



New Zealand Employment Relations Authority Decisions

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Kiely v Air New Zealand Limited (Auckland) [2007] NZERA 116 (20 April 2007)

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 113/07 5042003

BETWEEN DALE KIELY

Applicant

AND AIR NEW ZEALAND LIMITED

Respondent

Member of Authority: Representatives:

Determination:

Leon Robinson

Stewart King for Applicant David France for Respondent

20 April 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mr Dale Kiely claims he has a personal grievance for unjustifiable disadvantage because his employer Air New Zealand Limited ("Air New Zealand") has refused to reimburse him for his lost tie pin. He asks the Authority to investigate and resolve the problem in his favour by ordering Air New Zealand to reimburse him the value of the lost tie pin of \$490.00. He also seeks costs.

[2] The parties were unable to resolve the problem between them by the use of mediation.

[3] The Authority has taken evidence from Mr Kiely, his wife Mrs Linda Kiely ("Mrs Kiely"), and Air New Zealand's international cabin crew manager Ms Carrie Hurihanganui ("Ms Hurihanganui").

The facts

[4] Mr Kiely is employed by Air New Zealand as a flight attendant, premium service. The terms of his employment are recorded in a collective employment agreement known as the *Air New Zealand - FARSA Collective Employment Agreement* ("the Collective").

[5] On a flight to Tonga on 29 October 2005, Mr Kiely lost his gold tie pin, a gift Mrs Kiely had given to him for his birthday in April 2003. Mr Kiely noticed the tie pin was missing when he returned to the aircraft after he had assisted passengers to disembark.

[6] Mr Kiely and his colleagues searched the aircraft, tarmac and terminal for his tie pin but were unable to locate it.

[7] Mr Kiely submitted a *Staff Multi Purpose Claim* form dated 29 November 2005 to Air New Zealand making a claim for the loss of a *14k Solid Gold Tie slide*. He gave these particulars of the loss:-

A lady travelling with 3 young children & many bags, needed assistance at Tonga. The ground staff were already assisting with w/chairs so I helped carry one child & several bags to the terminal & through customs. On return to the aircraft noticed the slide

missing & searched on a/c & in Terminal to no avail. PTO

Crew assisted in a/c search for item & spoke with cleaners. Spoke with baggage tracking on return to AKL. ISD wrote up loss on Sector Report.

[8] Mr Kiely was informed by Ms Glenda Walser, a performance and development manager ("Ms Walser") that he was required to submit valuer's reports because his claim form did not disclose a claim value. He says he submitted four or five such reports.

[9] One such report is a facsimile from Walker and Hall Fine Gifts Limited dated 29 November 2005 which states:-

To whom it may concern

The following item was lost by your client.

9ct gold tie slide with button keeper and chain. The tie slide was purchased 6-8 years ago.

New replacement of a similar tie slide is \$495.00.

[10] Ms Glenda Walser, a performance and development manager spoke to Mr Kiely on 17 March 2006 and advised that his claim had been declined.

[11] Mr Kiely wrote to Ms Walser and Ms Hurihanganui by email of 20 March 2006:-

Further to our telephone conversation of two weeks ago, I was advised by Glenda Walser on Friday that you have determined to not pay my claim for a Tie Slide. Apparently this decision is based on the conclusion that the article was of an 'unreasonably' expensive nature.

It was suggested that calls have been made to jewellers, and prices of approx. \$100 given for a gold tie slide. I would be very surprised by this, as I made many telephone enquiries and then visited around ten different shops in Mt Wellington and New Market areas to find that a 9k tie slide would be around \$300 to replace. Mine was dearer as it was 18k.

I have spoken with an Insurance Broker, who is also a member of the New Zealand Insurance Council, who advised me, that had an actual insurance claim been made for this loss it would be paid unreservedly. This is because there are no stated exclusions, or other maximums that will be paid, up to the \$1,500 limit. The apparent argument presented to me is not that wearing the item is unreasonable, but that the value is. Unfortunately I do not believe that is a matter for question, as the contract clause merely refers to whether it is reasonable for me to carry it. While I do acknowledge that it is reasonably expensive for a tie slide, it was a gift from my wife and because of clause 13 in my employment contract I felt reassured that it was covered. I would therefore respectfully ask that your decision be reviewed, as I feel that to deny the claim would be an unjustified action and the only resolution available to me will be through legal action or to initiate a personal grievance.

It is not a decision I have come to lightly, as it would cost me far more than the tie slide is worth, however I believe that it is a matter of principle and therefore worth pursuing.

