Determination Number: AA 252/03
File Number: AEA 1192/02

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Eric Leathley (Applicant)
AND	Air New Zealand Ltd (Respondent)
REPRESENTATIVES	Alan Henley, Advocate for Applicant Graeme Norton, Counsel for Respondent
MEMBER OF AUTHORITY	Janet Scott
INVESTIGATION MEETING	21 July 2003
DATE OF DETERMINATION	19 August 2003

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The applicant Eric Leathley submits he was unjustifiably dismissed from his employment as an Inflight Service Director with Air New Zealand. To remedy his alleged grievance he seeks reinstatement with no loss of seniority, reimbursement of lost remuneration and compensation under s.123(c)(i) of the Act.

The respondent submits Mr Leathley was justifiably dismissed for serious misconduct following a careful investigation into allegations of alcohol consumption and smoking inflight and unsafe flight behaviour.

Background

Mr Leathley commenced employment with the respondent in 1975. By the time of his termination he had occupied roles as Inflight Service Director (ISD), Trainer and Qualified Flight Checker.

Over Christmas/ New Year 2001/2001 Mr Leathley was unwell. He was suffering from stress and depression. He took 2 weeks sick leave. His evidence was that he advised senior personnel within the company that he was suffering from stress and depression. He advised those personnel they were free to discuss the situation with his doctor.

Following his return to work Mr Leathley departed on a tour of duty Auckland/Kansai and return Kansai/Christchurch/Auckland. On arrival back in Auckland he attended a meeting at the employer's request, to discuss the circumstances concerning his sickness and leave over the Christmas/New Year period.

Sometime in February 2002 Mr Leathley found an anonymous letter in his file. It is set out below:

24 February 2002

Dear Eric,

This letter is given to you first and foremost out of concern.

As a recent crew on one of you flights, we witnessed the following behaviour by you:

Smoking in the rear toilets
Drinking in the galleys
and Unsafe door challenge practices.

We bring this matter to your attention in the hope that, if again any of us fly with you, you will have pulled yourself out of these hazardous practices.
As a group we decided to bring it to you directly rather than take it further at this stage.

We re-iterate this comes from a place of concern for everyone's safety and well being, including you. Please lift your game and be inspiring to us as our Supervisor!!

Be safe out there,

Signed 2002 Crew, Air New Zealand.

Mr Leathley's evidence was that he screwed the letter up and threw it away in disgust. He also gave evidence that he was taken aback by the letter and that he intended to raise it in his annual performance review which was to take place on 26 February 2002.

In February 2002 it had also come to the attention of Cabin Crew management that crew were writing a joint letter to Eric about his actions on flights he operated in January 2002.

Rachael Mason, Manager Cabin Crew opened a formal investigation. The allegations were taken very seriously by the company in terms of operational and safety requirements. It is noted that smoking on board aircraft is prohibited and there is an onus on crew to report it where it occurs. Further, flight attendants are prohibited from drinking alcohol prior to and whilst on duty.

Ms Mason wrote to Mr Leathley on 28 February 2002 setting out the company's concerns and inviting him to a meeting on 1 March. Mr Leathley was advised:

- That in order to facilitate the investigation process he had been removed him from the flight roster to ensure his availability.

- He was advised to bring representation.

- He was cautioned to treat the investigation with confidentiality and to limit his communications on the matter to his representative.

- He was advised the company was treating the allegations seriously and that if they were found to have substance he might face disciplinary action up and including dismissal.

In furtherance of the investigation Ms Mason and Ms Patty Davis (HR Manager) set about interviewing the crewmembers on the flights in question. Inquiries were also made of the First Officer and Captain on those flights and Safety Emergency Procedures (with respect to door disarming procedures) were examined and confirmed with appropriate personnel.

Thereafter there followed a series of meetings between company representatives and Mr Leathley accompanied by his representative. There were six meetings that took place over the period 1 March –29 April. Reports of crew interviews were made available to Mr Leathley as they became available and he was given the opportunity to respond to the allegations put to him. Mr Leathley denied smoking and drinking on the flights in question. He admitted he had breached the door disarming procedures.

After reviewing all the information available to it the company communicated to Eric (on 29 April) that its intention was to dismiss him for serious misconduct. Mr Leathley was invited to make any further submissions on the matters at issue by Friday 3 May. This invitation was re-iterated to Mr Leathley in a letter to him dated 1 May 2002 which enclosed the minutes of the meeting of 29 April. In response Mr Leathley submitted to the company a letter in which he admitted to depression and a dependency on alcohol. He asked for the company's help and understanding in the matter.

On 9 April Rachel Mason wrote to Mr Leathley confirming his dismissal for serious misconduct with effect from 7 June 2002.

Applicant's Position

The applicant denies that he was drinking red wine and smoking on the flights in question. He admits he disarmed aircraft doors in contravention of the established procedure.

The applicant has raised a number of concerns principally in respect of the process adopted by the respondent in investigating the allegations and in respect of the respondent's dealings with him. The applicant's concerns are:

- The suspension of the applicant was unnecessary and unreasonable given that there was no allegation that the applicant had repeated the alleged behaviour. Further, the reasons for the suspension included an allegation relating to his roster availability over Christmas New Year – a concern which had been disposed of. Its inclusion was simply another matter raised to discredit Mr Leathley.

- Inconsistencies in the allegations were not investigated by the respondent.

- The test conducted by Rachel Mason with Andrea Sulikowski (where she was asked to identify which of two glasses of liquid shown to her – red wine and diet coke - most resembled the colour of the liquid she observed the applicant drinking) was unreliable in that lighting conditions were not closely replicated and the wine in question had not been identified.

- Reliance on Mark Bell's testimony was unfair in that his report to the company as to what Andrea Sulikowski saw was markedly different to her own report. He was also in error as to the number of times that he had flown with Eric Leathley in the previous year.

- No explanation has been forthcoming as to why the allegations against Mr Leathley did not surface earlier.

- The investigation took so long it was unreasonably detrimental to Mr Leathley. This gave opportunities for other Air New Zealand staff to gossip. Further when the names of cabin crew (who could verify these breaches of confidentiality) were given to Rachel Mason no action was taken by the company. Liz Hewitt, another ISD, was one of those people and she gave evidence she was never contacted by the company.

- Written reports from the Captain and First Officer of the flights in question were not given to the applicant (albeit reports of discussions with these people were available to the investigation).

- Allegations re disparity arise in respect of the fact that other persons who had made mistakes in respect of door disarming procedures had been dealt with under the "no blame –no shame" polices of the company. They had been given remedial training. Mr Leathley had been dismissed. Further the company could not explain the disparity between the treatment of Mr Leathley and the treatment of maintenance staff who installed 4 screws in an aircraft panel instead of 25 as a result of which the panel had fallen off the plane and landed in a carpark.

Respondent's Position

The respondent submits Mr Leathley was dismissed for serious misconduct in relation to three separate issues on an operational flight. The rationale for the finding of serious misconduct justifying dismissal is set out in the dismissal letter of 9 May 2002.

The company's view is that each issue is in itself a serious breach of standards and conduct required of a flight attendant particularly an ISD in charge of the aircraft cabin. It is also the company's position that these acts were cumulatively sufficient to warrant dismissal for serious misconduct. And the findings in relation to smoking and drinking on an operating flight are sufficiently serious in themselves to warrant dismissal.

The company's findings which provided the rationale for the company's decision to dismiss Eric Leathley are comprehensive and are summarised in the letter of dismissal. It provides a clear view of the company's position and is set out below:

9 May 2002

Mr Eric Leathley
261 Manukau Rd
Epsom

Dear Eric,

Investigation into Flights NZ 97/98

This confirms our discussion and conclusions conveyed to you on 29 April 2002.

You have been advised from the inception of this investigation that the matters under consideration were of a serious nature. The issues investigated were: Serious concerns about your role inflight and your role as Inflight Service Director. In particular, allegations of alcohol consumption, smoking inflight and unsafe flight safety behaviour were investigated.

As advised, I interviewed all but one crew member on that tour of duty. You have been provided with all of the information considered as relevant to this investigation and have throughout the investigation had adequate time to consider the information with your representative, Mr Henley from Pegasus.

I summarise the findings of the investigation as follows: the content of this summary was discussed with you at our final meeting on 29 April 2002.

Unsafe Flight Behaviour

It is clear that you have adopted a practice of disarming the doors, which is in contravention of accepted and authorised practice. This has occurred on at least two and quite probably three of the sectors of this Tour of Duty. Your description of the disarming procedure at our first meeting leads me to believe this may have been a practice you have adopted before. More importantly, your reason for using this practice altered substantially during the course of the investigation. At the same time you agreed that the prescription for safety practices was embodied in the Safety and Emergency Procedures manual. You were advised that no flight attendant has authority to act contrary to these procedures.

Your explanations for your behaviour are inadequate, which was clearly unsafe in nature and one that I do not find acceptable. Your representative suggested that it was common practice for the doors to be disarmed in contravention of the set procedure. I find no evidence to support this view, not do I accept your explanation that because other people may engage in this behaviour that this makes a serious safety breach acceptable

Drinking Alcohol whilst on Duty Inflight.

You were observed by a Flight Attendant consuming what I have found on balance to be alcohol (red wine) in the front galley. Unbeknown to that Flight Attendant, and some time between first and second rest, you were observed taking a glass of red wine down to the rear of the aircraft. You were not observed delivering that drink to a passenger and on the second occasion you were watched, to ascertain whether you emerged from behind the toilet at the rear – you did not. The passenger group was primarily a group of Japanese schoolgirls. The Flight Attendants serving in that gallery were not aware of any passengers consuming red wine in that sector.

Given the actual observation in the front galley and the lack of plausible explanation for the consuming of the red wine at the rear of the aircraft I can only conclude on balance that you also consumed the glasses of red wine during the 'down time' of the KIX – CHC sector. It was certainly this crew's view that the alcohol was not delivered to a known passenger, and I accept this view.

Smoking

There was clearly an incident of smoking inflight. Again these issues were reported to you during the light but you failed to provide a reporting procedure that would be expected from an Inflight Service Director. You have been identified as smelling of cigarette smoke both on your person and on your breath. I do not accept that that smell occurred because you entered a "smoky smelling

toilet" at the rear of the aircraft or that the smell on your breath was due to a cigarette you consumed many hours beforehand, in Kansai.

I considered whether someone else may have smoked. No passengers could be identified as the culprit. You were positively identified as smelling of smoke. I conclude that it is highly probable that you were smoking in the toilet. This view is reinforced by your admission that you were seen chewing gum – your explanation was to make up for not being able to smoke and by your behaviour at CHC, where you left the aircraft before all passengers had disembarked. You were described as impatient by your crew and you were observed smoking in the terminal during the turnaround time.

We spoke at some length about the role of the Inflight Service Director and the expectation that role has in terms of duty of care for crew and passenger, and its essential aim as a role model for leadership. Your actions breach that requirement significantly and go to the heart of the contract between yourself and the Company in that I no longer find I have trust and confidence in you. This is of particular concern when you consider the degree of separation from home base and the degree of responsibility incumbent on anyone in the Inflight Service Director role.

At our last meeting you asked us to consider the frequency with which you have recently operated on 747s under the premise that lack of familiarity may have led to your behaviour. We reviewed your 747 flying and found that you had been flying 747s as frequently as would be expected of an Inflight Service Director in the last few months. This explanation was also rejected. Your representative suggested that further training and supervision might alter your behaviour. When I asked you how that would change the picture we had when you clearly had already received training, had been a trainer and a SARC checker you replied "do you think I would make the same mistakes?"……I rejected the view that this was a set of circumstance to which additional training and supervision would alter what were known requirements that you had breached.

I advised you that I considered the issues to comprise serious misconduct for which one of the options would be termination of your employment. After hearing submissions on the outcome I informed you that your employment was to be terminated.

Your representative, on 3 May 2002 after the time I advised you that termination for serious misconduct was the outcome – has submitted additional information for consideration. This information cites an admission to your General Practitioner of excessive alcohol consumption exacerbated by property problems, relatives residing with you and problems with the construction of a swimming pool. Whilst I understand the nature the nature of your explanation I can only say, after due consideration, that my cause for alarm at your lack of professional and safe practice is heightened. Your denial throughout the investigation – and in fact vehement defence in spite of the evidence, suggestions (sic) to me that you're blatantly unsafe to fly, never mind lead a crew away from the view of a ground management process. As previously discussed, there are some issues of such significance – in the type of industry and level of responsibility we hold for public safety – which cannot be compromised

I therefore regret to inform you that your request for further consideration is not accepted. Your employment with Air New Zealand is terminated for serious misconduct. We will provide payment in lieu of notice and the effective date of termination is 07 June 2002. Patsy Davies, Human Resources Manager – Cabin Crew, will be in contact regarding arrangements for your final pay and return of Company property. As discussed, we will continue to provide EAP counselling until your termination date, should your wish to avail yourself of the support.

As discussed, it is with sadness that I find ourselves (sic) in this position, however, my obligations and duty of care prevent alternatives under these circumstances and your conduct is clearly highly undesirable as a Flight Attendant and Inflight Service Director.

Yours sincerely

Rachael Mason
Manager Cabin Crew
9 May 2002
cc Alan Henley, Pegasus

Case Law

" For a discussion of the kind of conduct that will justify summary dismissal it is unnecessary to look further than this Court's judgement in *BP Oil NZ Ltd v Northern Distribution Workers Union* [1989] NZLR 580. Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential element of the employment relationship……..In the end, the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances"

The Court of Appeal in *W & H Newspapers v Oram* [2000] 2 ERNZ modified its thinking in respect to the test above stating:

"Bearing in mind there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of "could" rather than "would", used in the formulation expressed in the second BP oil case."

As to the process to be adopted by an employer in implementing any disciplinary action including the possibility of dismissal it is well established that in arriving at its decision an employer must approach the issues in question in a fair and reasonable manner. That leads to a consideration of process or procedural fairness. The Chief Judge of the Employment Court in *Petersen v Board of Trustees of Buller High School* unreported decision CC 7/02 has provided a useful summary of the standards expected:

"An example of the Court's approach to the matter is the early but often cited decision of the Labour Court in *NZ Food Processing IUOW v Unilever NZ Ltd* [1990] 1 NZILR 35, (1990) ERNZ Sel Cas 582. This is a judgment of the Labour Court that I delivered but which I do not hesitate to cite because I was assisted in that case by panel members who concurred in the decision, and because the decision has frequently been cited by the Employment Tribunal. That case can be said to stand for the following propositions:

1) Procedural fairness as a concept is a fundamental requirement and characteristic of the employment relationship which depends on mutual trust and confidence.
2) A dismissal which may appear to be substantively justified will be vitiated if, in the process, the minimum standards of fair and reasonable dealing are ignored or in question.
3) In an employment relationship which provides a procedure or code which is to be followed in the event of disciplinary action, it is a term or condition of the employment that the employee will not be

dismissed without the established procedure being first followed, and a good and conscientious employer will follow it.

4) Where there is no agreed procedure the law implies into the employment relationship a requirement to follow a procedure which is fair and reasonable.
5) What that procedure should be in a particular case is a question of fact and degree depending on the circumstances of the case, the kind and length of the employment, its history, and the nature of the allegation of misconduct relied on, including the gravity of the consequences which may flow from it if established.
6) The minimum requirements can be said to be –
   (a) notice to the employee of the specific allegation of misconduct and of the likely consequence if the allegation is established;
   (b) a real as opposed to a nominal opportunity for the employee to attempt to refute the allegation or explain or mitigate his or her conduct; and
   (c) an unbiased consideration of the employee's explanation, free from predetermination and uninfluenced by irrelevant considerations.
7) Failure to observe these requirements will render the disciplinary action unjustified.
8) However, the employer's conduct of the disciplinary process is not to be put under a microscope or subjected to pedantic scrutiny nor are unreasonably stringent procedural requirements to be imposed. *"Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person": Unilever* at p46 (NZILR) and 595 (Sel Cas). In that case the Court held that, although the dismissal appeared to be substantively justified, it was nevertheless unfair because the employee spoke little English and the manager had failed to convey to him adequately and unequivocally that he was facing the possibility of dismissal and why.

And at Para 98

"Most recently in *W & H Newspapers v Oram* [2000] 2 ERNZ 448, 457, the Court of Appeal made clear at paragraph [32] that –

"The burden on the employer is not that of proving to the Court the employee's serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct"

I note one last point made by the Chief Judge in the Petersen case (supra). That is that the Authority is entitled to arrive at its own view on each of the following elements:

- That the employer actually believed in the guilt of the employee of the particular misconduct that was relied on for dismissal; and

- That the employer at the time had, in its mind, reasonable grounds on which to sustain that belief; and

- That the employer at that time had carried out as much investigation into the matter as was reasonable in all the circumstances.

Once these points have been established, then the Authority "is not free to substitute its views for those of the employer about the adequacy of the reason shown by the employer for the dismissal

and it will be prudent for the Tribunal to remind itself not to substitute its own view for those of the employer as a safeguard against it judging the situation by reference to a state of affairs unknown to the employer at the relevant dismissal stage." (Petersen supra p36).

Findings

Mr Leathley was at pains to point out that the company was aware from Christmas/New Year 2001/2 that he had been suffering from stress *and* depression. However, some of his oral evidence was equivocal on the issue as to whether he had advised the company he was suffering from depression. On an overall view of the evidence – including that of Ms Davis and considering the fact that Mr Leathley did not inform the company of the true state of his health until after he was dismissed - I find that it is more probable than not that at the time of his absence due to sickness at Christmas 2001 Mr Leathley told the company only that he was suffering from stress – if he told them that.

I will now address the applicant's principle concerns regarding this matter.

The suspension

The applicant was not given the opportunity to comment on the proposal to suspend him or to affect the employer's decision on this point. That can give rise to a grievance. However, I cannot find any remedy is available to Mr Leathley on these grounds for the following reasons.

(i) Given Mr Leathley's knowledge as to the real state of his health from Christmas 2001 onwards and his post dismissal admissions on this subject I am surprised this is raised as an issue of unfairness in respect of Mr Leathley's treatment.

(ii) It is clear from the evidence overall that the respondent, whilst it wanted the applicant to be available for interview, was also concerned at the seriousness of the allegations and the safety implications which they posed. This was clarified with Mr Leathley at the first meeting with him on 1 March. On this issue I need look no further than the findings in *Air New Zealand v Samu* 1 ERNZ, 93, for a discussion on safety issues and their special status especially in a highly regulated environment such as the airline industry.

(iii) The respondent heard Mr Leathley's concerns re the suspension. The applicant was offered the opportunity to return to work in the customer services area and he declined that opportunity.

Inconsistencies in the information provided by the crew to the company

Certainly some crew reported a somewhat different view of other crewmembers' observations. However on a review of the information relied on by the company in arriving at its decision to dismiss Mr Leathley I note the company relied only on the first hand crew reports – not those it received second and third hand. Note for example the company's reliance on Andrea Sulikowsky and Claudia Cadell's information with regard to the drinking red wine not the second hand report on that subject by Mark Bell.

There were a number of alleged inconsistencies in the information received by the company. I find none of them undermine the soundness of the company's decision to dismiss Mr Leathley.

