

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 221
5379368

BETWEEN JENNIFER KILPATRICK
Applicant

AND AIR NEW ZEALAND
LIMITED
Respondent

Member of Authority: R A Monaghan
Representatives: J Kilpatrick in person
D France, counsel for respondent
Investigation meeting: 19 and 20 November 2012
Submissions received: 23 November 2012
Determination: 31 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jennifer Kilpatrick was employed by Air New Zealand Limited (Air New Zealand) as an international flight attendant.

[2] Ms Kilpatrick has raised:

- personal grievances on the ground that Air New Zealand affected her employment to her disadvantage by its unjustified actions (the disadvantage grievances);
- a personal grievance on the ground of unjustified dismissal for misconduct; and
- a personal grievance alleging unjustified and constructive dismissal.

[3] Ms Kilpatrick also seeks penalties for breaches of the employment agreement and of good faith.

[4] The first disadvantage grievance concerned an incident on 6 March 2012.

[5] Ms Kilpatrick was rostered for an Auckland-Rarotonga-Auckland tour of duty from 4 – 6 March 2012. The flight service manager (FSM) on the tour of duty, Michelle Coyle, found Ms Kilpatrick so disruptive and unco-operative that she was concerned about Ms Kilpatrick's reaction to the feedback she would be given on her performance. Flight attendants receive feedback for every tour of duty, under a rating system known as Exceler-Rater. An FSM or senior flight attendant usually gives the feedback while still inflight although on occasion, as here, feedback is given on the ground. The system addresses whether expectations have been met in four main areas of activity, and is relatively uncomplicated.

[6] Ms Coyle's concern led her to ask that assistance from a more senior manager be available on the ground. Two senior managers met the aircraft when it landed, and Ms Coyle attempted to deliver the feedback.

[7] Ms Kilpatrick said that when the aircraft arrived in Auckland she:

- was singled out and treated differently from other crew members;
- was wrongly prevented from leaving the aircraft;
- should have been provided with medical treatment when she said during the feedback process that she was unwell and was subjected to humiliating treatment when she said she was unwell; and
- was subjected to an abusive feedback process.

[8] She has raised her first personal grievance on those grounds.

[9] The second disadvantage grievance arose when Ms Kilpatrick was absent on sick leave after the 6 March incident, saying she was suffering from work-related stress.

[10] A performance and development manager, Sarah-Jane Whitehead, sought to address Ms Kilpatrick's stress. To that end Ms Whitehead relied on the Air New Zealand Limited and FARSA Flight Attendants Collective Employment Agreement

2009-2012 (the cea) in asking Ms Kilpatrick to attend a series of appointments with an Air New Zealand doctor. Ms Whitehead intended first to investigate the nature of the stress, then to consider how to address it.

[11] Ms Kilpatrick did not attend the appointments, but says her own doctor cleared her to return to work on 17 April 2012. By then Ms Whitehead had relied on the company's Cabin Crew General Operating Procedures (GOP) Manual in requiring Ms Kilpatrick to obtain clearance from an Air New Zealand doctor before she returned to operational duties.

[12] Ms Kilpatrick considered she was not obliged to submit to an examination by the company's doctors, and that clearance from her own doctor sufficed for a return to operational duties. Air New Zealand continued to require clearance from one of its doctors before Ms Kilpatrick resumed operational duties. After Ms Kilpatrick's entitlement to paid sick leave was exhausted on or about 3 April, she was placed on leave without pay.

[13] The stalemate over Ms Kilpatrick's return to work continued. The parties attended mediation on 12 June 2012 but were unable to resolve the matter.

[14] Meanwhile another performance and development manager, Karen Eppingstall, began an investigation into Ms Kilpatrick's behaviour on the Auckland-Rarotonga tour of duty. The investigation later incorporated additional concerns, including the inability to resolve Ms Kilpatrick's return to work.

[15] Ms Eppingstall interviewed other members of the crew about the alleged behaviour on the tour of duty, and made several attempts to meet with Ms Kilpatrick to obtain her response. She was unsuccessful in arranging a meeting, and formed conclusions with only limited further input from Ms Kilpatrick. She found the behaviour occurred, and that Ms Kilpatrick's responses did not adequately address the additional concerns. By letter dated 25 July 2012 she advised Ms Kilpatrick that her employment was terminated on the ground of serious misconduct, with immediate effect.

[16] Ms Kilpatrick says her dismissal for serious misconduct was unjustified.

[17] Ms Kilpatrick also says Air New Zealand's refusals in April and June to allow her to resume operational duties amounted to constructive dismissals which were unjustified.

