



Employment Court of New Zealand

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Kilpatrick v Air New Zealand Limited [2016] NZEmpC 1 (13 January 2016)

Last Updated: 18 January 2016

IN THE EMPLOYMENT COURT AUCKLAND

[\[2016\] NZEmpC 1](#)

ARC 46/13

IN THE MATTER OF a challenge to a determination of
the
Employment Relations Authority

BETWEEN JENNIFER KILPATRICK Plaintiff

AND AIR NEW ZEALAND LIMITED
Defendant

Hearing: 6-10 July and 31 August 2015
(Heard at Auckland)

Appearances: J Burley, counsel for plaintiff with plaintiff in person
presenting closing submissions
D France and S van der Wel, counsel for defendant

Judgment: 13 January 2016

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] Ms Kilpatrick was employed by Air New Zealand Limited (Air NZ) as an international long haul flight attendant. She commenced such employment on 19

April 2000. For the purposes of these proceedings her terms and conditions of employment were contained in the Flight Attendant Collective Employment Agreement covering the period 2009-2012.

[2] An employment relationship problem arose between Ms Kilpatrick and Air NZ in March 2012. On 25 July 2012 Air NZ dismissed Ms Kilpatrick by notice in writing. Ms Kilpatrick raised personal grievances against Air NZ in respect of the dismissal and for actions she alleged Air NZ had taken against her to her

disadvantage. Her grievances were not resolved and she commenced proceedings in

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the Employment Relations Authority (the Authority). Following a two day investigation meeting the Authority gave a determination dated 31 May 2013.¹

[3] Ms Kilpatrick was unsuccessful in her claims before the Authority. She challenged the determination. Her election relates to the whole of the determination and she sought a hearing de novo.

[4] Costs were reserved in the determination of the Authority of 31 May 2013. In a subsequent determination dated 4 July 2013 Ms Kilpatrick was ordered to pay a contribution of \$8,750 towards Air NZ's costs.² There has been no specific challenge to that determination. Nevertheless in dealing with costs in these proceedings the Court may need to consider the issue of costs in the

proceedings before the Authority.

Pleadings

[5] Ms Kilpatrick's final pleadings are contained in an amended statement of claim filed on 19 December 2014 by her then legal counsel. She had earlier filed a statement of claim while self-represented. This document contained causes of action clearly outside the jurisdiction of this Court to consider. During the course of interlocutory hearings in this matter the deficiencies in Ms Kilpatrick's first statement of claim were pointed out to her. Fortunately she was able to obtain the services of legal counsel and the matter was rectified in the amended statement of claim.

[6] In the amended statement of claim Ms Kilpatrick raises the following causes of action:

(a) Breach of contract for failure by Air NZ to comply with necessary rest provisions contained in the collective employment agreement.

¹ *Kilpatrick v Air New Zealand Ltd* [2013] NZERA Auckland 221.

² *Kilpatrick v Air New Zealand Ltd* [2013] NZERA Auckland 280.

(b) Breach of contract by failure to comply with the provisions of the [Health and Safety in Employment Act 1992](#). This also relates to the rest requirements.

(c) Unjustified disadvantage relating generally to alleged actions of Air NZ against her as pleaded. These relate to the same rest-period issue and allegation of fatigue, the manner in which a feedback report was issued after a flight from Rarotonga, her placement on leave without pay and the disciplinary process adopted by Air NZ.

(d) Breach of contract in refusing to allow her to return to work until she was medically examined by doctors employed by Air NZ outside the scope of the provisions of the collective agreement.

(e) Unjustified disadvantage by refusing to allow her to return to work when she had been certified as fit medically to do so and thereby unlawfully suspending her from employment.

(f) Unjustified dismissal.

[7] The remedies Ms Kilpatrick seeks are:

(a) an order that she be reinstated to employment;

(b) an order that she be reimbursed for wages lost (to be quantified at hearing);

(c) an order that she be paid compensation for humiliation, loss of dignity and injury to feelings (unquantified); and

(d) an order for costs (both in respect of the Authority proceedings and the challenge to the Court).

[8] No separate claim for damages is made for the alleged breaches of contract. Breaches of the employment agreement were raised before the Authority as founding

claims for penalties. Penalties are not now sought by Ms Kilpatrick. The alleged breaches now pleaded appear to be repetition of the alleged disadvantage grievances and can be considered simply as a part of those grievances.

Delay in allocation of hearing dates

[9] As Ms Kilpatrick is seeking an order for reinstatement and as her challenge against the Authority's determination was filed in this court on 20 June 2013, it needs to be noted that the delays in having this matter brought to a conclusion have not been occasioned by any delay on the part of the Court. Ms Kilpatrick and Air NZ both raised interlocutory applications. Difficulties were occasioned in the Court endeavouring to arrange a hearing date for those applications which was suitable to the parties. Ms Kilpatrick sought an order declaring that Air NZ's statement of defence in this matter had been filed out of time. Eventually that application was not pursued as it was plain from the Court records that the statement of defence was filed within time. Air NZ made an application for an order that Ms Kilpatrick pay security for costs and for an order of stay of proceedings until any such security had been lodged. The application for security for costs was made on the basis that Ms Kilpatrick was impecunious but also that she resided in Australia outside the

jurisdiction of the Court. An order for security for costs was made.³ The challenge

was stayed until payment was made. Ms Kilpatrick did not immediately meet the requirements of the order for security but time was extended for her to do so and eventually she lodged such security with the Court. There then followed difficulties in procuring a date for the hearing of the substantive proceedings. In order to meet the requirements of her then legal counsel in respect of his commitments in other courts, many months elapsed before a hearing date could be allocated. Even then her then legal counsel was unable to appear at the fixture dates and alternative counsel was arranged to represent her.

The Rarotonga flights

[10] The termination of Ms Kilpatrick's employment by Air NZ resulted from a sequence of events occurring during and in the months following flights from

Auckland to Rarotonga and return on 4-6 March 2012. The evidence which was available to Air NZ as to actions and behaviour of Ms Kilpatrick on those flights arose from its enquiries of other crew members following the flights. It then set in motion a process to consider whether disciplinary action against Ms Kilpatrick was appropriate and justifiable.

[11] The only witness from both the flight deck crew and flight attendants on board the aircraft who gave evidence to the Court was the Flight Service Manager (FSM), Michelle Coyle. However, her evidence was corroborated from statements obtained from other crew members by Air NZ during the course of its enquiries. Statements from these employees were produced unopposed in the bundle of documents. The sequence of events which Air NZ found to have been established as occurring during the flights between Auckland and Rarotonga and return is set out as follows.

[12] The first incident occurred right at the outset of the flight to Rarotonga, during the pre-flight briefing. As Ms Coyle indicated in both her statement to Air NZ and in her evidence, she had never met Ms Kilpatrick prior to this particular Tour of Duty (TOD). Ms Kilpatrick was designated as FA4 on the flight to Rarotonga. All flight attendants have a number designated for each flight, which determines their duties and responsibilities. The duties are also set out on a quick reference card, which flight attendants are required to have in their possession during duty. This has some significance in this case.

[13] Prior to the flight Ms Coyle had written Ms Kilpatrick's Christian name as "Jenny" on the briefing sheet. During the pre-briefing meeting which, while having its serious side, usually involved an amicable gathering of the flight attendants prior to the flight, Ms Coyle asked Ms Kilpatrick, after introducing herself to her, whether she was called Jenny or Jen. Ms Kilpatrick replied "Neither, I am neither of them and if you want to call me that I'm going home; it's over". This exchange was heard by all of the other flight attendants, some of whom stated that they were surprised and concerned by Ms Kilpatrick's response and tone. As to the exact words used, there were some variations in the recollection of other crew members. However, the tone of the conversation described was the same. Ms Coyle was taken aback and

noted that some of the crew looked shocked. She made a flippant comment to try and make light of the situation by saying something to the effect "Are we going to be operating one short today, sorry, Jennifer". Ms Kilpatrick looked at the briefing sheet, scribbled out her name and wrote in "Jennifer". Ms Coyle stated that throughout the remainder of the briefing Ms Kilpatrick did not look at her. She sat with her arms crossed and did not appear to be listening to what was going on.

