



Employment Court of New Zealand

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Rachelle v Air New Zealand Limited [2019] NZEmpC 191 (17 December 2019)

Last Updated: 21 December 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2019\] NZEmpC 191](#)

EMPC 250/2017

IN THE MATTER OF a challenge to a determination of
the Employment Relations
Authority
BETWEEN GEORGINA RACHELLE
Plaintiff
AND AIR NEW ZEALAND LIMITED
Defendant

Hearing: 3 and 4 December 2019 (Heard
at Queenstown)

Appearances: G Rachelle, plaintiff in person A
Caisley, counsel for defendant

Judgment: 17 December 2019

JUDGMENT OF JUDGE K G SMITH

[1] Georgina Rachelle claimed that she was employed by Air New Zealand Ltd and that the company unjustifiably dismissed her from a position as a customer service agent in Queenstown. She also claimed the company had engaged in unlawful discrimination against her by reason of her marital status, because it did not appoint her to a permanent position when she was in the process of getting divorced.

[2] The Employment Relations Authority held that Ms Rachelle did not have any personal grievance against Air New Zealand Ltd and dismissed her claims.¹

1 *Rachelle v Air New Zealand Ltd* [2017] NZERA Christchurch 140.

GEORGINA RACHELLE v AIR NEW ZEALAND LIMITED [\[2019\] NZEmpC 191](#) [17 December 2019]

[3] Ms Rachelle challenged the determination.

The challenge

[4] Ms Rachelle's fifth amended statement of claim alleged personal grievances against Air New Zealand encompassing eight causes of action. They were allegations of workplace discrimination, harassment and bullying within the workplace, breaches of 12 unspecified workplace "codes and conducts", breaches of the [Privacy Act 1993](#) within the workplace, unjustified dismissal, breaches of unspecified policies and procedures within the workplace, defamation and sexual harassment.

[5] Air New Zealand successfully applied to strike out several of the causes of action.² The remaining pleadings were those alleging harassment and bullying, breaches of 12 workplace "codes and conducts", and breaches of policies and procedures.

[6] The relief sought by Ms Rachelle included:³

- (a) a finding that she had a personal grievance;
- (b) compensation of \$150,000 for alleged humiliation, loss of dignity and injury to her feelings pursuant to [s 123\(1\)\(c\)\(i\) of the Employment Relations Act 2000](#) (the Act);
- (c) reimbursement for lost earnings of \$99,149.20, calculated on a standard 40-hour full-time wage for two and a half years;
- (d) any other relief the Court considered fit to grant due to the alleged unlawful workplace practices; and
- (e) all legal costs.

2. *Rachelle v Air New Zealand Ltd* [2018] NZEmpC 75; *Rachelle v Air New Zealand Ltd* [2019] NZEmpC 23; *Rachelle v Air New Zealand Ltd* [2019] NZEmpC 39.
3. At the hearing Ms Rachelle produced a revised claim purporting to substantially increase the compensation and lost earnings she intended to claim but did not seek leave to amend her pleadings.

[7] Air New Zealand did not accept that it had employed Ms Rachelle but, in any event, denied her claims.

[8] Before considering Ms Rachelle's pleadings it is necessary to place her work history into context and explain how that gave rise to her claim to have been employed by Air New Zealand.

Mt Cook Airline Ltd operations

[9] Ms Rachelle began work in Queenstown with Mt Cook Airline Ltd as a customer service agent. Mt Cook Airline is a wholly owned subsidiary of Air New Zealand but is a separate company.

[10] Until recently Mt Cook Airline provided ground handling services at Queenstown airport. Those services include customer check-in processes, aircraft passenger boarding, providing administrative support during disruption to air travel, dealing with mishandled baggage, and day of operations aircraft communication and coordination. It provided those services until 2016 when responsibility for them was taken over by Air New Zealand.

[11] When Mt Cook Airline was providing ground handling services it used a combination of permanent staff supplemented by temporary and casual employees. It employed about 34 permanent staff and approximately 15 "winter temps". That label described employees engaged on fixed-term employment agreements from about May to October each year for the winter peak season in Queenstown. In addition, a pool of approximately seven casual employees was available to cover for staff absences and intermittent peaks in demand. Over time the increase in demand for air travel to Queenstown has almost eliminated the seasonal peaks and troughs that were previously experienced.

Ground handling acquired by Air New Zealand

[12] Air New Zealand assumed responsibility for all ground handling work at Queenstown airport on 4 April 2016. In anticipation of this change Mt Cook Airline's

permanent employees were advised that their employment with that company would end on 3 April 2016. With effect from the following day they had the opportunity to start work with Air New Zealand under the terms and conditions of a collective agreement between the company and E tū union. One consequence of this change, which is significant to the claim Ms Rachelle has made, was that Air New Zealand planned to reduce reliance on casual staff.