A. Grievance arising from the 6 March incident

Background

[18] Phil Callaghan, the cabin crew manager, and Lee Barrett, a performance and development manager, were the senior managers who responded to Ms Coyle's request for assistance. In the light of Ms Kilpatrick's alleged behaviour on the flight, Ms Coyle was entitled to wait until the aircraft landed and seek assistance before giving the feedback. I do not accept that Ms Kilpatrick was unfairly singled out by this method of providing feedback.

[19] When the aircraft doors opened Ms Coyle stepped out onto the airbridge and briefed Messrs Barrett and Callaghan on her reasons for seeking assistance. The passengers and crew disembarked. Ms Kilpatrick's allocated work area was at the other end of the aircraft from the doors, so she was among the last to disembark. As she approached the exit Ms Coyle, who had re-entered the aircraft, asked her to remain on board to receive feedback. Ms Kilpatrick refused, and continued to refuse when Ms Coyle persisted.

[20] The reason Ms Kilpatrick gave for her refusal at the time was that she was not obliged to remain as she had finished her work. That reason was unacceptable to Ms Coyle as some 30 minutes of duty time remained when the encounter began. Ms Kilpatrick said much later that she refused because she was concerned about being alone in the aircraft with Ms Coyle. There were no reasonable grounds for that concern.

[21] When Ms Kilpatrick continued to refuse to remain, Mr Callaghan stepped into the aircraft to instruct her to remain and receive the feedback. Again she refused to remain. Mr Callaghan warned her that a continued refusal could lead to disciplinary action.

[22] Ms Kilpatrick says the effect of these actions was that Mr Callaghan and Ms Coyle detained her or wrongly prevented her from leaving the aircraft, and the others present aided in that detainment.

[23] After Mr Callaghan issued his instruction Ms Kilpatrick said: *'I am being set up, oh I feel sick'*. Ms Coyle did not believe Ms Kilpatrick was ill, and said so. When Ms Kilpatrick said she was going to be sick, again Ms Coyle did not believe her.

[24] Ms Kilpatrick had raised her voice and became increasingly agitated. A colleague of hers, who happened to be a union representative, had already offered assistance to her when difficulties had arisen during the flight. Ms Kilpatrick's later accusation that he 'conspired' to 'isolate' her misconstrues his account of his attempt to, in effect, prevent more difficulties. He was also still to disembark and was present during the incident. He was given an opportunity to speak privately to Ms Kilpatrick, and attempted to calm her down.

[25] When Ms Kilpatrick agreed to remain and hear the feedback, Messrs Callaghan and Barrett left. Ms Coyle and an inflight service coordinator (ISC), H, delivered the feedback. They advised Ms Kilpatrick she had not achieved the required standard in any of the areas of performance measured under the Exceler-Rater system.

[26] Ms Kilpatrick said that during this process she was spoken to in a way that was intended to humiliate her. In particular she said Ms Coyle mocked her when she was unable to find the 'seats to suit' service guide she was required to have with her. Ms Coyle was alleged to have said: *'you don't have it do you'*.

The issues

[27] To attract a remedy Ms Kilpatrick's disadvantage grievances must meet each of the elements of s 103(1)(b) of the Employment Relations Act 2000, which reads:

- (1) *For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim –*
 (a) ...; or

(b) that the employee's employment, or 1 or more conditions of the employee's employment ... was .. affected to the employee's disadvantage by some unjustifiable action by the employer;

[28] An employee's complaint alone does not amount to a personal grievance under the Act if it does not meet each of these elements.

[29] Section 103A of the Act also applies, in that it contains the test for assessing the justification for an employer's actions. The test is whether relevant actions were actions a fair and reasonable employer could take in the circumstances at the time.

[30] Ms Kilpatrick had four specific complaints about the incident of 6 March. The complaints were not supported by reference to the elements of s 103(1)(b), rather Ms Kilpatrick argued in effect that she had not been treated fairly. For that reason I address each of her complaints with reference to the test of the justification for each of the actions complained of.

Was Ms Kilpatrick's employment affected to her disadvantage by an unjustified action of her employer's

1. Singled out and treated differently

[31] In that Ms Kilpatrick was required to receive feedback on the ground rather than before the aircraft landed, she was treated differently from her colleagues on the flight. However I do not accept there is any substance to her concern on this point. In general the FSM or other senior flight attendant could, and did if necessary, provide feedback on the ground. Here an inflight service co-ordinator (ISC), H, had already made an abortive attempt to provide feedback before the aircraft landed and he participated in the attempt on the ground.

[32] Ms Coyle's decision to provide feedback to Ms Kilpatrick after the aircraft had landed was an action a fair and reasonable employer could take in the circumstances at the time.