[14] Ms Kilpatrick continued to look around the room and not pay attention when the In-flight Service Coordinator (ISC) continued the pre-flight briefing. Ms Coyle noted for feedback purposes later that she thought the attitude was unnecessary. Ms Kilpatrick looked bored, annoyed and irritated when responding to any questions from the ISC.

[15] Ms Kilpatrick's hostile behaviour then continued as the TOD progressed. Ms Kilpatrick claimed in documents she lodged with Air NZ a few days following the flights that she had not been given adequate rest as required under the employment agreement between her previous TOD to Tahiti and the commencement of the Rarotonga flights. She claimed that she mentioned this factor during the briefing session, although Ms Coyle and the other crew members cannot recall her mentioning this. These assertions will be discussed more fully later in this judgment. However, even if Ms Kilpatrick had a dispute with Air NZ over her rest between the two tours of duty, this would be no excuse for her attitude and behaviour towards fellow employees which occurred during the Rarotonga flights. Ms Coyle also denies Ms Kilpatrick's allegation that she told Ms Kilpatrick that she had no choice other than to undertake the duty. If Ms Kilpatrick did not mention the apparent source of her irritation, there would be no reason why Ms Coyle would have said this.

[16] Ms Coyle considered Ms Kilpatrick's attitude and performance on the Auckland to Rarotonga flight "wasn't great". Ms Kilpatrick was responsible for the galley. As there were only seven passengers in business class where Ms Coyle was stationed, she went to help with the meal cart at the back of the aircraft. When she got there Ms Kilpatrick was doing nothing in the cabin. After Ms Coyle finished handing out the meals she took the cart back to the galley to put it away. As she

wished to extend a courtesy to Ms Kilpatrick by recognising that she was in charge of the galley, she asked Ms Kilpatrick where she wanted the cart stowed. She described Ms Kilpatrick's attitude as rude and uncooperative.

[17] It then became clear that Ms Kilpatrick had not programmed the in-flight entertainment screens to include food orders for those wanting to purchase food. This was Ms Kilpatrick's responsibility. Passengers had been complaining that they were unable to order food and it was found that no programming had been entered to enable them to do so. Ms Kilpatrick endeavoured to pass the blame to another flight attendant for this oversight. When instructed to do the inventory by Ms Coyle, Ms Kilpatrick replied it was not her problem, turning her back on Ms Coyle and walking to the other side of the galley. Another crew member then did the inventory. Ms Coyle realised the galley management by Ms Kilpatrick was a shambles. Ms Coyle describes the galley as being in a mess with carts out, no replenishing of tea or coffee and Ms Kilpatrick not knowing which food orders had gone out and which had not. Ms Coyle stated that other crew members were covering for Ms Kilpatrick with the passenger requirements. Ms Coyle tried to provide some feedback to Ms Kilpatrick; however, she would not accept any.

[18] The ISC described an incident which arose out of the passengers' inability to order food from the in-flight screens. Towards the end of the flight, a passenger heading to the toilet walked past the galley and saw Ms Kilpatrick eating one of the pies, which were to be available for passengers to order from the in-flight screens. The passenger made a pointed comment to Ms Kilpatrick and she then rudely berated him for watching her while she ate her meal. She then told the other crew members in the galley in a loud voice "He has been watching" after the passenger had moved on but was still within earshot. The ISC endeavoured to get her to quieten down.

[19] There was also another incident with Ms Kilpatrick shouting within hearing of passengers at another flight attendant who had asked to have a tea or coffee pot refilled calling him useless. She also abused Ms Coyle to another attendant, saying Ms Coyle was

useless. When the ISC remonstrated with Ms Kilpatrick about

shouting at the other attendant, Ms Kilpatrick said "I'm not shouting, I have a loud voice".

[20] During the stopover in Rarotonga Ms Kilpatrick did not socialise with other crew members over dinner as would normally be the case. Prior to dinner at the hotel restaurant, Ms Coyle discussed Ms Kilpatrick's behaviour with the Captain, the First Officer and the ISC.

[21] For the return flight, at the hotel in Rarotonga Ms Kilpatrick reported to the crew transport bus at the last minute. She sat at the front of the bus with her back to the other crew and did not engage with them. Ms Coyle described the other crew members as being uncomfortable at this.

[22] Ms Kilpatrick's behaviour on the flight back was equally concerning to Ms Coyle. Ms Kilpatrick contravened Air NZ requirements by going to the flight deck without clearance from the FSM, who was Ms Coyle, or the ISC who was in fact acting as Flight Services Manager for training purposes on the flight back. In their narratives given to Air NZ, the Captain and the First Officer described Ms Kilpatrick coming to the flight deck and raising a point relating to boarding requirements. Ms Kilpatrick in effect was trying to criticise Ms Coyle. Neither the Captain nor the First Officer agreed with Ms Kilpatrick's interpretation of the Long-Haul Cabin Safety Manual. The Captain and the First Officer soon assessed that Ms Kilpatrick was endeavouring to intimidate both Ms Coyle and the ISC. When they would not agree with Ms Kilpatrick's interpretation, she stated that she was going to lodge an Operations Occurrence Report (OOR) against her supervising flight attendants in any event. The Captain and the First Officer formed the view that Ms Kilpatrick had it in for Ms Coyle and was intent on causing her trouble. During evidence these matters were not in fact denied by Ms Kilpatrick, although she claims that she did not breach policy by going on to the flight deck without clearance, stating that she had endeavoured to get permission from Ms Coyle or her deputy but they could not be found. There was considerable dispute in the evidence about this.

[23] On the flight back from Rarotonga to Auckland Ms Kilpatrick was designated

FA3. This meant she was working with another attendant on the starboard side of

the aircraft. Further behavioural issues which Ms Coyle noticed from her were as follows:

(a) Ms Kilpatrick left the galley when Ms Coyle first entered the aircraft and then chose to remain by door 4R and would not speak to Ms Coyle.

(b) Ms Kilpatrick was required to contact Ms Coyle to confirm that the over-wing seats were locked for landing. She was required to identify herself and her position. In calling Ms Coyle, she simply confirmed that the seats were locked and hung up the phone.

(c) During what could only be described as an altercation following landing, Ms Kilpatrick when requested could not show Ms Coyle her

'Seats to Suit Service' delivery card or quick reference card which as a flight attendant she was required to have during the flight. These cards highlight the FA4/FA3 service flow duties and FA4/FA3 safety duties. As Ms Coyle said in her evidence it was important for flight attendants to carry these cards at all times.

(d) Ms Kilpatrick was not engaging with the passengers. She appeared to be simply going through the motions of her job.

[24] On a TOD such as this the flight attendants on the return flight would be given feedback on their performance by Ms Coyle during less busy breaks in the return flight. All of the flight attendants, apart from Ms Kilpatrick, were given their feedback. This would be given either by the FSM or the ISC.

[25] During the TOD, not only was Ms Kilpatrick disrespectful to Ms Coyle and the ISC but she had also acted rudely towards other flight attendants. The entire crew had noticed her behaviour and could not understand why she was behaving towards them in this way. Ms Coyle, therefore, became concerned that if she gave Ms Kilpatrick her feedback during the flight, Ms Kilpatrick, because of her unpredictable behaviour, may have reacted badly to what was inevitably going to be

a poor performance rating. It was decided that Ms Kilpatrick would be given her feedback after the aircraft had landed and when the passengers had departed. It was not unusual for feedback to be given at the end of the flight and sometimes this is given when the plane is on the ground. Even though Ms Coyle decided to give Ms Kilpatrick her feedback on the flight once the plane was on the ground, she was still concerned about the likely reaction from Ms Kilpatrick. Ms Coyle went to the flight deck and spoke to the Captain. The Captain was sufficiently concerned at this stage that he was considering taking the very rare step of standing Ms Kilpatrick down. Ms Coyle, however, persuaded him not to do this and the Captain then suggested that the satellite phone should be used to call for a Performance and Development Manager (PaDM) to meet the aircraft upon arrival so that Ms Coyle would have backup support. The fact that the Captain was considering taking the step of standing Ms Kilpatrick down showed that, from his own observations and the information that had been passed on to him as to her behaviour towards the other crew members, he was led to the view that the flight was potentially being compromised.

[26] Once the request for management assistance on the ground was communicated by satellite phone from the aircraft, the PaDM involved also arranged for another manager to accompany him to meet the aircraft. They were not aware of the circumstances which required their attendance but nevertheless met the aircraft and waited on the air bridge. On the ground, Ms Coyle, upon exiting the aircraft, explained to the two managers concerned the problem which needed to be addressed and they went onboard with Ms Coyle to assist giving the feedback to Ms Kilpatrick. The giving of feedback was a company requirement and was not to be deferred. The reason for this was that once the TOD was completed, it was difficult to administer the feedback dissemination in view of the diverse nature of

the flight attendants' duties. It would be unlikely, for instance, that Ms Coyle would again be on the same flight as Ms Kilpatrick within the near future.

[27] Once the passengers had disembarked and as Ms Kilpatrick walked towards the exit door, Ms Coyle confronted her and informed her that she was required to give her the feedback on her performance. As expected, Ms Kilpatrick reacted badly, not only to this suggestion but also to seeing that she was confronted with the two managers who had met the aircraft. Ms Kilpatrick claimed that upon being

confronted with this situation she suddenly felt sick, although witnesses say there was no physical evidence of this. Ms Coyle refused to accept that Ms Kilpatrick was unwell. The two managers, Ms Coyle and the ISC were all present. One of the other flight attendants who was a union representative also remained onboard, apparently to assist Ms Kilpatrick. This was the same flight attendant who later indicated during Air NZ's disciplinary inquiry that he had seen Ms Kilpatrick behave in a similar way on other flights.

[28] There was a period of time that followed before the feedback could be given. Ms Kilpatrick went to another part of the aircraft at one stage and was advised by the flight attendant assisting her. She also endeavoured to use her cell phone to record the conversation, shoving it at Ms Coyle's face. This was put a stop to by Ms Coyle. Ms Kilpatrick endeavoured to bully Ms Coyle by trying to control where Ms Coyle stood. She repeatedly said "You, over here" whilst pointing at Ms Coyle. Then the ISC for whom English was a second language, tried to perform his part of the feedback. Ms Kilpatrick made disparaging comments about his speech. She said "Can you speak English" and repeatedly said "I can't understand you". This was to a senior member of the crew with whom she had had a long association. The two managers by this time had exited the aircraft and remained on the air bridge so that Ms Coyle and the ISC could administer the feedback.

[29] Ms Kilpatrick claimed that she was unlawfully detained on the aircraft. However, her contentions in this regard cannot be credible. She was informed she was not being detained. The two managers had exited the aircraft and witnesses say that Ms Kilpatrick's ability to exit the aircraft was not impeded as she alleged. She claimed that she was off duty and could not be compelled to stay on the aircraft. However, this was not correct either, because the TOD did not finish until 30 minutes after the aircraft has reached the blocks at the terminal. Ms Kilpatrick gave some timings as to all of this in an effort to show that her TOD had ended but her own timings simply do not tally with what was clearly the factual situation as to the aircraft's actual landing time in Auckland. The further fact which shows that Ms Kilpatrick's ability to leave the aircraft was not impeded was that she indeed left the aircraft during the course of the feedback being given to her and before it could be completed, and left the aircraft despite receiving warnings to remain. During the

course of the feedback and before it was completed, Ms Kilpatrick said "You've had your time I am out of here". She then left and went home.

[30] In keeping with the other behaviour Ms Kilpatrick had demonstrated on both the Auckland to Rarotonga flight and the Rarotonga to Auckland flight, she escalated the attempt to give her feedback into an allegation that it was a disciplinary procedure and that she was entitled to have legal or other advice before receiving it. This was confirmed in a letter Ms Kilpatrick sent the following day to the PaDM who had met the aircraft. The letter submitted personal grievances and suggested mediation. Later correspondence discloses that a mediation subsequently arranged did not take place as a result of Ms Kilpatrick being unwell.

[31] It is clear from their evidence both in Air NZ's inquiry and presented to the Court that Ms Coyle and the ISC who remained with her, and indeed the managers, were shocked by Ms Kilpatrick's outburst at this point. As Ms Coyle was required to provide the feedback to Ms Kilpatrick as part of her duties, she used her best endeavours to direct Ms Kilpatrick to remain on board. Ms Kilpatrick was required to complete her TOD by remaining on the aircraft and a direction to remain, which was given by Ms Coyle and also the PaDM, was a lawful direction, despite Ms Kilpatrick's subsequent assertion to the contrary.

[32] Ms Kilpatrick had indulged in reasonably serious insubordination and in view of this serious incident on the ground and all the other behaviour which had taken place during the flights, Air NZ could reasonably require Ms Kilpatrick to participate in and co-operate with a disciplinary inquiry. During the stopover in Rarotonga, Ms Kilpatrick was not required to socialise with the other crew members even though they regarded her behaviour on the ground as unusual. No exception was taken by Air NZ to her behaviour there and it does not form part of the disciplinary process which followed.

The operational occurrence reports

[33] Following the completion of the Rarotonga-to-Auckland flight and the incidents which had occurred on the ground at Auckland, Ms Kilpatrick prepared and

filed two OORs and three fatigue reports. The OORs were sent to Air NZ on 9

March 2012 and were critical of Ms Coyle and the ISC. They referred to incidents and breaches which Ms Kilpatrick alleged arose out of the Auckland/ Rarotonga/Auckland flights. One of the fatigue reports related to the earlier TOD which Ms Kilpatrick had undertaken as a flight attendant on the Auckland/Papeete/Auckland flights. The significant point about the fatigue reports which will be discussed further in this judgment is that the fatigue reports were also not forwarded to Air NZ until 9 March 2012. Ms Kilpatrick conceded this in evidence. A fatigue report is a document which is required to be filed with Air NZ before the flight affected by the attendant's fatigue is taken. The dates contained in the fatigue reports as the local report date are shown as 2, 4 and 6 March 2012 respectively. However, they were all faxed to Air NZ on the same date which is shown as 9 March 2012 and therefore after the allegedly affected flights had been completed.

[34] The OORs and the fatigue reports were considered by Karen Louise Eppingstall who was Air NZ's Performance and Development

Manager. Ms Eppingstall carried out the investigation into Ms Kilpatrick's behaviour and initiated the disciplinary process. In one of the OORs Ms Kilpatrick made an allegation about the ISC leaving his seat after final descent had commenced into Auckland. While this was held to be established, Ms Eppingstall's primary concern was that the majority of the matters raised by Ms Kilpatrick in the OORs and indeed in the fatigue reports did not comply with normal requirements or reasons for the preparation and submitting of such reports. The ISC was dealt with by Air NZ for leaving his seat. His explanation was that he was so concerned by Ms Kilpatrick's actions that he wanted to discuss with her why she was behaving in that way. Ms Eppingstall's view on the fatigue reports was that if Ms Kilpatrick was indeed fatigued to the extent that she alleged prior to both the Papeete and Rarotonga flights, then she had an obligation not to fly. The onus rested upon a crew member to arrange to be relieved from a TOD if they were not fit to carry it out. As Ms Eppingstall stated in her evidence there were two possible conclusions arising from the fatigue reports being filed after the flights had ended. As Ms Kilpatrick had chosen to fly despite being fatigued to the extent that she alleged in the fatigue reports, then an inference arose that the alleged fatigue was false and was simply

raised retrospectively by Ms Kilpatrick to try and justify her behaviour. Alternatively, if Ms Kilpatrick was genuinely fatigued to the extent that she alleged, then she breached company policy by flying on those flights.

[35] The effects of the alleged fatigue described by Ms Kilpatrick were quite significant. In respect of the Papeete flight, she stated that she was suffering from lack of concentration, affected vision and balance, memory loss and nausea. In the second report which is dated 4 March 2012 and relates to the flight to Rarotonga, she alleges that she did not achieve rest time as per the employment agreement prior to that flight and following the Papeete TOD. She described memory loss, lack of energy and nausea. She also took the opportunity of raising personal grievances and other matters which would not normally be contained in a fatigue report form. In respect of the final fatigue report dated 6 March 2012, which must relate to the flight back to Auckland, she simply referred to the fact that she did not get any rest before the duty and once again took the opportunity of referring to her outstanding personal grievances with the company. No actual physical consequences were referred to in the final report. If genuine, the type of physical effects which she described as having suffered would certainly have meant that she should have stood herself down from both the TOD to Papeete and Rarotonga. Ms Kilpatrick was not observed by other employees as suffering from these effects. The feedback she received on her performance on the Papeete flight indicated that she had performed her duties to a high standard. Insofar as the Rarotonga flight was concerned, she only alleged illness for the first time when confronted with the circumstances on the ground in Auckland when her superiors endeavoured to give feedback on the Rarotonga TOD.

[36] So far as Air NZ was concerned, in its inquiry the timing of the filing of the fatigue reports raised considerable suspicion as to Ms Kilpatrick's motivation for filing them.

Ms Kilpatrick's sick leave

[37] Following the incident on the aircraft on the tarmac at Auckland International Airport on 6 March 2012, Ms Kilpatrick did not immediately return to work. The following day she forwarded to Air NZ a medical certificate from her general practitioner dated 7 March 2012. This certificate stated that she would not be fit to attend work from 7 March 2012 until 18 March 2012. While the medical certificate did not disclose Ms Kilpatrick's medical condition, in a covering email enclosing the certificate, Ms Kilpatrick stated that she was unfit for duty due to stress.

[38] Ms Kilpatrick sent Air NZ a further medical certificate dated 19 March 2012. Again this certificate did not disclose her medical condition. However, it stated that she was medically unfit to attend work from 19 March 2012 until 2 April 2012. In her covering email, Ms Kilpatrick again stated that she was on stress leave.

[39] The third medical certificate was sent to Air NZ dated 3 April 2012. This certified Ms Kilpatrick as medically unfit to attend work from 3 April 2012 until 17 April 2012.

[40] The fatigue reports which Ms Kilpatrick had forwarded to Air NZ on 9 March 2012 set out the symptoms from which Ms Kilpatrick alleged she was suffering. Along with the medical certificates, these alleged symptoms would have caused concern about Ms Kilpatrick's medical state. The medical certificates and the fatigue reports were received by Sarah-Jane Whitehead, the Health, Wellbeing and Safety Strategy Manager for Air NZ cabin crew. As Ms Whitehead stated in her evidence, Air NZ takes claims of workplace stress very seriously. Where an employee raises an issue of workplace stress, an Air NZ medical officer investigates the issue in consultation with the employee so that Air NZ can understand what is happening and where necessary, take practical steps to address the stressors. Ms Whitehead therefore sought to facilitate this process with Ms Kilpatrick. As part of that process Ms Whitehead made an appointment for Ms Kilpatrick to see an Air NZ medical officer. This was part of the process for dealing with workplace stress, which is listed as a hazard in Air NZ's crew hazard register. Air NZ provides a number of support mechanisms to assist crew members suffering from stress; and Ms Whitehead's approach to Ms Kilpatrick in this regard was clearly part of the pastoral care which Air NZ offered in such a situation.

[41] The attempt by Ms Whitehead to assist Ms Kilpatrick met with opposition from Ms Kilpatrick. She responded to the invitation to attend an appointment with

the Air NZ medical officer by stating that she could not attend the meeting due to health. The correspondence which followed then degenerated into Ms Kilpatrick debating with Ms Whitehead whether she could be required to attend an appointment with the in-house medical officer and discussions about requirements under the collective agreement.

[42] In accordance with what was clearly Ms Whitehead's understanding of her good faith obligations towards Ms Kilpatrick in representing the employer, Ms Whitehead endeavoured to short-cut the process by telephoning Ms Kilpatrick. Ms Kilpatrick hung up the phone on her. She also tried to solve the problem by obtaining from Ms Kilpatrick a written authority for Air NZ to contact Ms Kilpatrick's own medical advisors but again there was no response by Ms Kilpatrick to this written suggestion by Ms Whitehead.

[43] Once Ms Kilpatrick had been unable to work because of being medically unfit for 14 consecutive days, she was then required to obtain clearance from the Air NZ in-house medical advisors before she could return to flying duties. Ms Kilpatrick endeavoured in her evidence and submissions to allege that she was not away on sick leave for 14 consecutive days because she was not on rostered duties. However, this could never be a correct application of the Sick Leave/Absence Policy provisions in the Cabin Crew General Operating Procedures contained in the General Operating Procedure Manual. The concern requiring clearance was because she was medically unfit for that period. The debate between Ms Kilpatrick and Ms Whitehead and subsequently Ms Eppingstall, as to whether Ms Kilpatrick could be required to obtain clearance from the in-house medical advisors, arose from Ms Kilpatrick's apparent belief that the in-house medical advisors were to conduct a medical examination. This was simply not what was required. The distinction between the required medical examination by Ms Kilpatrick's medical practitioner and the clearance by the company's medical team is plain from the General Operating Procedures Manual. It would also have been obvious to Ms Kilpatrick but even during the hearing when the position was made abundantly clear, she persisted with the misunderstanding.

[44] Another factor which intervened in all of this was that by 17 April 2012 Ms Kilpatrick had used up all of her sick leave entitlement. She had no accrued annual leave upon which she could rely and was therefore placed on leave without pay. She variously alleged that this was either a suspension or a termination of employment. Her actions later, in returning to duties when she was mistakenly rostered on a flight to San Francisco, meant Ms Kilpatrick could not seriously have maintained this assertion, even though she did so during the course of her evidence until she was persuaded during cross-examination that the assertion was untenable. Ms Kilpatrick also endeavoured to indicate to crew control on 17 April 2012 that she was clearing herself for duty. This was based on the medical practitioner's certificate but it was a deliberate circumvention of the directions that had been given to her by Ms Whitehead and Ms Eppingstall by that stage, when she was firmly directed that she could not return to work until she had received the clearance from the in-house medical advisors. Ms Kilpatrick raises this point as another disadvantage grievance on the basis that when she was fit to return to work, Air NZ withdrew the opportunity for her to do so.

[45] Despite the disciplinary process which was running alongside these attempts by Ms Whitehead to assist Ms Kilpatrick in an appropriate manner with her stress, Ms Whitehead was of the view that Ms Kilpatrick could return to work so long as she gained the appropriate clearance. She would still, however, have to continue with and undergo the disciplinary process. Ms Kilpatrick converted what was a genuine attempt to assist her with her medical issues into legal issues for the purpose of simply obstructing Ms Whitehead from carrying out her obligations towards Ms Kilpatrick. When Ms Whitehead came to the view that Ms Kilpatrick was going to continue to frustrate her efforts, she left the alleged workplace stress issue to be dealt with by Ms Eppingstall as part of the disciplinary process.

The disciplinary process

[46] Having completed interviewing all available crew members from the flights and the two managers who met the plane upon landing in Auckland, Ms Eppingstall decided that a disciplinary procedure was necessary. She had earlier written to Ms Kilpatrick on 26 March 2012 alerting her to the fact that there were concerns about

the latter's actions and behaviour and that Air NZ was gathering information and speaking to witnesses. Following the interviews, a further letter dated 23 May 2012 was sent to Ms Kilpatrick asking her to attend a meeting on 30 May 2012. This was a full week after the letter was sent and would normally be regarded as a reasonable period for Ms Kilpatrick to read the material enclosed and be prepared to respond at the meeting. The letter was sent to Ms Kilpatrick by courier and was also emailed to her at each of the various email addresses she had provided to Air NZ. The courier could not deliver it to Ms Kilpatrick personally so Ms Eppingstall sent it to Ms Kilpatrick's address by fast post. She also sent a text message to Ms Kilpatrick advising her of the meeting day.

[47] Ms Eppingstall in her letter set out the allegations against Ms Kilpatrick, which at that point Air NZ was considering. These were as follows:

- (a) Acting in an aggressive and disrespectful manner towards managers and colleagues;
- (b) insubordination;
- (c) failing to follow correct notification processes with OORs and failing to first report her safety concerns to the Captain on the flight deck;
- (d) either reporting for work when not fit to do so or submitting incorrect or misleading fatigue reports;
- (e) failing to deliver required level of customer service;
- (f) failing to follow correct flight deck access procedures;
- (g) failing to produce "quick reference card" when requested; and
- (h) failing to follow correct over-wing communications procedures.

[48] In the letter Ms Eppingstall followed correct procedures in the notification of the disciplinary meeting to Ms Kilpatrick by advising her that she could be

accompanied by a support person or representative. The documents prepared during the investigation were enclosed. The names of company attendees who would be at the meeting were advised to Ms Kilpatrick. She was also advised that the possible outcome of the meeting was disciplinary action up to and including dismissal. The letter also referred to previous disciplinary action Ms Kilpatrick had faced and which the company was intending to take into account.

[49] It is evident that Ms Kilpatrick received this letter from Ms Eppingstall because she wrote a letter in response dated 28 May 2012. This reply though was not received by Air NZ until 12 June 2012. It was sent by ordinary post and there was no email or telephone follow up which could have been expected from Ms Kilpatrick as she was clearly intending not to attend the meeting on 30 May 2012. In this letter Ms Kilpatrick attempted to set her own agenda as to how the disciplinary procedure would continue from that point. The timetabling which she set out in her letter culminated in her requesting that the disciplinary meeting take place on 16 July

2012. This would be an inordinate length of time for the disciplinary process to be delayed. In the letter in reply Ms Kilpatrick made no attempt whatsoever to respond to the allegations which were being made against her. Air NZ could not reasonably have been required to wait until mid-July to meet with Ms Kilpatrick.

[50] On 31 May 2012, Ms Eppingstall wrote again to Ms Kilpatrick. At this stage Ms Eppingstall had not received Ms Kilpatrick's response dated 28 May 2012. The letter pointed out that Ms Kilpatrick had not attended the meeting as requested and pointed out that efforts had been made to communicate with her by cell phone, landline, email, courier and regular mail. In the circumstances Ms Eppingstall indicated to Ms Kilpatrick that she was prepared to arrange a further meeting on either 6 June 2012 or 11 June 2012. Ms Kilpatrick did not respond to this letter. It was around this time that Ms Kilpatrick also removed the address details she was required to provide to Air NZ so it could communicate with her.

[51] Air NZ had also become aware that as a result of an error by the roster builder, Ms Kilpatrick was rostered on an Auckland/San Francisco/Auckland flight departing 5 June 2012 and arriving back in Auckland on 9 June 2012. Ms Kilpatrick reported for duty and undertook these flights. On 11 June 2012 Ms Eppingstall

wrote to Ms Kilpatrick pointing out that she had been clearly directed not to resume flying duties until she had been cleared to do so by the in-house medical advisors and that the procedure was set out for cabin crew in the General Operating Procedures Manual. Ms Eppingstall pointed out that Ms Whitehead had advised Ms Kilpatrick, both verbally and in writing that she could not return to work until she had been cleared. Ms Kilpatrick did not respond to this letter either.

[52] Ms Eppingstall then wrote to Ms Kilpatrick again on 13 and 15 June 2012. These letters offered further meeting dates of 15 June 2012 or 19 June 2012 respectively for the disciplinary meeting. The letter of 13 June 2012 added further concerns to the list of matters upon which disciplinary action was going to be considered. These included the removal of the home address and private email address from the company's systems in breach of the requirements upon Ms Kilpatrick as a flight attendant. The letter also referred to her lack of response to previous correspondence regarding the investigation. Additionally, the letter referred to Ms Kilpatrick's failure to visit one of the company doctors to obtain clearance for duties following her absence on sick leave and unfitness for work of more than 14 days. The letter also stated that in breach of the clear and specific instructions given, Ms Kilpatrick had operated on the San Francisco TOD. Ms Eppingstall wrote the further letter to Ms Kilpatrick on 15 June 2012 because Ms Kilpatrick did not initially respond to the letter of 13 June and failed to attend the proposed meeting on

15 June 2012. That letter imposed a requirement upon Ms Kilpatrick to attend a meeting on 19 June 2012. Advice to Ms Kilpatrick was repeated that if she did not turn up for the meetings as requested, Air NZ would consider itself at liberty to continue with the investigation and impose disciplinary action.

[53] Ms Kilpatrick wrote to Ms Eppingstall in a letter dated 18 June 2012. In this letter she did not make any attempt to respond appropriately to the allegations being made against her but instead set out an event chronology. In that letter she also set out five personal grievances which related to her being placed on leave without pay. Four of the grievances alleged unjustified dismissal and the fifth grievance was a disadvantage claim allegedly arising out of breach of the provisions of the collective employment agreement. In this letter Ms Kilpatrick for the first time made some attempt to address the allegations against her relating to the Rarotonga flights, but

she simply stated "For the record, the allegations are denied. However, it will not be constructive to go into the details of that in this letter".

[54] Ms Kilpatrick did not attend the meeting set for 19 June 2012. In further letters dated the 19 June 2012 and 21 June 2012 Ms Eppingstall wrote to Ms Kilpatrick pointing out that she had failed to attend the meeting and that no further meetings would be scheduled; and that Air NZ would simply go ahead and consider the allegations. Ms Kilpatrick's letter of 18 June 2012 clearly crossed with Ms Eppingstall's letter of 19 June 2012. In her letter to Ms Kilpatrick on 21 June 2012

Ms Eppingstall advised that Air NZ did not accept Ms Kilpatrick's event chronology as accurate and, despite Ms Kilpatrick still insisting on having a meeting on 16 July

2012, she was advised that a meeting on that date could not take place.

[55] In a letter dated 26 June 2012 Ms Kilpatrick wrote again to Ms Eppingstall. In that letter she endeavoured to deal with some of the more recent allegations which had been made against her. She maintained that she was entitled to work on the San Francisco flights as she had been cleared by the medical examination undertaken by her own doctor and the certificate which the doctor had issued. In this letter she also claimed that she needed to be rostered in order to attend meetings. She reiterated some of her grievance issues. She also stated that the previous correspondence had caused her some confusion although it is difficult to see how this could be so, as the

correspondence emanating from Ms Eppingstall was perfectly clear.

[56] A further exchange of correspondence followed in July. By 13 July 2012 Air NZ had reached findings from the investigation into Ms Kilpatrick's conduct. In a letter of 13 July 2012 Ms Eppingstall wrote to Ms Kilpatrick advising that a further meeting was necessary in order that the findings could be communicated to her. Meeting dates of 18 July or 19 July 2012 were offered. It was again made clear that the company would not be able to meet with Ms Kilpatrick on 16 July 2012 but she was asked to confirm her choice of meeting date by 5pm on that date.

[57] On 16 July 2012 Ms Kilpatrick wrote to Ms Eppingstall. This letter contained an updated chronology of events. Her letter acknowledged receipt of the letter of 13 July 2012 and accordingly it would have been open to her to contact Ms

Eppingstall by telephone or text to confirm attendance on one of the meeting days which was offered. She failed to do that by the deadline imposed and did not address any of the matters which had been raised with her at some length in previous correspondence.

[58] Air NZ had kept an eye out in case Ms Kilpatrick in fact attended at the premises on 16 July 2012 but she did not do so. In a letter dated 18 July 2012 Ms Eppingstall confirmed that if Ms Kilpatrick did not attend the final date offered of 19

July 2012 the company would simply send the findings to her in writing. Ms Kilpatrick did not attend on that date and on 19 July 2012 Ms Kilpatrick was notified by Ms Eppingstall, in writing, that the company was considering terminating her employment in view of overall findings of serious misconduct. The written findings were sent to Ms Kilpatrick and she was then invited to attend a final meeting on Wednesday 25 July 2012 to discuss the proposed outcome. She was advised that if she did not attend that meeting the company would reach a decision in her absence. Ms Kilpatrick did not attend on 25 July 2012 and did not make any formal submissions in response to the findings which had been made against her. Accordingly, her employment was terminated.

[59] Ms Eppingstall indicated in her evidence that in all she had suggested eight alternative meeting dates to Ms Kilpatrick. Ms Kilpatrick never responded regarding meeting times apart from her insistence upon the meeting taking place on 16 July

2012. Ms Kilpatrick had been informed that Air NZ's senior legal counsel and other

Air NZ attendees were not available to attend the meeting on 16 July 2012.

[60] In the interim, while Ms Eppingstall was proceeding with the investigation and disciplinary process, Ms Whitehead had, as earlier discussed, engaged in email correspondence with Ms Kilpatrick. This related to the fatigue reports and concerns arising from Ms Kilpatrick's medical certificates from her general practitioner advising that she was sick and suffering from stress. This correspondence then led to the antagonistic stance Ms Kilpatrick took over clearance for her return to work. It led to an inexplicable stand-off, resulting in Ms Kilpatrick failing to attend meetings with the in-house medical advisors so as to deal with her alleged stress and to obtain clearance. At one point Ms Kilpatrick intentionally notified crew control that she

was cleared for duty, thereby ignoring and bypassing Ms Whitehead and evading the required procedures for her to return to work.

[61] The procedures being followed by Ms Eppingstall and Ms Whitehead overlapped but were nevertheless separate from each other. Ms Eppingstall, while having overall responsibility and oversight, was primarily directing her attentions at the disciplinary process. Ms Whitehead, however, was endeavouring to deal with Ms Kilpatrick's alleged stress by ensuring that she received pastoral support from Air NZ, and also adopting procedures to ensure that she received advice and treatment for it so that eventually she could be cleared to return to work. Even if Ms Kilpatrick had been cleared to return to work, the disciplinary process relating to her behaviour on the Rarotonga flights would still have been the subject of investigation and findings.

Discussion – Ms Kilpatrick's actions and evidence

[62] To summarise, these separate procedures have been combined in the overall narrative of this matter. That is mainly because of the pleadings. Ms Kilpatrick has pleaded both an unjustifiable dismissal and unjustifiable disadvantage grievances relating to the rest periods and the processes which were adopted to deal with her stress, fatigue and being unfit to return to work for medical reasons. She relied upon the doctor's certificates provided to Air NZ to justify her absence from work for a lengthy period of time. It was during her absence from work that she used up her sick leave entitlement and any remaining leave entitlement and was then placed on leave without pay.

[63] Ms Kilpatrick alleges that when the decision was made to place her on leave without pay, she was either suspended or dismissed at that point. Her assertion that she was dismissed is somewhat inconsistent with her subsequent actions while the disciplinary process was following its course. The primary reason for saying this is her return to work for the TOD to San Francisco. The rostering mistake probably occurred as a result of Ms Kilpatrick endeavouring to bypass proper procedures by advising crew control that she was fit to return to work. Air NZ was extremely concerned at this turn of events and particularly the fact that having been told that

she could not return to work until she obtained a proper medical clearance, she then disobeyed this directive. It therefore became one of the further matters upon which disciplinary action was to be considered. Ms Kilpatrick alleges that the fact that she was placed on this TOD indicated to her that she was no longer required to follow proper procedures for her clearance. In all of the circumstances this was completely disingenuous and devious in view of the clear understanding of contractual procedures Ms Kilpatrick would have had from her experience as a flight attendant and her union involvement.

[64] The correspondence discloses that in her dealings with the company after the disciplinary process was initiated, Ms Kilpatrick was obstructive. While she was responding to correspondence received from Air NZ by writing letters, she was not following up with email or telephone calls when it would have been appropriate to do so. More than one letter crossed in the post which made the process

more difficult. She made a claim at one point that she could only be required to attend a disciplinary meeting if she was placed on the roster to do so. She deliberately tried to frustrate the whole process. In doing so, she failed to act with good faith.

[65] During the hearing when under cross-examination from Mr France, counsel for Air NZ, Ms Kilpatrick was evasive. She tried to avoid questions. From my observations her misunderstanding or misinterpretation of the questions under cross-examination was deliberate. When faced with repetition of clear questions she had failed to answer and being then compelled to answer, she often avoided them by giving a straight denial. She often placed reliance upon some imagined right under the provisions of the collective employment agreement or incorporated manuals and procedures. It was often the case that her interpretation of the provisions of the collective employment agreement and policy and safety manuals was not correct.

[66] In the correspondence from both Ms Whitehead and Ms Eppingstall, it was plainly set out to Ms Kilpatrick what allegations there were against her and what were her obligations, insofar as a response was concerned. She was given substantial documentation which included the statements of her colleagues as to what had transpired on the flights. She failed to respond adequately. In two of the letters she wrote to Air NZ, she simply responded to the allegations with her version

of a chronology of events without dealing directly with the allegations being made against her. As referred to earlier, in one letter she had indicated that "for the record" the allegations against her were denied but went no further than that. She also referred to an earlier unrelated grievance she had raised against Air NZ and to which she alleged Air NZ had not adequately responded although irrelevant to the matter involving the Rarotonga flights.

[67] It is significant that in her brief of evidence provided at the hearing, Ms Kilpatrick did not deal with the allegations made against her by her colleagues as to her behaviour on the flights apart from the incidents when the aircraft was on the ground at Auckland. Ms Kilpatrick referred to breaches of protocols and performance deficiencies she alleged had been committed by the supervising flight attendants. It was not until the specific allegations as to her behaviour were put to her under cross-examination, that she endeavoured to proffer any explanation at all. In the face of the corroborated evidence of Ms Coyle, I found Ms Kilpatrick's evidence and denials unconvincing.

[68] There was also the issue relating to Ms Kilpatrick's contact details. Against the company's requirements of employees, she withdrew her contact details. She replaced those with a post office box address that could only have been for the purposes of frustrating Air NZ's efforts to correspond with her in a timely fashion. On the occasion where Ms Whitehead, in an effort to try and shortcut matters to assist Ms Kilpatrick, telephoned her at her home using a number which had apparently been given to Air NZ by Ms Kilpatrick's mother, Ms Kilpatrick responded to this call by hanging up. She gave an explanation in evidence that she was at the time expecting a call from her mother and was not prepared to talk to Ms Whitehead.