Employment history with Mt Cook Airline

[13] Ms Rachelle started working for Mt Cook Airline in the winter of 2014 as a "winter temp". Her employment was for a fixed term from 19 May 2014 to 28 September 2014.

[14] In a letter of 25 September 2014, Mt Cook Airline advised Ms Rachelle that she would be included on a list of people to whom it might offer work from time to time. The company's letter emphasised that this work would be casual, on an "as and when required" basis, so that each time she worked there would be a separate period of employment. Ms Rachelle was advised there was no guarantee that she would be offered any work.

[15] This arrangement for casual work came to an end in April 2015. At that time Ms Rachelle advised the company that she, and her then husband, were starting a business and she was not available for work for a few weeks. There is a disagreement about whether she ceased working for the company completely or merely indicated there was a period of time when she would not be able to accept work. It is not necessary to resolve this disagreement to reach a conclusion in this case.

[16] In practical terms Ms Rachelle's unavailability meant she was not offered any work by Mt Cook Airline after April 2015. Although she was ready to resume work on 27 June 2015, and advised the company accordingly, there was no work available for her and she had to wait for an employment opportunity to arise.

[17] Eventually, Mt Cook Airline wrote to Ms Rachelle on 18 September 2015 to advise her that she would be included on the list of people to whom it might offer

casual work with effect from later that month. As it had done before, the company's letter stated the basis on which this casual work would be offered. There was no guarantee of an offer of any work.

[18] Ms Rachelle remained available to work as a casual employee for Mt Cook Airline until 22 February 2016. On that day she sent a text message to the company advising it that she would be unavailable to work until 11 April 2016. As a casual employee her message was a courtesy, but had no other significance.

[19] Before Ms Rachelle undertook further work for Mt Cook Airline the company ceased to have responsibility for ground handling at Queenstown Airport. Consequently, it had no need for any ground handling staff. The last time she worked for Mt Cook Airline was on 20 February 2016.

Employment history with Air New Zealand

[20] When Air New Zealand took over the ground handling work it planned to rely predominantly on permanent employees, but it did have a need for some casual staff. On 31 March 2016 it wrote to Ms Rachelle and offered her work as a casual employee. The letter began by briefly describing a simplified structure for ground handling work at regional airports and informed her that permanent Mt Cook Airline employees would transfer to Air New Zealand on 4 April 2016. The letter advised Ms Rachelle that, from 4 April, Mt Cook Airline would not be offering any further casual work.

[21] Air New Zealand's offer to Ms Rachelle was qualified in the same way as the casual employment she had with Mt Cook Airline. It did not guarantee an offer of any work or any expectation of regular or continued employment. In fact, Air New Zealand never offered Ms Rachelle any actual work as a casual employee.

[22] Air New Zealand reassessed its need for a casual workforce in Queenstown. As a result Jeremy Holman, the company's Head of Regional Airports, wrote to Ms Rachelle on 12 June 2016 to advise her about this reassessment and inform her she was not required to work in future. That letter ended the relationship created by her acceptance of the offer made in March.

[23] Separately, Ms Rachelle unsuccessfully applied for permanent employment with Air New Zealand. Ms Christina Guthrie was one of the managers who considered the application. Ms Guthrie is now employed by Air New Zealand as Senior Manager Customer, but previously she was employed by Mt Cook Airline as its Airport Manager at Queenstown.

[24] The decision about Ms Rachelle's application was made on 11 December 2015. Ms Rachelle was told she had been unsuccessful in a meeting with Ms Guthrie on 22 December 2015. The reasons for this decision were not given to Ms Rachelle in writing at the time, but they were summarised subsequently in an email sent to her on 29 April 2016. The reasons were:

- (a) about her team work, specifically regarding her comments to the effect that everyone else was hopeless and doing a terrible job, and that she could not understand why they were employed; and
- (b) that she was quick to react in a negative way and needed to consider how she came across and interacted in some situations.

The grievance

[25] All of the subsequent litigation stems from a combination of the decision not to offer Ms Rachelle permanent employment, her tendency to view Air New Zealand and Mt Cook Airline as the same company, and an ambiguous claim by her (then) lawyers that she was permanently employed by Air New Zealand so that the letter of June 2016 was an unjustified dismissal.

[26] Ms Rachelle's former lawyers wrote to Air New Zealand in August 2016 raising a personal grievance alleging she had been unjustifiably dismissed. While the letter acknowledged she had worked as a casual employee for Mt Cook Airline, it claimed she had continued to work for Air New Zealand for over two years.

[27] In the same vein, claiming she worked for Air New Zealand, Ms Rachelle pleaded that all employees, including her, wore its uniform, marketed and endorsed its products and brand name, provided assistance to its scheduled services and that she

never considered herself to be a Mt Cook Airline employee. She sought to illustrate that she worked for Air New Zealand by wearing that company's uniform and name tag throughout the hearing.

