

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Clive Peachey (Applicant)
AND Air New Zealand Limited (Respondent)
REPRESENTATIVES Tim Oldfield, Advocate for Applicant
Andrew Caisley, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 19 August 2005
DATE OF DETERMINATION 15 September 2005

DETERMINATION OF THE AUTHORITY

The Problem

[1] Mr Clive Peachey (“Mr Peachey”) claims that he was unjustifiably dismissed. Air New Zealand Limited (“Air New Zealand”) says its decision to terminate Mr Peachey’s employment was justified.

[2] Mr Peachey asks the Authority to find his dismissal was unjustified and grant him orders for reinstatement, reimbursement and compensation by way of resolution of the problem.

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

[4] At the time he was dismissed, Mr Peachey had worked for Air New Zealand in cargo for 31 years. As a member of the Service and Food Workers Union, the terms of his employment were those set out in the applicable collective employment agreement.

The Issues

[5] These issues fall to be determined:-

- (i) Was the dismissal justifiable?
- (ii) If not, was there any contributory conduct?
- (iii) What remedies are appropriate to resolve the problem.

These issues are dealt with in turn.

A justifiable dismissal?

[6] There is no dispute that Mr Peachey was dismissed. He was dismissed at the end of meeting held with him on Friday 1 July 2005. That decision was confirmed by letter dated 13 July 2005 which materially provided as follows:-

At this meeting you were advised that the outcome of the investigation into your activities of the 05 & 06 December 2004 was as follows:

That the findings of the investigation were:

1. *In the matter of the unauthorised possession of foreign newspapers*
The investigation found no evidence that you had taken unauthorised possession of foreign newspapers. No action is to be taken on this matter.
2. *In the matter of the unauthorised removal or disposal of any item belonging to, or in the care of the company*
In the interview of 23 June 2005 you admitted that you had disposed of a number of magazines from consignment 086 7888 0012 and that you had put 2 magazines from the same consignment aside for your use. This is viewed as a serious matter and disciplinary action is appropriate.
3. *In the matter of compliance with regulatory requirements*
Your admission that you disposed of magazines from consignment 086 7888 0012 and that you had put 2 magazines from the same consignment aside is contrary to regulatory requirements. This is viewed as a serious matter and disciplinary action is appropriate.

You were advised that as a result of these findings your employment was terminated without notice on the following grounds:

1. *That your actions in the unauthorised disposal of items in the Company's care and the unauthorised taking possession of items in the Company's care constituted serious misconduct.*
2. *That your actions in the unauthorised disposal and the unauthorised taking possession of import cargo that was under the regulatory control of the NZ Customs Service constituted serious misconduct.*
3. *In the course of your actions you had undermined the trust and confidence that is essential to the relationship between Cargo management and Cargo employees.*

[7] Air New Zealand's Cargo Operations Manager Mr Greg Sullivan ("Mr Sullivan") had first written to Mr Peachey by letter dated 16 May 2005. Mr Peachey was asked to attend a meeting on 18 May 2005. The purpose of the meeting was explained:-

... to discuss footage from a security camera, together with a booklet of still photographs taken from the same footage. The video and photographs appear to show you dealing with newspapers and other printed materials in a manner and circumstances, which require explanations. In particular, but not exclusively the company would like to discuss with you your actions while unloading AKC16069NZ, your possession of a newspaper, and in general the circumstances around the handling of newspapers ex arriving aircraft. We also wish to explore your understanding of the regulatory requirements and Cargo's instructions regarding the possession of property that is owned by or in the care of the Company.

Enclosed for your information enclosed (sic) are copies of the DVD, video tape and photos from the security surveillance.

You should be aware that the matters under investigation are potentially serious and depending on the outcome of the investigation may result in disciplinary action up to and including dismissal. For this reason

you are reminded of your right to be accompanied by a representative of your choice at this meeting and any subsequent meeting regarding investigation that you may be required to attend.

[8] Mr Sullivan had previously viewed video surveillance which revealed Mr Peachey removing magazines from a unit load device. Mr Sullivan made further enquiries and ascertained the unit load device had arrived on Air New Zealand flight NZ1 on 5 December 2004. He further ascertained that eleven magazines were not eventually delivered to the consignee as originally despatched.

[9] By further letter of 16 May 2005, the advised meeting was postponed until 23 June 2005 to allow time for Mr Peachey to take advice and accommodate a period of leave.

