reasonably excluded otherwise.

[42] It was common ground Mr Morpeth had exhausted his paternity leave. At hearing neither party knew whether Mr Morpeth had any available leave on 8 or 9 March 2013. He offered a telephone interview which Air NZ declined. Ms Snell required a face to face interview with Mr Morpeth because *honesty was an issue in the investigation*.²³ Mr Morpeth's credibility was not at issue. Ms Kensington's was. There was no evidence he was dishonest or colluding with Ms Kensington against Air NZ.

[43] Ms Kensington discharged her obligation to provide this relevant information by Mr Morpeth's offer of a telephone interview. Questions Air NZ wanted to ask could have put to him by telephone. Air NZ could not legally compel him to give a face to face interview. Its refusal to interview him by telephone does not validate its conclusion Ms Kensington was untruthful.

[44] The explanation about her mother, Ms Lois Stapleton's unavailability due to a dying relative was reasonable in the circumstances and did not evidence Ms Kensington's untruthfulness.

[45] Given the above, the Authority determines a fair and reasonable employer could not have concluded Ms Kensington was untruthful about her sister being sick and dependent upon her based on the evidence before it.

Was the dismissal of Ms Kensington what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred, including an assessment of any disparity in treatment of Ms Kensington compared with other employees?

[46] Ms Kensington submits the dismissal decision omitted relevant matters her 13 year unblemished record, this was a 'one off' incident and expressed remorse. There was disparity of treatment with another employee, Vania Armstrong aka Marsh (Ms Marsh) who took domestic leave to care for a sibling. The decision included matters she had no opportunity to comment upon such as low ranking, below average PD scores and above average absenteeism.

²³ Witness Statement (WS) LM Snell para.48

[47] Air NZ submits it had an adequate explanation for disparity and took all relevant matters into account including consideration of alternatives. The matters of low ranking, below average PD scores and above average absenteeism were merely in reply to Ms Kensington's allegation of a 'spotless' record.

[48] All of the relevant matters were before the employer when it made its decision.

[49] It is important employers treat employees in a similar manner where there are similar offences or circumstances. Disparity may be significant enough in some cases to hold a dismissal unjustified unless there is an adequate explanation.²⁴ The explanation for disparity with Ms Marsh was Ms Kensington had domestic leave declined and been instructed to report for work. It also did not accept Mrs Morpeth was sick or dependant at the time of the dismissal. Subject to the Authority's above finding, this was an adequate explanation for disparity at the time the dismissal occurred.

[50] There was a reasonable inference low ranking, below average PD scores and above average absenteeism was relevant to considering alternatives to dismissal. They were not merely 'in reply' to her submissions. These matters were listed under *possible outcome and the alternative to dismissal* and *the finding of loss of trust and confidence*²⁵. They were not raised before the decision to dismiss. Ms Kensington disputed these matters at hearing. A fair and reasonable employer is required to give an employee a reasonable opportunity to respond to these concerns prior to the decision to dismiss (s103A(3)(c)). It did not. A failure to meet any of the s 103A(3) tests is likely to result in a dismissal being found to be unjustified.²⁶

[51] The Authority determines the dismissal of Ms Kensington was not what a fair and reasonable employer could have done in all the circumstances at the time it occurred. The dismissal was unjustified.

²⁴ *Airline Stewards and Hostesses of NZ IUOW v Air NZ Ltd* (1985) ERNZ Sel Cas 156 (CA)

²⁵ RBD Tab 33

²⁶ *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160 at [26].

If the Authority finds that the dismissal was unjustified, what remedies should be awarded?

[52] The Authority can indicate on the facts there will be substantial contribution by Ms Kensington under s124. Her behaviour was both causative and blameworthy. This will reduce her remedies significantly.

[53] Whether it is practicable and reasonable to grant reinstatement requires the Authority to make findings about Ms Kensington's truthfulness. This conclusion was not open to her employer based on the evidence before it. If found to be untruthful, this may prevent reinstatement on the basis of breach of trust and confidence. It will require a further half day hearing and the attendance of Ms Jeffries and Mr Morpeth, either in person or by telephone.

[54] The parties may benefit from a direction to mediation in the interim to avoid the cost of a further investigation meeting on remedies. The parties are to advise if a further direction to mediation would assist and their availability for a half day hearing.

[55] A teleconference shall be set down for 9.00 am on 10 September 2013 to discuss progression of this case.

[56] Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority