

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 73
5319541

BETWEEN MALAE KORIA
Applicant
AND AIR NEW ZEALAND
LIMITED
Respondent

Member of Authority: Robin Arthur
Representatives: Kerry Single, Advocate for Applicant
Tim Cleary, Counsel for Respondent
Investigation Meeting: 29 September 2011
Determination: 28 February 2012

DETERMINATION OF THE AUTHORITY

- A. Air New Zealand Limited (ANZL) was justified in finding Mr Koria had committed serious misconduct and in deciding to dismiss him for that conduct.**
- B. ANZL did not treat Mr Koria unfairly by not suspending him while it carried out a disciplinary inquiry or by how that inquiry was conducted.**
- C. Costs are reserved.**

Employment relationship problem

[1] Air New Zealand Limited (ANZL) dismissed Malae Koria on 4 June 2010 for serious misconduct. An investigation conducted by ANZL international operations shift manager Darren Thurlow concluded Mr Koria breached the company's code of

conduct, its ticketing procedure, its compassionate travel policy and his obligations of trust and honesty.

[2] Mr Thurlow's inquiry into Mr Koria's conduct focussed on three particular transactions where airline travel tickets were changed without a service or change fee being charged and with the passengers also being upgraded to business class. One of the tickets changed was for Mr Koria's mother. Two others were for relatives of a staff member in Mr Koria's team.

[3] Mr Koria had worked from ANZL since 1985. From 2007 he was employed as a team manager in ANZL's international passenger operations.

[4] He raised a personal grievance and lodged an application in the Authority alleging he was unjustifiably disadvantaged and then dismissed following an unfair investigation by ANZL. He said that he was dismissed on the basis of an investigation rather than a formal disciplinary process and that the investigation (of events which occurred in January 2009 or earlier) took an excessive amount of time, beginning in late November 2009 and ending in June 2010.

The investigation

[5] For the purposes of the Authority investigation written witness statements were lodged by Mr Koria, Mr Thurlow, ANZL human resources manager Anita Jordan and ANZL passenger support manager Debbra Hazell. Each witness attended the investigation meeting and, under oath or affirmation, confirmed their own statement and then answered questions from the Authority member and the parties' representatives. The representatives also provided oral closing submissions speaking to a written synopsis.

[6] In preparing this determination I considered the written and oral evidence of the witnesses, relevant background documents provided by the parties and the submissions of the representatives. As permitted under s174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received but has stated the Authority's findings of facts and law and

expressed conclusions on matters requiring determination.

The issues

[7] The primary issue for determination was whether the decision of ANZL to dismiss Mr Koria – based on its findings about his involvement in three booking transactions – and how those findings and that decision was made, was what a fair and reasonable employer would have done in all the circumstances at the time? An incidental issue was whether ANZL’s inquiry (which took place over a period of more than 6 months) was unfairly protracted and whether Mr Koria was unjustifiably disadvantaged during that time by having to remain at work rather than being suspended on pay?

[8] Those issues were addressed through these three broad questions:

- (i) Was ANZL justified in its finding of serious misconduct?
- (ii) Did ANZL conduct a fair inquiry into the allegations?
- (iii) Did ANZL adequately consider alternatives to dismissal?

The suspect transactions

[9] A random audit by ANZL’s fraud unit during 2009 identified some apparent ticketing irregularities. As a result Mr Thurlow carried out inquiries into the conduct of seven staff members in making those ticket transactions.

[10] Mr Koria was asked to provide explanations regarding four transactions. One transaction involved a situation where Mr Koria had allowed another staff member to use his personal credit card to make an internet booking and Mr Thurlow accepted Mr Koria had not breached company policy by doing so.

[11] It was the other three transactions which ultimately led to Mr Koria’s dismissal – one involved travel by his mother and two involved travel by the parents and sister of Bert Lealiifano, a customer services officer. Mr Koria was the team manager to whom Mr Lealiifano reported.

[12] While at work on 29 January 2009 Mr Koria made an internet booking for his mother to travel to Apia on 26 May. Mr Koria intended the ticket to be a gift so his mother could visit her last surviving brother in Samoa. He telephoned his mother to tell her about the ticket and was told that her brother (his uncle) had died only two days earlier. He decided to get the ticket changed so his mother could go to Apia for the funeral. He told her to pack her bags and he would arrange a ticket for her to fly the next day. Mr Koria then asked Mr Lealiifano to change the booking which he did. The ticket was changed from the cheapest normal fare to the most expensive fare but no fee was charged for the change. When Mr Koria's mother flew out of Auckland the next day, her seat was upgraded to business class by the other team manager working at the time.

[13] In the other two transactions the tickets of Mr Lealiifano's parents and sister were changed from the cheapest normal fare to a higher booking class and they were upgraded to business class on a flight in December 2008. The booking system recorded those changes as being made by Mr Koria. The changes were made free of charge.

Was a finding of serious misconduct justified?

[14] ANZL's concerns about those transactions may be paraphrased in this way:

- (i) The change of ticket for Mr Koria's mother did not comply with its guidelines for changing travel on compassionate grounds, such as in the case of the death of a family member. The guidelines stated customers were required to provide supporting documentation (such as a copy of a death notice from the newspaper or a letter from the doctor) in order to receive compassionate consideration. Customers unable to get that documentation before travelling were to be offered ordinary fares and told to seek a retrospective refund once they have the required documents.
- (ii) No fees were charged for the changes of ticket or business upgrades for Mr Koria's mother or Mr Lealiifano's parents and sister.
- (iii) Mr Koria asked a subordinate to make the change to his mother's ticket rather than referring it to his own manager, and that request carried the risk that he could be seen as using his position of power and responsibility for

his own advantage because a subordinate might be reluctant to question him over whether the change was permitted by ANZL policy.

- (iv) By having approved upgrades for Mr Lealiifano's parents and sister and then asking Mr Lealiifano to make the change of ticket for his mother, Mr Koria created the risk of a perception that the two men were swapping favours to privately benefit family members at ANZL's expense.

[15] Following his inquiry Mr Thurlow concluded Mr Koria's actions regarding each of those ticket changes amounted to instances of serious misconduct. He found those actions breached ANZL's code of conduct, procedures on reissuing tickets, its compassionate travel guidelines and Mr Koria's obligations of trust and honesty as an employee. His conclusion about serious misconduct was, I find, open to a fair and reasonable employer in light of the applicable policies, Mr Koria's conduct and the explanations he had given for it. I do so for the following reasons.

[16] Mr Koria's employment agreement required him to read and adhere to ANZL's code of conduct. One provision of the code "*requires all employees to ensure they have no real or perceived conflict of interest between their own personal interests and those of the Company*". It gives, as an example of such potential conflict, "*making decisions, taking actions or use of the Company's assets ... for personal gain or for the improper benefit of any other party*". Employees are expected to "*inform their manager as soon as possible should a real or perceived conflict of interest arise*".

[17] In his evidence to the Authority Mr Koria accepted he needed to be familiar with the code, and had access to it, but said he had never read it. He accepted that he should have known about the code's provision regarding conflict of interest but said he did not think about it at the time.

[18] His evidence about the guidelines on changes to travel on compassionate grounds was to similar effect. He was aware the guidelines. He had been given a copy. He had kept it but not read it.

[19] As the Employment Court's description of a similar situation in *Safe Air*

Limited v Walker made clear, unfamiliarity with applicable policies did not excuse Mr Koria's failure to act in accordance with them:¹

[35] In Chief Executive of the Department of Inland Revenue v Buchanan (No 2) [2005] ERNZ 767, the Court of Appeal rejected the proposition that ignorance of significant employment obligations meant that breach of those obligations could not be regarded as serious misconduct. It found that the proper approach is to consider whether, in all the circumstances of the case, the employee could be expected to know of the obligations and, if so, it was a matter of fact in each case whether breach of those obligations was capable of amounting to serious misconduct.

[36] In this case, it is clear that Mr Walker was aware that Safe Air had policies relating to email use and that he was bound by them. On his own evidence, it is also clear that he knew at the time that it was wrong to send the emails he sent. The policies were readily accessible to Mr Walker and readily understood by him when he looked at them on 9 September 2009. In these circumstances, I find that Mr Walker ought to have known what the policies were and that his ignorance of them was inexcusable.

[20] Mr Koria admitted, during Mr Thurlow's inquiry, to having some doubt at the time of arranging the changes for his mother's ticket. He described it as "a little voice" in the back of his mind but justified it to himself by saying that he would have done the same thing for any other paying customer. However, in terms of the requirements of ANZL's compassionate travel guidelines, Mr Koria's mother was not asked to provide any documentation regarding the family bereavement and neither Mr Koria nor Mr Lealiifano considered applying the charges normally required for a change of ticket category. If Mr Koria had acted in the same way for any other paying customer, that too would have breached the guidelines.

[21] Mr Koria told Mr Thurlow he could not recall the circumstances of authorising upgrades to business class for Mr Lealiifano's parents and sister. Although the electronic records showed Mr Koria's sign-in code was used for the change, Mr Koria could not remember making those changes. He suggested in his evidence to the Authority that the changes made were permissible under a 'surprise and delight' policy used by the airline at the time. That policy allowed upgrades for certain passengers (such as frequent flyers) where capacity permitted, but I accept Mr

¹ CC 8/09, 7 August 2009.

Thurlow's evidence that Mr Lealiifano's relatives did not meet the criteria for such treatment.

[22] Mr Koria was either careless of his obligations under terms of the code and guidelines he should have known about, or knew (through the "*little voice*" in his mind) he was acting improperly. In those circumstances it was, I find, open to a fair and reasonable employer to conclude, as ANZL did, that his actions had deeply impaired or destroyed the basic confidence or trust essential in its employment relationship with a manager of 30 staff (as Mr Koria was).²

[23] Mr Koria could have avoided the perception of having acted with a conflict of interest by having referred decisions about travel changes for his mother to a manager above him – either Mr Thurlow or the nominated shift manager on duty that day. Mr Thurlow's evidence was that, if asked at the time, he would probably have approved the change of travel date (to the next day rather than the date booked for several months later) if he had been asked and if Mr Koria had paid the necessary surcharge. The surcharge was an amount Mr Koria later said he would have gladly paid to avoid any suggestion of impropriety. Unfortunately that suggestion came too late as, by his actions, he had already damaged the trust ANZL had in him.

[24] Mr Single submitted that ANZL should have given Mr Koria the benefit of the doubt on two points – firstly, whether he knew that his mother was upgraded to business class on the day of her travel and whether he had any influence over that change and, secondly, whether he knew that his sign-in code was used for the changes made for Mr Lealiifano's family members. However I accept those were matters for assessment by the employer which I see no reason to disturb. It was not clear from his evidence in the Authority whether Mr Koria knew about his mother's business class upgrade before she flew but he was responsible for protecting the security of his sign-in code used for the Lealiifano family bookings. In the absence of any evidence of improper use of the sign-in code by a third party, and given his unclear memory of whether he did or did not make the changes for the Lealiifano travel, he bore responsibility for transactions done using it.

² *Northern Distribution Union v BP Oil New Zealand Limited* [1992] 3 ERNZ 483, 487.

Was how ANZL conducted the inquiry unfair?

[25] Mr Koria said ANZL acted unfairly by taking until 4 June 2010 to complete a disciplinary process of which he was first notified on 25 November 2009 and which was about events which occurred in late 2008 and early 2009. He said that lack of apparent urgency showed the issues were not as serious as ANZL made out but if they were, he should have been suspended on pay. He also said being required to work during the period of just over six months was embarrassing and disturbing.

[26] However I find, on a broad assessment, that ANZL's treatment of Mr Koria was not so unfair or unreasonable as to amount to unjustified actions on its part in all the circumstances of this particular case.

[27] ANZL's evidence about why the inquiry took six months was somewhat thin. It was said to result from the demands of leave and shift work for both the managers conducting the inquiry and the staff who were the subject of it, and some complexity resulting from the fact that a total of seven staff were under investigation as a result of the number of suspect transactions identified in the random audit. All seven of those staff members – Mr Koria, one other team manager, and five customer service officers – either resigned during the inquiry or were dismissed by the time of its completion.

[28] I do not accept ANZL unjustifiably disadvantaged Mr Koria by not putting him on suspension during the inquiry. The relevant contractual and policy provisions made suspension an option, not a requirement, and there was nothing to suggest ANZL improperly exercised its discretion by keeping Mr Koria at work over those months. Mr Koria was able to work without any negative effect on safety and security and there were adequate means to supervise the integrity of his transactions in that period (as the random audit had demonstrated). To have suspended him could as easily have given rise to other allegations of unfairness such as predetermination or damage to his reputation by being removed from the workplace.

[29] ANZL's discipline policy included standards of fairness which it stated must

be adhered to in the investigation process. Mr Koria confirmed in his evidence that he accepted ANZL representatives had met those standards in their inquiry into his conduct. They included:

- Reminding him of ANZL’s code of conduct and the standards expected of him; and
- Advising him in writing of the allegations being investigated; and
- Giving him an opportunity and reasonable time to prepare and present responses; and
- Providing him with relevant information; and
- Giving him an opportunity to have personal representation; and
- Advising him of the consequences or possible consequences of the investigation.

Did ANZL adequately consider alternatives to dismissal?

[30] Mr Koria submitted ANZL failed to adequately consider alternatives to dismissal after Mr Thurlow made the finding of serious misconduct against him. He submitted ANZL should have chosen a sanction less severe than dismissal for two reasons – firstly, as an employee with more than 20 years service, he should have been treated with more compassion and secondly, he had continued to work satisfactorily for the six month period that was taken for the inquiry so it should have been sufficient for him to have continued in employment with ongoing training and supervision.

[31] I did not accept either reason made ANZL’s decision unjustified in this case. An employer cannot be required to comply with the Authority’s subjective opinion as to kindness and generosity after the event.³ Rather the present case is an example of circumstances that the Employment Court has described in this way:⁴

Another employer may have stayed its hand and found some solution short of dismissal, but that would have been the result of compassion,

³ *Wellington Road Transport IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59, 87.

⁴ *Auckland Provincial District Local Authorities Officers IUW v Northland Area Health Board* [1991] 2 ERNZ 215, 229

indulgence even, rather than of any obligation so to act as a matter of fairness and reasonableness.

[32] Considering solely that obligation to act fairly and reasonably I accept Mr Thurlow's evidence that he had weighed the option of dismissal against less severe alternatives.

[33] While Mr Koria had no previous disciplinary history which needed to be taken into account, Mr Thurlow said the issue disclosed by the inquiry in Mr Koria's conduct were not one of training but rather one of the integrity of a manager whom ANZL expected to be able to trust and to set an example. Having had what he called a "*problem around integrity*" resulting in a loss of trust and confidence, I accept the decision Mr Thurlow made was within his discretion to do so and the evidence does not support a conclusion that it was done unfairly or unreasonably.

[34] While Mr Koria had worked satisfactorily throughout the period of the investigation, and must have been trusted to do so, that occurred in part because ANZL had to act without predetermination towards him while it conducted its investigation and in part because any further unsatisfactory transactions by Mr Koria would have been able to be identified through ANZL's electronic records. It did not, in these particular circumstances, negate ANZL's conclusion about its loss of trust in Mr Koria due to the earlier events.

Determination

[35] For the reasons given I find:

- (i) ANZL's decision to dismiss Mr Koria for serious misconduct was what a fair and reasonable employer would have done in all the circumstances at the time; and
- (ii) ANZL did not treat him unfairly through its decision not to suspend him while it carried out its disciplinary inquiry or by how that inquiry was conducted.

[36] Mr Koria's personal grievance application is declined.

Costs

[37] Costs are reserved. The parties are encouraged to agree any matter of costs between themselves. If they are not able to do so and an Authority determination of costs is sought, ANZL may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Koria would then have 14 days from the date of service to lodge any reply memorandum. No application for costs will be considered outside this timetable without prior leave.

[38] If the parties cannot resolve costs themselves, the Authority is likely to set costs on its usual tariff basis. For this relatively straightforward one day investigation meeting, the likely award would be no more than \$2500. That amount would be subject to the parties' submissions about any factors requiring an upward or downward adjustment of the tariff.⁵

Robin Arthur
Member of the Employment Relations Authority

⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.