[10] Mr Peachey's solicitors wrote to Mr Sullivan by letter dated 17 May 2005 advising of their instructions to act, seeking further information and communicating Mr Peachey's instructions denying any wrongdoing.

[11] Mr Sullivan wrote by facsimile to Mr Peachey's solicitor Ms Kate Trethewey ("Ms Trethewey") acknowledging her advice and confirming a meeting on 23 June 2005.

[12] Present at the meeting on 23 June 2005 were Mr Sullivan, Air New Zealand Human Resources Advisor Mr Klaas Blokker ("Mr Blokker") and Mr Andrew Caisley solicitor ("Mr Caisley"). Mr Peachey attended with Ms Trethewey, and Service and Food Workers Union delegate Mr Grant Sutton ("Mr Sutton").

[13] Mr Blokker took notes of the meeting. Mr Sullivan asked questions of Mr Peachey and Mr Peachey responded. Mr Peachey was assisted by Ms Trethewey. I am satisfied that the notes presented to the Authority referred to as document "Q" are an accurate record of the discussion in that meeting.

[14] Mr Peachey said he threw the magazines away because they were damaged. He also said he had seen instances of cargo being discarded. Having viewed the video surveillance myself, I did not discern any damage whatsoever.

[15] When he was asked if disposing of cargo was in compliance with correct handling procedure he said:-

To be honest, I don't really know - I'm not familiar with imports. I have seen items swept up and thrown away.

[16] The response was repeated later in the interview. Mr Peachey was asked whether he was aware of procedures for removing or disposing of items from Company premises and shown a memorandum alerting staff to relevant procedure. Mr Peachey said:-

I can't say I have read it or not. You put out so many - maybe you should find a better way of doing it

[17] Equally dissatisfying I conclude, when Mr Peachey was asked about what import cargo he had actually seen swept up and thrown away he said:-

Can't answer you.

[18] Mr Peachey confirmed that he had placed two magazines in a filing cabinet. He said:-

That's the two that were very badly damaged and I thought I would put them aside and flick through to look for a crossword or something. Then I was going to dispose of them.

[19] The surveillance video showed a co-worker Mr Laurie Johnstone (“Mr Johnstone”) discarding packaging waste. When Mr Peachey was asked to indicate on the video surveillance where he was shown disposing of the remaining items, Mr Peachey said:-

I think Laurie threw some of the magazines away. When I say “I” I mean “Laurie and I”.

[20] Mr Sullivan reaffirmed the statutory duty of good faith the parties owed to each other, Mr Peachey said:-

Well, it was Laurie and I who did it. Don't know whether it was me or Laurie or 3rd guy.

[21] In confirming he had placed two of the magazines in the filing cabinet, Mr Peachey said:-

Yes, I admit the two magazines came from there, but they were badly damaged, so if that's a misdemeanour I admit it.

[22] When asked whether he had the right to remove anything, Mr Peachey said:-

I didn't remove anything. I know what you're saying but in my mind, what I disposed of was rubbish. It wasn't anyone's property we just considered it to be rubbish.

[23] Mr Peachey was also asked about Air New Zealand's obligations to New Zealand Customs. He said:-

I don't want to answer

[24] He was pressed again and asked about obligations relating to reporting disposed cargo under bond. He said:-

I/we just disposed of stuff considered to be rubbish. We were under time pressure.

[25] He was asked about Customs and Excise legislation. He said:-

No, I have no idea. I don't want to put up with this. I have never been so disgusted with the way I have been treated in the last two hours after 33 years with the company. I may just call a halt to this now.

[26] Mr Peachey, Ms Trethewey, Mr Sutton, Mr Sullivan, Mr Blokker and Mr Caisley attended a further meeting on 1 July 2005. Mr Peachey was advised at this meeting that his employment was terminated. The reasons for that termination were set out in the advice dated 13 July 2005.

[27] Mr Sullivan's investigation was thorough, comprehensive and meticulous. I am impressed by it. I cannot fault it. Mr Sullivan has established to my satisfaction that he had given matters much thought and deliberation before he reached a decision. Accordingly, I find that Air New Zealand's investigation of matters was full and fair.

[28] That full and fair investigation revealed that Mr Peachey had on 5 December 2004, removed magazines from a consignment and placed them in a filing cabinet. He had explained that when the container was unpacked the consignment of magazines had broken open. He further said that some of the magazines were damaged and thrown away, but he had taken two of them for himself.

[29] Mr Peachey's actions were of serious concern to Air New Zealand because of commercial considerations and in the context of the regulatory environment in which it operates its cargo-handling business.