2. Wrongly prevented from leaving the aircraft

[33] Ms Kilpatrick says not only that she was wrongly prevented from leaving the aircraft but she was unlawfully detained. However in requiring her to remain and

receive feedback both Ms Coyle and Mr Callaghan were issuing instructions they were entitled to issue. Mr Callaghan gave a warning about the consequences of a refusal to accept the instruction which he was obliged to provide. Beyond instructing Ms Kilpatrick to remain and warning of the consequences if she did not, neither Mr Callaghan nor anyone else otherwise sought to restrain Ms Kilpatrick or prevent her from leaving the aircraft. Indeed, despite the way she articulated it, Ms Kilpatrick's principal concern was with the lawfulness of the instruction to remain rather than with any other matter.

[34] I do not accept the instruction was unlawful, that it meant Ms Kilpatrick was wrongly prevented from leaving the aircraft, or that she was detained in any other way. I do not accept Ms Kilpatrick's submission that the instruction cut across rights contained in the New Zealand Bill of Rights Act 1990. The instruction that she remain to receive feedback was lawful and reasonable, and was the action a fair and reasonable employer could take in the circumstances.

3. Should have been provided with medical treatment

[35] Nothing in Ms Kilpatrick's claims of illness during the feedback process suggested immediate medical treatment was required, and Ms Kilpatrick did not become physically sick. Moreover, she did not ask for medical treatment during the process.

[36] In addition, Ms Kilpatrick's behaviour during the tour of duty means I find Ms Coyle had reason for her view that Ms Kilpatrick was exhibiting more of the same kind of behaviour, and was resisting any participation in the feedback process.

[37] There was nothing unjustified in the failure to seek medical treatment. Further, Ms Coyle's reaction to the claim of illness was no more than unsympathetic and does not attract any legal remedy.

4. Subjected to an abusive feedback process

[38] Ms Kilpatrick was not subjected to an abusive feedback process. She was given appropriate feedback about her performance. She was not abused at all. Her

complaint amounts to her view of what, in the example relied on, was at most a terse and exasperated comment from Ms Coyle when she was asked about her 'seats to suit' service guide. The comment was prompted when Ms Kilpatrick seemed not to have the guide with her as she was required to, and had become flustered when she was unable to find it.

5. Conclusion

[39] Although the encounter was upsetting to Ms Kilpatrick, her reaction was not reasonable. Indeed, having heard her evidence I find that on several occasions she demonstrated resistance to and avoidance of direct interaction with her managers when they sought to address problems with her. Instead of engaging constructively she showed that behaviour, or made retaliatory complaints that were often poorly-founded. Unfortunately she has not demonstrated any insight into how her own frame of mind affected her interactions with her employer.

[40] Overall I find the actions complained of did not amount to unjustified actions. It is not necessary to address whether the remaining elements of s 103(1)(b) are met.

B. Grievance concerning medical requirements

Background

[41] Ms Whitehead had responsibility for health and safety. This included the management of Ms Kilpatrick's workplace stress. When Ms Kilpatrick advised on 7 March 2012 that she was unfit for duty 'due to stress' until 18 March, Ms Whitehead responded by expressing concern and asking that she obtain clearance before she returned to work. To that end Ms Whitehead asked Ms Kilpatrick to make an appointment to see the company's doctor.

[42] When on 19 March Ms Kilpatrick provided a further medical certificate saying she was unfit for work until 2 April, Ms Whitehead replied by explaining the need to ensure appropriate support was available. She advised she had made an appointment for Ms Kilpatrick to attend on a company doctor on 20 March, at the company's expense. Later that day she explained the company's obligations under the Health and Safety in Employment Act 1992.

[43] Ms Kilpatrick did not attend. By letter dated 22 March she questioned the right to make such an appointment when she was under the care of her own practitioner, and raised concerns about confidentiality.

[44] Ms Kilpatrick also raised a third concern about the failure to provide her with medical assistance on 6 March - particularly as she said that incident had triggered her stress. Her point was that the company did not seem concerned about her stress at the time, but was now insisting that she attend on its doctors. I do not accept the point is valid. On 6 March Ms Kilpatrick was merely being asked to engage in a simple feedback process which she seemed to be avoiding, and there was otherwise no real suggestion of illness. When the matter escalated into an absence on the ground of stress-related sick leave, Ms Whitehead was entitled to take the view that an investigation was necessary.

[45] Ms Whitehead answered the questions in a letter dated 26 March 2012. Regarding the appointment with a company doctor Ms Whitehead relied on cl 10.15 of the cea. The clause reads:

Flight attendants shall undergo a medical examination at the Company's expense when requested to do so.