[12] By letter dated 21 March 2006, Air New Zealand confirmed Ms Walser's advice:-

As you are aware we have declined this claim for the loss of a Tie Slide valued at \$490.00. Our decision to decline this is based on what is 'reasonable' for a flight attendant to carry. Whilst there is the option to wear a tie pin or slide, this is not a mandatory requirement. Given that the Flight Attendant grooming guide states a simple gold tie slide or tie pin may be worn, it would be unreasonable to expect the company to reimburse a lost pin to the value of \$490. What we believe to be reasonable is replacement value of a simple gold pin. This means the company will pay \$100 towards replacement of tie pin.

Yours faithfully Glenda Walser Performance and Development Manager

The merits

[13] The Collective has this term:-

Clause 13 LOSS OF EFFECTS

*13.1 A Flight Attendant shall, subject to the normal conditions of insurance, be covered by the Airline against loss or damage to his/her luggage and personal effects which accompany him/her for the purposes of any journey undertaken by him/her in performance of his/her duties and which are **necessary or reasonable** for him/her to carry, provided such loss or damage does not arise from negligence on the part of the Flight Attendant. The maximum cover in respect of one claim shall not exceed \$1,500.*

(emphasis added)("Loss of Effects clause")

[14] The *Cabin Crew General Operating Procedures Manual* 23 June 2005 contains a description of the insurance of personal effects. It says this:-

*A crew member shall, subject to normal conditions of insurance, be covered by the Company against loss of or damage to his/her luggage and personal effects which accompany him/her for the purpose of any journey undertaken in the performance of his/her duties and which are **necessary and reasonable** for him/her to carry, provided such loss or damage does not arise from negligence on the part of the staff member.*

(emphasis added)

[15] There is a subtle but significant difference in that the luggage or personal effects must be both necessary **and** reasonable to be carried, whereas the Loss of Effects clause specifies necessary or reasonable. The Loss of Effects clause must prevail as having contractual force.

[16] The *Cabin Crew General Operating Procedures Manual* also says this on page 2.71 :-

Claims will not be accepted for items of jewellery not covered by the grooming regulations. Air New Zealand does not accept claims for fine jewellery damaged or lost where it is not practical to be wearing such items. For example, fine bracelets are not considered reasonable to wear in the galley.

Cabin crew with expensive jewellery (e.g. engagement rings) should have these valued as proof of ownership and original receipts should be kept. Claims will not be processed if they are supported by a valuation certificate based on a description to a jeweller after the loss.

[17] **The Air New Zealand Grooming Guide has a section Men's Image and Presentation Standards and says this on Tie Pins:-**

*A simple gold tie slide or tie pin, no larger than 2 cm in diameter or a 5 cent piece, **may** be worn. These are available for purchase from the Wardrobe Service Centre.*

(the emphasis is added)

[18] I do not understand either party to argue that only simple gold tie pins purchased from its Wardrobe Service Centre are permitted. That is how I interpret the provision but proceed to give effect to the parties understanding.

[19] It is noted that in his statement of evidence and in his email of 20 March 2006 to Ms Hurihanganui, Mr Kiely reports the tie slide as 18k. The claim form of 29 November 2005 refers to a tie slide of 14k. The valuer facsimile refers to a tie slide of 9ct.

[20] I have understood Mr Kiely to assert that his claim falling within the \$1,500.00 limit, ought to have been accepted. The stated maximum is not a qualifying criterion for cover. I told Mr Kiely in the investigation meeting I did not regard the matter quite so "black and white". His assertion would render any claim less than \$1,500.00 automatic and that cannot be so. Air New Zealand does not automatically indemnify all flight attendants' luggage and personal effects less than \$1,500.00 and its flight attendant employees can have no expectation that it will.

[21] It is submitted that the *Loss of Effects* clause is an insurance contract such that legal principles relating to insurance contracts apply including the fundamental "utmost good faith". I do not accept that submission because I regard the provision as a mere term of an employment relationship and not a common law insurance contract.

[22] Mr Kiely's tin pin was a personal effect carried by him. I agree with counsel that there are three antecedent qualifications for cover:-

(i) the luggage or personal effects must accompany the flight attendant for the purpose of any journey;

(ii) the journey must be undertaken in performance of the flight attendant's duties; and (iii) the luggage or personal effects must be necessary or reasonable for the flight attendant

to carry.

[23] I regard the central issue in this problem as the third element i.e. whether the tie pin was necessary or reasonable for Mr Kiely to carry

[24] I do not accept the submission that the tie pin was necessary as mandated in the premium service training. That was many years ago and I regard any such mandate as now superseded by Air New Zealand's prevailing uniform requirements at

the time the tie pin was lost. I find that male staff were not required to wear tie pins but were permitted as a matter of personal choice to do so.

[25] It is pertinent then to ascertain the meaning and interpretation of "reasonable". Was it reasonable for Mr Kiely to carry a tie pin? Air New Zealand decided it was not:-

Our decision to decline this is based on what is 'reasonable' for a flight attendant to carry. Given that the Flight Attendant grooming guide states a simple gold tie slide may be worn, it would be unreasonable to expect the company to reimburse a lost slide to the value of \$490.

What we believe to be reasonable is replacement value of a simple gold pin. This means the company will pay \$100 towards replacement of tie pin.... "

[26] The advice is unfortunate because it confuses what is reasonable to carry with what is reasonable for Air New Zealand to pay. They are different matters. The central issue is whether the tie pin was "reasonable" for Mr Kiely to carry.

[27] Air New Zealand says that Mr Kiely's tie pin valued post loss as the sum of \$490.00 is excessive in value and is not reasonable for a flight attendant to carry. That being so it is submitted that the risk of loss should lie with the employee and not with the company. The salient point submitted is that the value of an item is an inherent consideration in determining whether that item is reasonable. Air New Zealand submits that to wear an expensive tie pin is not reasonable and highly impractical due to the nature and location of the work performed by a flight attendant.

[28] I have no difficulty accepting that a tie pin is reasonable to carry because it is permitted by the airline to be worn. The real issue however, is whether an expensive tie pin is reasonable for a flight attendant to carry. Air New Zealand decided it was not. The assessment of what is reasonable is an objective one.

[29] Air New Zealand does accept that its flight attendants will carry on their person expensive jewellery items, for example engagement rings. Its policy document the *Cabin Crew General Operating Procedures Manual* contemplates such items and warns that staff keep receipts or proof of ownership to substantiate any claims. It therefore contemplates it will be asked to cover losses of expensive jewellery items.

[30] That would suggest Mr Kiely's expensive tie pin is entitled to cover. But Mr Kiely did not retain proof of ownership or an original receipt and contrary to the document, Air New Zealand instructed him to obtain a valuation from a jeweller based on a description after the loss. It does not deny the claim on that ground in any event. It has waived its right to do so now.

[31] So does the stipulated "simple" gold tie pin mean not expensive? Ms Hurihanganui says "simple" refers to the design and not value. A simple gold tie pin can be simple in appearance but still be expensive, as no doubt, Mr Kiely would agree. Pure gold can be simple but it can also be expensive.

[32] Obviously both parties have a different view of what is expensive. Mr Kiely does not regard \$490.00 as expensive for a tie pin whereas Air New Zealand clearly does. Air New Zealand submits that to wear an expensive tie pin is not reasonable and is highly impractical due to the nature and location of the work performed by a flight attendant. But it forgets however, that it asks its attendants to wear not merely a *simple tie slide* but rather, a *simple gold tie slide*.

[33] It seems to me that when it permits only "gold" tie pins to be worn, it is to be contemplated that such a reference can include solid gold, plated gold and gold coloured items. So in my view, to permit "gold" adorning accessories or items of jewellery is also to expect solid gold.

[34] There is no qualification specified that such items are to be gold coloured, gold plated or a lower composition of gold. All that is said is that the item may be gold. I suspect that Air New Zealand's staff, having and desiring higher standards of personal grooming for their employer airline, are more likely than not to regard references to gold as being gold of higher quality and price.

[35] There is no basis to interpret the stipulation of gold to be read down so as to refer only to lower grade items or inexpensive items. To adopt that approach is to apply exclusions or maximums which are not expressed. The only maximum expressed is that any one claim shall not exceed \$1,500.00. If Air New Zealand means gold in colour only or prefers only lower carat gold items, then it must say so because its policy documentation and Collective do not. It may well have other staff carrying solid gold items wrongly expecting their employer to bear the risk of loss.

[36] It is for these reasons that I conclude that Air New Zealand must expect that such tie pins will possibly be expensive for that is generally the very nature of gold items. Air New Zealand must expect, having prescribed that if he wears a tie pin that it must be a gold tie pin, that Mr Kiely may carry an 18 carat tie pin. On this basis, I therefore conclude it was reasonable for

Mr Kiely to carry the tie pin he now claims cover for.

[37] I find that Mr Kiely's 18 carat gold tie pin was a personal effect which was reasonable for him to carry. This is the interpretation of the Collective that is to be adopted. Mr Kiely is entitled to cover from Air New Zealand.

Costs

[38] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr King is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr France is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson

Member of Employment Relations Authority

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