Delays in commencing and concluding the investigation

It is unfortunate that crewmembers felt so intimidated that they did not put in immediately an operational occurrence report (OOR). However, the company could only investigate matters as they came to its attention. When the allegations came to the attention of the company it immediately commenced an investigation. The resultant time it took to complete the investigation was related to the company's ability to interview staff between tours of duty. A thorough investigation was to Mr Leathley's advantage not disadvantage.

Disadvantage arising from breaches of confidentiality

This concern appears to be tied to the above concern in that the time taken over the investigation gave rise to gossip and breaches of Mr Leathley's confidentiality relating to the ongoing investigation.

There was more smoke and mirrors surrounding this concern than evidence I can assess and determine. For example it was submitted on the applicant's behalf that Liz Hewitt had evidence of breaches of confidentiality and that the company did not follow this up with her when a complaint was made about the matter. With respect the only specific matter raised by Ms Hewitt under this head was that she had overheard Ms Sulikowsky and other crewmembers discussing ISDs they didn't like working with. Ms Sulikowsky mentioned Mr Leathley's name in this context. What relevance this alleged statement has to allegations of breaches of Mr Leathley's confidentiality in respect of the matters under investigation escapes me.

Concerns relating to the provisions of reports by the First Officer and Captain

There was no OOR filed in respect of the flights in question. Ms Mason had telephone interviews with the First Officer and Captain of the flight. The first officer's report was read out to Mr Leathley on 11 April. He was fully appraised of its contents and had the opportunity to comment on it. The Captain's interview notes added nothing that disadvantaged Mr Leathley.

"No blame - no shame" philosophy and disparity of treatment

Generally speaking when taking disciplinary action against employees employers must treat employees in a similar manner where there are similar offences or circumstances. In some circumstances consistency of treatment is not paramount e.g. where safety issues are concerned and an employer is not forever bound by the mistaken or overgenerous treatment of a particular employee on a particular occasion. However, where there are allegations of disparity of treatment an adequate explanation for that disparity is called for. If an adequate explanation is forthcoming then disparity will be irrelevant. *Samu v Air NZ Ltd* [1995] 1 ERNZ 636 (CA).

Evidence was brought on Mr Leathley's behalf that other ISD's who had disarmed doors in contravention of the established procedures had been given additional training and supervision on the matter and had not suffered disciplinary action. On this matter, I accept the evidence brought by the company that the difference in treatment is adequately explained by the very different circumstances that pertain between the situation the other workers were in and that of Mr Leathley.

The other workers in question had been identified as having made mistakes in door disarming, and had owned their mistakes. Mr Leathley had on the other hand owned up to deliberate non-observance of a critical procedure. He had admitted he knew the correct procedure and admitted he did not follow it.

I also note that Mr Leathley's termination was based on three serious breaches amounting to serious misconduct.

On the matter of the panel falling off the plane and the alleged disparity of treatment between the engineers in question and Mr Leathley I find there is insufficient information to establish there has been disparity such as to call on the employer to rebut it.

Conclusion

On reviewing the information available to the respondent and the process undertaken by it I can only conclude that the decision to dismiss Mr Leathley was one that was open to a fair and reasonable employer. It is a conclusion that the employer was entitled to reach taking an overview of the totality of crew members' ***independent*** experiences of Mr Leathley's conduct on that flight. Finally I would just note to round out in respect of the context of some of the submissions made on the applicant's behalf that the respondent is not required to show that Mr Leathley did in fact drink red wine and smoke on this tour of duty. The employer is charged with showing on the balance of probability after a full and fair investigation that it had a genuine and reasonable belief that he had done so. I find the employer has discharged that burden.

Determination

The decision to dismiss Mr Leathley was justified and his application is dismissed.

Costs

Costs are reserved. The parties are to attempt to resolve the matter of costs between them. If they cannot do so they are to file and serve submissions on the subject within one calendar month of the date of determination.

Janet Scott
Member of Employment Relations Authority