[30] Air New Zealand's cargo business customers expect their property will arrive at its destination on time and intact. Air New Zealand also contracts its cargo handling operation services to other airlines. Those contracts are an important source of income for Air New Zealand.

[31] Air New Zealand's cargo business is operated within a customs controlled area. As such, there are strict regulations and legislative control of the cargo operation under New Zealand Customs and MAF legislation. Non-compliance with relevant legislation jeopardises Air New Zealand's authority to deal with cargo and can also lead to prosecutions and fines.

[32] New Zealand Customs procedures prescribe that consignments of goods suspected to be damaged or pillaged must be reported to a Customs Inspection Officer immediately and the goods held in tact until released by New Zealand Customs. Such goods are endorsed and discrepancies noted by New Zealand Customs. They are stored separately from other cargo. It is an offence for any person to remove items from cargo without the permission of a Customs Officer.

[33] Mr Peachey's denial of any understanding of relevant processes and legislation do not impress me as it did not Air New Zealand. Mr Peachey did not disagree with me when I suggested to him that he knew all there was to know about cargo. It is difficult to accept he would not, having regard to his thirty-one years service in the area. His service was longer than Mr Sullivan's. I find it more likely than not, that Mr Peachey well knew the procedures for damaged cargo and I consider it most implausible for him to deny any situational knowledge of the relevant considerations relating to damaged cargo. His responses when questioned about such matters and his non-responses are conspicuous.

[34] I agree with Mr Sullivan that it is inconceivable that a man of Mr Peachey's experience in international cargo would not understand that imported cargo comes under the control of New Zealand Customs. It was reasonable for Air New Zealand to reject Mr Peachey's explanation that it was usual for cargo items to be thrown away irrespective of whether they were damaged or not.

[35] I find that Mr Peachey's actions were contrary to established procedure and regulation. I find too that Mr Peachey knew his actions were such and it was reasonable for Air New Zealand to reject his denial of knowledge of the relevant procedures and regulation.

[36] It is obvious that Air New Zealand must account for all cargo entrusted to it. That must also include damaged cargo. At its very basic, Mr Peachey's actions were to misappropriate property that did not belong to him.

[37] I am satisfied that Air New Zealand was entitled to reject any suggestion that Mr Peachey's actions were due to time pressures. I am satisfied too that there was not an undue delay in taking matters up with Mr Peachey and that such delay is adequately explained. I am satisfied that there was no prejudice to Mr Peachey which resulted from any time delay.

[38] I take into account Mr Peachey's interests in deciding the justifiability of his dismissal. It is true that he had an extensive period of service of thirty-one years. It is also true that that thirty-one years service ended because he took two magazines. Viewed in that way it can appear brutal and harsh that he should be dismissed for a seemingly trivial act having regard to the value of the magazine items.

[39] I conclude that Mr Peachey's actions were not trivial. The value of the items he took is immaterial. It is the fact that he misappropriated property that it is relevant. It is the interference in the property rights of others, the very real threat to Air New Zealand's business relationships and the disregard for strict regulations and law that is material. Nor is it his place to decide what is rubbish and what is not.

[40] Far from excusing his actions, Mr Peachey's service makes the situation far less tolerable. He clearly ought to have known better. Air New Zealand was entitled to expect better from him. I agree that Mr Peachey's responses and non-responses led Air New Zealand to conclude that he expressed no remorse for his actions or appreciation of his failings. His approach was to minimise and downplay his actions. He failed to acknowledge and appreciate that what he had done was significant and wrong. His denial of the relevant legislative obligations and company procedures was quite rightly a matter of serious concern to Air New Zealand causing it to have no confidence or trust in him for a continuing employment relationship.

[41] I am satisfied that Mr Sullivan agonised over the decision before it was taken and he took into account Mr Peachey's very lengthy service with Air New Zealand.

[42] As for the disparity argument, Mr Johnstone was not disciplined by Air New Zealand because he left its service in December 2004. The other employees Mr Peachey refers to, Mr Logan Billing and Mr Ambrose Samuels, did not engage in conduct which involved consignment cargo and as such, no question of disparate treatment arises.

Determination

[43] For all the above reasons on an objective basis weighing both Mr Peachey's and Air New Zealand's interests, **I determine that Mr Peachey was not unjustifiably dismissed. Accordingly, there will be no formal orders.** It is unnecessary for me to determine the other issues set out above.

Costs

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

Leon Robinson
Member of Employment Relations Authority