[46] Ms Whitehead considered it reasonable to arrange an appointment with a company's medical team because they '*are aviation experts and understand the nature of the flight attendant role*'. Regarding confidentiality, she said the company's doctors are under the same legal and ethical obligations as other doctors. As for the 6 March incident, Ms Whitehead remained of the view that an investigation into Ms Kilpatrick's broader claim of workplace stress was required.

[47] The letter ended with advice that a further appointment had been arranged with the company's doctor, and formally instructed Ms Kilpatrick to attend. It advised Ms Kilpatrick that she would not be able to return to flying duties until Air New Zealand was confident she was fit and able to carry out her duties, and her issues with stress had been addressed. Finally, it said a further appointment had been booked for 28 March.

[48] Ms Kilpatrick did not attend. By message dated 3 April 2012 Ms Whitehead advised Ms Kilpatrick she had been removed from any operational duties until cleared to return to them, and noted that Ms Kilpatrick had exhausted her entitlement to paid sick leave. Ms Whitehead also cited the provisions in the GOP manual which applied to absences in excess of 14 consecutive days. They read:

Once a flight attendant's absence has reached 14 consecutive days, they must contact the company's medical team to provide details of their absence. If absent for over 14 days, a flight attendant must be cleared fit to return to work by a registered medical practitioner and following this, the company's medical team will need to provide clearance to return to operational duties.

[49] Ms Kilpatrick had obtained a further medical certificate from her doctor advising she was unfit to work until 17 April. By message dated 17 April she informed crew control that she was '*clearing myself from sick/stress leave from today*'. She did not seek or obtain clearance from the company's doctors. When Ms Whitehead became aware of this she instructed Ms Kilpatrick to contact a member of the medical staff to arrange an appointment with one of four named doctors available. She also asked that Ms Kilpatrick either meet with a company doctor to discuss her stress, or authorise a company doctor to contact her own doctor.

[50] Ms Kilpatrick responded in a letter dated 21 April 2012, asserting that she was raising a personal grievance and that Ms Whitehead was preventing her from going to work. She also alleged Ms Whitehead had breached good faith by abdicating her '*responsibilities when dealing with employment matters and patient rights following the 6 March 2012 detainment*' and '*trying to mislead me on those rights and procedures.*' She sought immediate reinstatement.

[51] Ms Whitehead wrote to Ms Kilpatrick on 24 April, again explaining that clearance from a company doctor would be required before she could return to operational duties.

[52] This information was repeated in a letter from Ms Eppingstall dated 31 May. The 31 May letter was written in the course of Ms Eppingstall's investigation of Ms Kilpatrick's conduct on the Auckland-Rarotonga tour of duty. It urged Ms Kilpatrick either to meet with the company doctors to discuss the circumstances of her stress, or to authorise the company to contact her doctor to obtain information to allow it to take

steps to address the stress. It warned that, without clearance, Ms Kilpatrick could not undertake work as a flight attendant and her employment could be terminated.

Issues

[53] Sections 103(1)(b) and 103A of the Act also apply here.

[54] The issues are:

- were Air New Zealand's actions justified in that it acted as a fair and reasonable employer could act in the circumstances at the time when it:
 - instructed Ms Kilpatrick to attend on a company doctor, and
 - refused to allow her to return to operational duties without clearance from the company's doctors.
- if either of these actions was not justified, did Ms Kilpatrick suffer a disadvantage in her employment as a result.

[55] Ms Kilpatrick purported to raise further and related grievances in a letter dated 18 June 2012, alleging in general terms that being placed on leave without pay was a breach of unspecified provisions in the cea. Put that way, for the purposes of a personal grievance the allegation bears on the nature of any disadvantage suffered as a result of an unjustified action. Otherwise, as it was put in the 18 June letter, the allegation concerned the interpretation, application, or operation of provisions of the agreement. 'Unjustifiable action' for the purposes of a disadvantage grievance does not extend to such circumstances.¹

Was Ms Kilpatrick's employment affected to her disadvantage by an unjustified action of her employer's

1. The instruction to attend on a company doctor

[56] Clause 10.15 entitles Air New Zealand to require a flight attendant to undergo a medical examination at its expense. It does not go as far as to allow it to specify the practitioner who will provide the examination, particularly in the absence of consultation about the matter.

¹ s 103(3)

[57] Ms Whitehead had genuine reasons for seeking medical information and believing the expertise of the company's doctors should be utilised. However arranging appointments for Ms Kilpatrick to attend on one of them during the first 14 days of her absence was premature. This is particularly so because Ms Kilpatrick was already under the care of her own doctor, and a better first step would have been to explore the possibility of a report from that doctor.