[69] Throughout this process the only impression to be gained was that Ms Kilpatrick was using stonewalling tactics. She was clearly being uncooperative about meeting dates and was setting out her own timetabling agenda as to arranging the face to face meeting that would be needed. This was outside her prerogative, particularly in setting a timeframe with which she expected Air NZ to comply in responding to her own written submissions. She maintained that she was only

available to meet on 16 July 2012 even though the original allegations were sent in May with a meeting scheduled after a short period that clearly gave her a reasonable time to respond. She maintained her only availability was on this date even after she had been informed that it was not suitable to Air NZ because of its other commitments. It seems inconceivable that she would not contact one of the managers by telephone to shortcut the process if she needed further time. There was also her clear obfuscation arising in the correspondence with Ms Whitehead on the requirement to obtain medical clearance to return to work following her own doctor's certificate of fitness to return to work. She would have known that she would not be required to undergo a further medical examination as part of that clearance process and yet she dogmatically maintained that falsely held misunderstanding throughout the court hearing.

[70] It was difficult to understand Ms Kilpatrick's stand in this respect. In her evidence and submissions she made the point that she could not be required to attend the in-house medical advisors for a meeting. This was based on her view that the contractual requirements and also the requirement in the [Holidays Act 2003](#) meant that she could not be required to undergo a medical examination by any medical practitioner directed by the employer. However, this overlooked the clear fact that Air NZ was not requiring her to undergo a further medical examination before being cleared to return to duties. It was prepared to accept the diagnosis of her general practitioner. To advance matters further, a written authority from Ms Kilpatrick was sought so that the Air NZ medical advisers could contact Ms Kilpatrick's own doctor if further clarification was needed. She failed to co-operate with this process. However, there remained the clear requirement that before she could return to duties after a lengthy period of sick leave and unfitness for work, she had to obtain clearance from the in-house medical advisors. She failed to obtain this required clearance.

[71] Ms Whitehead's attempts to have Ms Kilpatrick seen by the in-house medical advisors were a genuine attempt to deal with the separate issue of Ms Kilpatrick's alleged stress. This was because of the in-house medical advisor's experience with aviation matters. There was an assertion by Ms Kilpatrick that Ms Whitehead could not require her to attend in-house medical advisors because she had not at that time

been on sick leave for 14 consecutive days. The Authority determination makes the comment that Ms Whitehead's request was premature. This would be so if it was being requested to enable Ms Kilpatrick to be cleared for return to work. However, Ms Whitehead was also dealing with the separate issue of Ms Kilpatrick's alleged stress and I do not regard her actions in trying to ensure Ms Kilpatrick received appropriate medical care at that early stage as unreasonable.

[72] The behaviour on those flights was clearly sufficient to enable Air NZ to commence a disciplinary process. However, if Ms

Kilpatrick had co-operated with the process and taken the opportunities to provide timely and proper explanations for her conduct, the company may not have held that her actions and behaviour amounted to serious misconduct, even though on the face of it that was a likely outcome. However, as Ms Kilpatrick's actions in frustrating the process progressed, the earlier misconduct was aggravated. It was revealed during the hearing that Ms Kilpatrick's behaviour on the Rarotonga flights may have resulted from a sad event within her own family occurring at that time. This was never disclosed to Air NZ. However, whether this would have made a difference is in some doubt in view of the fact that two of the other flight attendants, who knew her well and had flown with her on previous occasions, indicated in their statements to Air NZ that Ms Kilpatrick's behaviour on those flights was not untypical of her. One of these flight attendants remained onboard the plane after the Rarotonga flight to assist her.

[73] By not engaging in the process and adopting obstructive behaviour, Ms Kilpatrick left Air NZ with no choice but to rely upon the matters which had been placed before it and to dismiss her. Her failure to co-operate with the disciplinary process in itself would have amounted to insubordination and would justify Air NZ in reaching a decision to terminate her employment.

[74] Between 23 May 2012, when Ms Kilpatrick was first notified of the disciplinary process being commenced against her and the end of July, there would have been ample time to meet and discuss the allegations. It was simply not acceptable for Ms Kilpatrick to set her own agenda and timetable.

Ms Kilpatrick's disadvantage claims

[75] The first of Ms Kilpatrick's disadvantage claims relates to her allegation that she was not given a sufficiently long rest period between the completion of the flights to and from Tahiti and the commencement of the TOD to Rarotonga. This claim is contained in the first three causes of action contained in the amended statement of claim as previously discussed. The first and second causes of action are claims for breach of contract by not providing adequate rest and breach of conditions implied in the employment agreement; being applicable provisions of the [Health and Safety in Employment Act 1992](#). As indicated there is no separate claim for damages for the causes of action based on breach of contract and I have decided to regard those causes of action as effectively part of the unjustified disadvantage claims. In any event the more general third cause of action for unjustified disadvantage is sufficiently widely pleaded to incorporate the allegations as to failure to provide adequate rest.

[76] Ms Kilpatrick relies on a number of provisions contained in the collective employment agreement to assert that she was entitled to 48 hours rest between the Tahiti and Rarotonga flights. Upon analysis I consider that Ms Kilpatrick has misinterpreted the provisions of the collective employment agreement in this regard and I accept the evidence of Ms Eppingstall that Ms Kilpatrick, being rostered on standby duties for a period when the flights occurred, was entitled to the rest period set out in cl 5.4.1 of the collective agreement. This provides that on return to home base after a TOD, the rest period that follows shall not be less than twice the number of duty hours flown as an operating flight attendant on that TOD or ten hours, whichever is the greater. Applying that provision to Ms Kilpatrick's TOD to Tahiti which totalled 13.2 hours, she was therefore entitled to a total rest period of 26.4 hours. As Ms Eppingstall has pointed out, the total rest period that Ms Kilpatrick received between the end of the Tahiti flights and commencement of her duties for the Rarotonga flights was 31 hours. Depending upon when she was actually required to report for the Rarotonga flights the period may have been as much as 33 hours.

[77] Ms Kilpatrick referred to cl 5.7.3, which provides that when a flight attendant is rostered to operate a duty with time in excess of 12 hours, a rest period of 24 hours including a local night's rest will be rostered prior to departure from home base. Ms Kilpatrick submitted that this means that the 24-hours rest period shall be in addition to the period for a local night's rest. However, that cannot be a correct interpretation of cl 5.7.3 as the local night's rest period is included within the 24 hours and not in addition to it. Even if Ms Kilpatrick was correct, that provision would still not have entitled her to the claimed total of 48 hours rest as a local night's rest is defined for the purposes of the clause as 0001 hours to 0600 hours. In Ms Kilpatrick's case on this occasion that would mean a total of 30 hours rest under this clause, which in fact she received.

[78] Ms Kilpatrick maintained that when she was contacted by crew control to report for the Rarotonga flights, she raised the issue of an inadequate rest period following the Tahiti flight and was told that she would be recorded as failing to report if she did not attend as required. Ms Eppingstall disputed this evidence from Ms Kilpatrick and also pointed out that crew control operate computer software programmed with rostering rules in the collective employment agreement. That system would not permit crew control to allocate flying duties that would breach duty times and rest periods required under the collective employment agreement. I do not accept that Ms Kilpatrick suffered a disadvantage as a result of being required to report for duty for the Rarotonga flights as there was no breach of the collective employment agreement in requiring her to do that. No condition of her employment was affected to her disadvantage as she received more than the required rest period following the Tahiti TOD.

[79] The next disadvantage claim, which would appear to be covered by the general pleadings in the third cause of action, relates to the incident that occurred when the plane was on the ground following completion of the flight from Rarotonga to Auckland. As Ms Eppingstall pointed out in her evidence, Ms Kilpatrick was still on duty when Ms Coyle attempted to give her her feedback report. Clause 5.2.3(i) of the collective employment agreement provides that duty time ends 30 minutes after the on-blocks time of the last flight in the duty period. The evidence confirms that this period had not ended when Ms Kilpatrick was asked to undergo the feedback report. The direction given by Ms Coyle and the PaDM who met the plane on the ground was a lawful direction and Ms Kilpatrick's entire behaviour during this episode amounted to insubordination. Ms Kilpatrick was not forcibly detained on the plane and I find that she has suffered no disadvantage from actions taken by Air NZ in endeavouring to give her the required feedback on her performance.