[58] Ms Whitehead had also asked at the commencement of the absence that Ms Kilpatrick obtain clearance before she returned to work, linking that request to the appointments being made with the company doctors. However for the first 14 days of the absence express provisions relating to the need for clearance to return to operational duties were not applicable. If clearance could still be requested inside that period in appropriate circumstances, reliance could not be placed on the GOP manual for that purpose. In that respect again the request that clearance be obtained was premature.

[59] After the first 14 days Ms Whitehead was entitled to require clearance from the company's doctors before Ms Kilpatrick could return to operational duties. I discuss the matter of clearance in the next section of this determination.

[60] In any event, even if Ms Whitehead's attempts to arrange medical appointments during the first 14 day period were premature and therefore unjustified, I do not accept Ms Kilpatrick suffered a disadvantage as a result.

2. The refusal to allow a return to operational duties without clearance

[61] Ms Kilpatrick says that, from 17 April, she was fit to return to work and should have been permitted to do so. The evidence did not establish that. Ms Kilpatrick simply had a medical certificate which expired on 17 April, and asserted her fitness herself. There was no other medical information to support her assertion.

[62] Ms Kilpatrick says further that:

- Air New Zealand was not entitled to rely on the GOP manual in requiring her to obtain clearance to return to operational duties because the manual had no contractual force;

- alternatively,
 - if the GOP manual had such force, then the required 14 day period of absence had not elapsed, and
 - its terms did not require her to submit to an examination by the company's doctors in order to obtain clearance to return to her duties.

[63] In the context of an extensively-regulated and safety sensitive aviation environment, the GOP manual set out the procedures staff were required to follow in carrying out their duties and ensuring the airline met its various obligations. These were available to the staff and were followed, including by Ms Kilpatrick herself in respect of other matters. Moreover, Ms Kilpatrick's letter of appointment obliged her to follow company manuals.

[64] Ms Kilpatrick relied in support on a determination of the Authority in *Kiely v Air New Zealand Limited*². That determination found, correctly, that the terms of the cea prevailed where there was an inconsistency as there was in that case. No such inconsistency was identified here.

[65] For these reasons I do not accept the provision in the GOP manual requiring clearance for a return to operational duties had no force.

[66] Ms Kilpatrick had other concerns about the requirement to obtain clearance, some of which were expressed in her alternative argument.

[67] Of those, I find '14 consecutive days' does not mean '14 rostered days' or '14 consecutive rostered days'. Air New Zealand was entitled to invoke the requirement for clearance under the GOP manual when Ms Kilpatrick was still absent as a result of illness as at 28 March.

[68] Other concerns were with: the nature of any examination she would be required to undergo at the company's medical centre; and the confidentiality of her medical information. It transpired that she objected to attending on one doctor in particular - apparently because of her knowledge of an issue between that doctor and

² ERA Auckland, AA113/07, 20 April 2007

another person - but she did not raise the objection at the time and in any event other company doctors were available.

[69] Ms Kilpatrick was entitled to raise these concerns and have them addressed, although they could have been allayed if she had followed Ms Whitehead's suggestion that she either meet with a company doctor or authorise a company doctor to contact her own doctor. She had also received assurances as to the confidential treatment of her medical information, and I do not accept she had reason to doubt those assurances to an extent that entitled her to refuse to seek clearance from a company doctor. Thirdly, she had been through a clearance process before, successfully, and had some understanding of the procedure.

[70] Overall I find the refusal to allow Ms Kilpatrick to return to operational duties without clearance from the company doctors was justified in the circumstances at the time.

C. Grievance alleging unjustified dismissal

Background

[71] By letter dated 26 March 2012 Ms Eppingstall advised Ms Kilpatrick there would be an investigation into her behaviour during the Rarotonga tour of duty of 4 – 6 March 2012. An investigation duly went ahead and Ms Eppingstall interviewed the members of the crew, as well as Mr Callaghan and Mr Barrett.

[72] The result was a conclusion that breaches of the code of conduct and other policies may have occurred. By letter dated 23 May 2012 Ms Eppingstall sought a meeting with Ms Kilpatrick on 30 May in order to discuss these, listing a number of specific concerns. The letter attached copies of the policies and provisions being relied on, as well as records of Ms Eppingstall's interviews with Ms Coyle, Mr Callaghan, Mr Barrett, H, K (a flight attendant), the captain, the first officer and other flight attendants.

[73] Ms Kilpatrick did not attend the meeting. On 28 May her home address and private email address were removed from the company's records. On the same date, she wrote a letter advising that she did not believe she had enough time to assess all of

the material sent to her, and prepare a response, in the time available. The letter proposed a timetable which would culminate in a meeting on 16 July 2012, when she returned from a scheduled period of some 3 weeks' annual leave.

[74] It appears this letter was not received. For her part Ms Kilpatrick did not respond to attempts to contact her by telephone and email regarding her intentions. Ms Eppingstall wrote again on 31 May and 13 June. Both times she sought meetings on either of two dates offered, and both times there was no response. By 13 June a further concern had arisen because, without clearance, Ms Kilpatrick operated a tour of duty between Auckland and San Francisco on 5 – 9 June. That, too, was to be discussed.

[75] A further letter dated 15 June recorded that Ms Kilpatrick had again failed to respond to a request for a meeting, and required her to attend on 19 June.

[76] Both the 13 and 15 June letters warned that a failure to attend, or to provide advice of non-attendance, meant the investigation would continue without Ms Kilpatrick's participation. Findings would be made from the information available.

[77] Ms Kilpatrick responded with the letter dated 18 June. As well as raising personal grievances in respect of her placement on leave without pay, the letter set out her chronology of events. It asserted a willingness to meet, but said there was a lack of clarity in the allegations about her conduct. It sought a list of the questions to be put to her, and asked that the list be provided in advance of the meeting. It advised that Ms Kilpatrick had changed her address, when she had confirmed her address to the company only four days earlier, and asked that all mail be sent to the post office box nominated. Finally, the letter suggested that 16 July be confirmed as a meeting date.

[78] A letter from Ms Eppingstall, dated 19 June, probably crossed in the mail with this letter. By further letter dated 21 June Ms Eppingstall formally declined to provide a list of questions as this was not company practice, did not agree to a meeting on 16 July, said findings would be prepared from the available information, and said a meeting would be held to communicate these to Ms Kilpatrick.

[79] Ms Kilpatrick replied in a letter dated 26 June. She said she was confused by being told she was rostered to attend meetings when the rosters did not show that, and

confused about being on leave without pay on the one hand then being paid for a tour of duty she completed in June on the other. She repeated her view that she was cleared to fly on 17 April, but said she planned to comment on the rest of the material after she had an opportunity to assess it.

[80] By letter dated 13 July Ms Eppingstall asked Ms Kilpatrick to attend a meeting on 18 or 19 July, where the findings would be advised to her. By letter dated 16 July Ms Kilpatrick sought again to discuss aspects of her clearance to return to duty, but did not comment on the 19 July meeting. She did not attend the meeting.

[81] By letter also dated 19 July Ms Eppingstall advised Ms Kilpatrick of her findings. In respect of the Auckland-Rarotonga tour of duty, they were that Ms Kilpatrick:

- failed to act with integrity and respect for others by acting in an aggressive and disrespectful manner, including,
 - overreacting during a pre-flight briefing to Ms Coyle's use of a shortened version of her first name,
 - shouting at K during the tour of duty,
 - being disrespectful to H during the tour of duty, and later to H and to Ms Coyle when feedback was being given on 6 March,
 - refusing to accept feedback on 6 March,
 - not respecting the advice of the captain and first officer that a safety concern which she raised with them - and later filed in an operations occurrence report (OOR) - was based on a misinterpretation;
- had been insubordinate and failed to follow instructions, as illustrated by the above conduct;
- showed a lack of integrity in her subsequent filing of a number of OOR reports;
- reported for the tour of duty when not fit to operate, or alternatively reported for duty and submitted incorrect and misleading fatigue reports;
- failed to deliver the required level of customer service, including by;
 - not entering inventory as required, and not cooking sufficient food,
 - shouting at K in the hearing of passengers,

- speaking to a passenger in an unprofessional way when the passenger stood near where she was eating a meal;
- failed to follow correct flight deck access procedures when she went to the flight deck to speak to the captain;
- failed to produce the 'seats to suit' quick reference card when asked to during the feedback process on 6 March; and
- failed to follow correct communications procedure on one occasion on the Rarotonga –Auckland flight.

[82] In respect of the additional concerns, Ms Eppingstall found that Ms Kilpatrick:

- failed to follow the clearance process for a return to work, by advising crew control on 17 April that she was cleared for duty when the company's doctors had not cleared her;
- operated a tour of duty between Auckland and San Francisco on 5 June 2012, when not cleared as fit to fly; and
- removed home email details in breach of a requirement in the GOP manual to provide current contact information.

[83] The letter advised that dismissal was being considered, and invited comment. No response was received, and Ms Kilpatrick did not attend a meeting scheduled to advise the disciplinary outcome. By letter dated 25 July 2012 Ms Eppingstall advised of her conclusion that Ms Kilpatrick's actions amounted to serious misconduct, and that her employment was terminated effective on that date.

The issues

[84] The test of the justification for the dismissal is also set out in s 103A of the Employment Relations Act 2000. The test concerns whether dismissal was the action a fair and reasonable employer could take in the circumstances at the time³. It encompasses whether the employer genuinely believed misconduct occurred, and whether the misconduct found to have occurred was such that a decision to dismiss was a reasonable response.