[80] The further disadvantage claims which appear to be raised by Ms Kilpatrick in the amended statement of claim arise out of the decision of Air NZ to place her on leave without pay once her sick leave entitlement had expired. The circumstances surrounding this have already been dealt with at some length in this judgment. Clause 10 of the collective employment agreement clearly provides that

once a flight attendant has no available balance of sick leave the company is not obliged to pay for any further period of sick leave. Ms Kilpatrick has variously claimed that she was suspended or dismissed as a result of this action, but that clearly is not the case and there has been no breach of the collective employment agreement by Air NZ in this regard.

[81] Connected to this part of the claim is the curious behaviour of Ms Kilpatrick in refusing to attend a meeting with Air NZ's in-house medical advisors so that she could receive clearance to return to work following certification to that effect by her own doctor. Air NZ did not require Ms Kilpatrick to undergo a medical examination by doctors engaged by Air NZ. Ms Whitehead would have preferred her to do so to assist with her claim to be suffering from stress. Ms Kilpatrick did not agree to undergo such an examination and the matter was left there. Accordingly, there was no breach of contract in that regard as she alleged and as she has pleaded in the fourth cause of action.

[82] The fifth cause of action is also related, in that Ms Kilpatrick alleged an unjustified disadvantage because Air NZ refused to allow her to return to work once she had been certified as fit and able to return to her duties by her own doctor. However, this overlooks the fact that the General Operating Procedures Manual still required the company's medical team to provide clearance for Ms Kilpatrick to return to work after she had been certified as fit to do so by her own doctor. The safety reasons for these requirements were clearly enunciated in the evidence of

Timothy Sprott, Air NZ's Chief Medical Officer, whose evidence I accept. She did not need to undergo a further medical examination to obtain this clearance. She was not subject to disadvantage in her employment in any way by the requirement.

[83] In case Ms Kilpatrick is seeking to include in the third cause of action for unjustified disadvantage (as opposed to the unjustified dismissal claim) the actions Air NZ undertook in conducting the disciplinary process, I shall deal with that also. It will be clear from the sequence of events which has been set out in this judgment, that Air NZ and in particular Ms Eppingstall and Ms Whitehead went to extraordinary lengths to deal both with Ms Kilpatrick's claim to be suffering from stress and to have her engage on a sensible basis with the disciplinary process. The ultimate decision to terminate Ms Kilpatrick's employment was made after the many attempts to meet with her were frustrated by her obstructive actions and correspondence. Air NZ carried out a careful investigation into the events which occurred on the Rarotonga flights. It went to considerable lengths to ensure that Ms Kilpatrick was notified of the allegations against her and to have her meet with Air NZ so that she had the opportunity to present her own submissions on the matter. She failed to take that opportunity. Any allegation that Air NZ did not comply with proper procedure in carrying out the disciplinary process would be completely without substance.

Summary and disposition

[84] Ms Coyle was an experienced flight attendant and crew administrator and manager. Without exception the witnesses who were interviewed prior to disciplinary action being commenced against Ms Kilpatrick spoke highly of Ms Coyle and the professional manner in which she handled the circumstances which arose on the flights between Auckland and Rarotonga and the return in March 2012. Ms Coyle stated in evidence that she had never, prior to these flights with Ms Kilpatrick or since, experienced such behaviour from a flight attendant. She carefully recorded the experience in writing at the time and her recollection was well corroborated by other observers amongst the flight deck crew and flight attendants. It is for these reasons that Air NZ in its inquiry and this Court, in reviewing the decision resulting from that inquiry, can regard her evidence of these events as reliable.⁴

[85] Following its enquiries and the statements which it had obtained from its employees during the course of its enquiries, Air NZ would have been sufficiently concerned about the circumstances to entitle it to commence a disciplinary process against Ms Kilpatrick. Viewed objectively, that would have been the action which a fair and reasonable employer could have taken in all of the circumstances.⁵ Ms Kilpatrick's actions following the commencement of the disciplinary process frustrated Air NZ from carrying out the course it was entitled to take and are difficult to understand. Ms Kilpatrick's behaviour and actions during the course of the disciplinary process breached her obligations of good faith towards Air NZ as an employee. It is possible of course that had Ms Kilpatrick responded to the allegations against her in an appropriate way, Air NZ, even though it was entitled to be concerned by her behaviour on the flights, may not have made a decision to terminate her employment. Indeed even as the disciplinary process was continuing to take its course, all that was required for Ms Kilpatrick in the interim to return to work from the sick leave which she took following the flights, was clearance from Air NZ's in-house medical advisors.

[86] The events which occurred from the initial briefing for the flights through to their conclusion when Ms Kilpatrick left the aircraft can largely be taken from Ms Coyle's evidence, but with the observations of other crew members as recorded in their statements provided to Air NZ. In a challenge such as this the Court is entitled to review the decisions which Air NZ made in order to assess whether in all the circumstances before it, the actions which it took were justifiable. That process can involve an assessment of all the evidence Air NZ had before it, including the statements of witnesses which it had obtained from persons who did not necessarily give evidence before the Court. The statements, nevertheless, are all included in the bundle of agreed documents. Ms Kilpatrick, during the course of the hearing, having

agreed to those statements being included as undisputed evidence, retrospectively

⁴ *Angus v Ports of Auckland Ltd* [2011] NZEmpC 125, [2011] ERNZ 292; *C v Air Nelson Ltd* [2011

NZEmpC 27 [2011] NZEmpC 27; , [2011] ERNZ 207 at [48]- [51]; *Gazeley v Oceania Group (NZ) Ltd* [2013] NZEmpC

234 [2013] NZEmpC 234; , [2013] ERNZ 727at [90].

⁵ [Employment Relations Act 2000, s 103A.](#)

sought to deny some of the allegations which were to be made by both Ms Coyle during the hearing and as were put to Ms Kilpatrick; and as contained in the other witness statements. Even so, in addition to her serious misconduct on the Rarotonga flights, it was her own refusal to properly engage with Air NZ in its inquiry into her behaviour that primarily led to her dismissal in this case. While there were some degrees of response from her to correspondence from Air NZ, Ms Kilpatrick failed to appropriately engage with Air NZ in good faith and in a timely manner. She refused to agree to meetings with management which were arranged so that Air NZ could hear her side of events and possibly get to the bottom of why she had behaved in the way she did and by which discussion she could possibly have saved her employment. In the end Air NZ simply had to base its decision on the descriptions of the events which it had available and giving cognisance as far as possible to the technical objections which effectively Ms Kilpatrick relied upon in such correspondence as she did send and in opposition to the disciplinary procedure taking its proper course.

[87] Viewed on an objective basis Air NZ's decision to terminate Ms Kilpatrick's employment was an action which a fair and reasonable employer could have taken in all the circumstances at the time the dismissal occurred.

[88] For the sake of completeness I mention here the evidence of Stewart King, a witness called by Ms Kilpatrick. Mr King's evidence does not add significantly to the overall narrative of events in this matter. Mr King formerly advised flight attendants on behalf of their union, the Flight Attendants and Related Services Association. Ms Kilpatrick sought his assistance in this matter immediately following the Rarotonga flights and his evidence deals with the assistance he gave her. I did not find his evidence assisted me in reaching my decisions.

[89] Ms Kilpatrick's challenge in its entirety is dismissed. Costs are reserved. Air NZ will no doubt wish to seek costs. Any submissions by it on costs are to be filed by 29 January 2016. This will accommodate the remainder of the holiday break. Ms

Kilpatrick is to file any submissions in answer by 12 February 2016. Any final reply by Air NZ is to be filed by 19 February 2016.

ME Perkins
Judge

Judgment signed at 2 pm on Wednesday 13 January 2016

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