³ S 103A(2)

[85] The test requires a consideration of whether the employer: sufficiently investigated the relevant allegations before imposing the dismissal; raised its concerns with the employee before taking that action; gave the employee a reasonable opportunity to respond; and considered the explanation genuinely before taking action.⁴ The Authority may take other factors into account,⁵ but must not determine the dismissal to be unjustified if any defects in the process were minor and did not result in the employee being treated unfairly.⁶

[86] The issues are:

- did Air New Zealand genuinely believe misconduct occurred;
- did it form this belief following a fair and reasonable investigation; and
- was dismissal the action a fair and reasonable employer could take in the circumstances at the time.

Did Air New Zealand genuinely believe misconduct occurred

[87] I address in the next section of this determination Ms Kilpatrick's participation in the investigation Air New Zealand sought to conduct.

[88] Otherwise, with reference to the Auckland-Rarotonga tour of duty, Ms Eppingstall had sufficient information to make the findings on the specific matters listed above and the findings were reasonably available to her.

[89] The individual incidents occurring in-flight or during the attempt to provide feedback were particular examples of a broader problem with Ms Kilpatrick's behaviour and were also addressed in the findings. During their interviews, for example, crew members commented on the disruptive nature of the behaviour and on the lack of respect Ms Kilpatrick showed for Ms Coyle and H. No reasonable grounds for that lack were disclosed. Further, the captain was concerned enough to consider standing Ms Kilpatrick down because her behaviour was compromising safety. Ms Coyle described Ms Kilpatrick as very stressed and with a huge dislike for the company, and believed other issues may have been affecting her behaviour. Another flight attendant reported that EAP had been offered, but refused.

⁴ S 103A(3)

⁵ S 103A(4)

⁶ S 103A(5)

[90] Ms Kilpatrick's behaviour extended beyond the disrespect shown for senior cabin crew members, and the failures to meet requirements of performance and service expected on the tour of duty. In particular, Air New Zealand's Operations Occurrence Report (OOR) manual requires flight attendants to report all operations occurrences to the senior flight attendant, who in turn is responsible for reporting to the pilot in command. Either the pilot in command or the senior flight attendant files the OOR. The purpose of the report system is to enable Air New Zealand to meet its responsibilities with respect to accidents and serious or reportable incidents.

[91] Ms Kilpatrick filed two OORs at the end of the tour of duty. Both of them were filed without referring first to Ms Coyle or H, and in the face of advice from the captain that her concern about safety was misplaced. She later submitted five more OORs in respect of the tour of duty. Ms Eppingstall investigated the matters raised in them, and found that in many respects Ms Kilpatrick's account of what occurred was incomplete or inaccurate. She also found that all but one of the reports disclosed failures by Ms Kilpatrick to understand certain requirements relevant to the aircraft being operated at the time.

[92] Ms Eppingstall concluded Ms Kilpatrick had raised the OORs in order to distract attention from her own poor performance, and in an attempt to use the system against Ms Coyle and H. This was a misuse of the system. It breached the OOR manual and the code of conduct in that it was a failure to act ethically. I find there were reasonable grounds for finding Ms Kilpatrick had misused the reporting system.

[93] Further to the fatigue reports, Ms Kilpatrick completed a tour of duty between Auckland and Papeete on 2 March 2012. According to a fatigue report she filed on 9 March 2012, she became fatigued during the sector from Papeete to Auckland. She was then called out for the Auckland-Rarotonga tour of duty on 4 March. According to the two fatigue reports covering that tour of duty - also filed on 9 March - she was fatigued both prior to and during the duty. She also noted in the forms that she had not achieved the rest time required under the employment agreement.

[94] Ms Eppingstall began by considering whether Ms Kilpatrick reported for duty on 4 March knowing she was fatigued, or reported she was fatigued when she was not. Ms Eppingstall noted the crew members who were interviewed reported that there were no signs of fatigue, and there was an unexplained delay in the filing of the

fatigue reports. She concluded that Ms Kilpatrick was not fatigued, and had submitted incorrect or misleading reports. This amounted to a failure to act ethically.

[95] The evidence in the Authority also indicated that Ms Kilpatrick was not fatigued. Ms Kilpatrick's oral evidence on precisely when she became fatigued was equivocal, and she tended to address the point by relying on her allegation that she was called out for the Auckland-Rarotonga duty in breach of the rest period provisions in the cea. Air New Zealand denied any breach of the cea, but even if there was a genuine dispute about the matter it was not appropriate to raise the dispute by the filing of fatigue reports.

[96] Ms Eppingstall found the advice of fitness to work Ms Kilpatrick gave to crew control in April was given in the face of the company's repeated instructions that she first obtain clearance under the GOP manual. Ms Eppingstall had reasonable grounds on which to find this was an act of misconduct.

[97] Similarly the extensive exchanges between the parties on the matter of clearance meant Ms Kilpatrick should not have operated the Auckland-San Francisco tour of duty without it. Ms Eppingstall acknowledged Ms Kilpatrick was rostered for the duty, but she had been rostered in error and probably in reliance on her advice of 17 April to crew control. Ms Eppingstall had reasonable grounds for finding that Ms Kilpatrick had operated wrongly without clearance, and should have sought clarification if there was any uncertainty.

[98] The unexplained removal of contact details was relatively minor in itself, although it was a breach of procedure. On the information available to Ms Eppingstall at the time it had more significance against the background of Ms Kilpatrick's failures to respond to oral and emailed approaches and failures to attend meetings, and the deliberate steps she took to do things her way. Ms Eppingstall was entitled to make the findings she did.

Did Air New Zealand form its belief following a fair and reasonable investigation

[99] The question of whether Air New Zealand conducted a fair and reasonable investigation turns on whether it gave Ms Kilpatrick a reasonable opportunity to respond to the allegations against her. Otherwise, it conducted a sufficient

investigation of the relevant allegations and raised its concerns with her before it dismissed her.

[100] The material provided to Ms Kilpatrick on 23 May was extensive and detailed. Because of that I accept she was entitled to seek more time to prepare a response, as she did in her 28 May letter. Although the fate of the letter is not clear she did not respond to further attempts to set another date as she should have, culminating in Ms Eppingstall's requirement that she attend a meeting on 19 June.

[101] That date provided her with sufficient time to consider the material and prepare a response - she had ample time by then to have done so - as well as accommodating her leave requirements. If she had decided against any meeting before 16 July she was not justified in doing so, and should have been more responsive to Ms Eppingstall's attempts to arrange an earlier date.

[102] Further, I do not accept Ms Kilpatrick's 18 June claim of lack of clarity in the allegations against her. The allegations were listed clearly, and full information in support was provided. Nor do I accept there were reasonable grounds for the confusion Ms Kilpatrick asserted in her letter of 26 June, and I regard the assertion as a further attempt at prevarication and delay.

[103] Finally, Ms Kilpatrick was warned of the consequences of her failure to attend the 19 June meeting.

[104] For these reasons I conclude Air New Zealand met its obligation to give Ms Kilpatrick a reasonable opportunity to respond to the allegations against her.

Was dismissal an action a fair and reasonable employer could take in the circumstances at the time

[105] Ms Kilpatrick's actions showed extensive and repeated resistance to receiving instruction, and a profound distrust of her managers. There was no good reason for reactions as extreme as hers.

[106] The nature and quality of her conduct meant the conclusion that the employment relationship could not continue, and that dismissal was a suitable action to take, was one a fair and reasonable employer could reach.

[107] The dismissal was justified.

D. Grievances alleging constructive dismissal

[108] Ms Kilpatrick says Air New Zealand dismissed her actually or constructively in:

- placing her on leave without pay on 3 April 2012; or
- placing her on leave without pay on 9 June 2012.

[109] There is no merit in Ms Kilpatrick's claim that she was dismissed on 3 April. She had been and remained on sick leave supported by medical certificates from her own doctor. At most there was a period of uncertainty about her entitlement to payment, and how her leave should be described. Moreover, it was clear that she did not consider her employment at an end when she operated the Auckland-San Francisco tour of duty in June.

[110] There is no merit in Ms Kilpatrick's claim that she was dismissed on 9 June. Her logic appears to be that she had returned to operational duties, as evidenced by the roster which included the Auckland-San Francisco tour of duty. The dismissal took the form of Air New Zealand's reaction in reiterating the requirement to obtain clearance before returning to operational duties, and that she not carry out the remaining duties on the roster in question. However in the circumstances the issuing of the roster in error did not amount to any form of authorised resumption of full operational duties, and the company's reaction was no more than a correction of the error. The dispute about clearance to return to work remained unresolved.

Penalties

[111] Ms Kilpatrick seeks penalties for breaches of good faith and of her employment agreement, in respect of some of the matters giving rise to her grievances.

[112] There is no merit in the claims for penalties for breach of good faith. I am not persuaded there was a breach of the employment agreement, and there will be no order for penalties in that respect.

Costs

[113] Costs are reserved.

[114] The parties are invited to agree on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve a written statement setting out what is sought and why. The other party shall have a further 14 days from the date of receipt of the statement in which to file and serve a written reply.

R A Monaghan

Member of the Employment Relations Authority