Analysis

[28] Against that background the three causes of action pleaded by Ms Rachelle need to be considered. Harassment and bullying was pleaded in the following way:

Harassment and bullying within the workplace

Please refer to **dated** Appendix 3c. Roster alternations as well as threats of being unable to enter the ZQN grounds of operation. (*Mr Jeremy Holman and Mr Naoto Unno 2015 – 2016*)

(Emphasis original)

[29] The pleading about breaches of workplace codes and conducts was as follows:

[Breaches] of 12 workplace codes and conducts

Please find attached **dated** Appendix 2 (*Mr Naoto Unno, Ms Christina Guthrie, Joanne Kirker, Mr Jeremy Holman, Christopher Luxon, Chantelle Air New Zealand HR, (2015 - 2016)*)

(Emphasis original)

[30] The alleged breaches of policies and procedures within the workplace is as follows:

Several breaches of policies and procedures carried out within the workforce

Please find **dated** attached Appendix 2 (*Mr Naoto Unno, Ms Christina Guthrie, Mr Jeremy Holman, Ms Joanne Kirker, Mr Christop[h]er Luxon and HR Department Air New Zealand (2015- 2016)*)

(Emphasis original)

[31] Air New Zealand's response to all of these claims was that it did not employ Ms Rachelle, having only established by its agreement with her in March 2016 the terms and conditions of employment that would apply if she had actually been offered any casual work. While not abandoning that argument Mr Caisley explained that,

rather than dwell on a legal analysis, Air New Zealand intended to establish that it had not been involved in any of the alleged behaviour attributed to it.

Harassment and bullying?

[32] The first part of the claim for harassment and bullying was about an alleged unlawful variation of Ms Rachelle's hours of work. When her former lawyers raised a grievance on her behalf, one claim was that Air New Zealand had unlawfully and unilaterally varied her hours of work by reducing them from the previous level to four per week. Her evidence was that she worked 84 hours per fortnight, but that figure was inconsistent with the pleading that she worked 50 hours per week. In fact, the only record of her hours of work was from Mt Cook Airline and they showed that between the weeks commencing 21 September 2015 and 28 March 2016 there was no regular pattern to the hours of work.

[33] The first, and obvious, problem with this pleading was it could only be directed to Mt Cook Airline, where Ms Rachelle actually performed work from time to time. Air New Zealand could not have unilaterally and unlawfully altered Ms Rachelle's hours given that she was never contracted to it for any specified hours. That point aside, Mr Caisley submitted that, as a casual employee, Ms Rachelle had no guarantee of hours of work and there could be no breach of the employment agreement if they were different from one week to another. I agree. Ms Rachelle was not a permanent employee of Air New Zealand during the time she now says her rostered hours of work were varied. Furthermore, the terms and conditions of her casual employment were on an "as required" basis. As a casual employee she had no entitlement to any hours of work, let alone the hours she claimed. There was no substance to the claim that Ms Rachelle's work hours were unilaterally altered and that as a result her employment agreement was breached.

[34] The second part of this claim was linked to what was pleaded as access to "ZQN". The letters "ZQN" are aviation code for Queenstown Airport. How Air New Zealand harassed and bullied Ms Rachelle over access to the airport was only vaguely and imprecisely stated in the pleading and not touched on by her in evidence.

[35] The airport is owned and operated by Queenstown Airport Corporation Ltd. That company is wholly separate and independent from Air New Zealand. Access to the airport is controlled by Queenstown Airport as the owner and operator of the airfield, not Air New Zealand.

[36] When cross-examined, Ms Rachelle accepted that this part of her claim was not made in her lawyer's letter raising her grievance. She attributed her complaint to remarks she said were made by Mr Holman, in a telephone call between them after she had received his letter ending the casual employment agreement. Mr Holman denied making any statement, or taking any action, that could have been seen as a threat about access to Queenstown Airport. Whatever was said in the discussion, it took place after Air New Zealand ended the casual employment agreement and cannot, by definition, give rise to a personal grievance.

[37] There is a possibility that Ms Rachelle was referring, in some ill-defined way, to the last part of Mr Holman's June 2016 letter. In that letter she was asked not to enter the company's offices and reminded that she had no authorisation to be on its premises. The company leases office space from Queenstown airport. If what has just been described was her claim, the letter did no more than remind her that its offices are only able to be accessed by employees and approved visitors. It fell well short of a threat relating to airport access.

[38] I am satisfied that Ms Rachelle was not subjected to harassment and bullying by Air New Zealand, or anyone employed by it. This claim is unsuccessful.

Policies and procedures

[39] The remaining two causes of action can be dealt with together because they are essentially indistinguishable. They will be described collectively as alleged breaches of policies and procedures. In relation to both causes of action Ms Rachelle's evidence attributed alleged breaches of policies and procedures to three Air New Zealand employees. With one exception, she did so by quoting from Air New Zealand's policies and procedures without any further explanation of the circumstances or events said to justify each claim. As an example, Mr Holman was said to have engaged in

seven breaches the second one of which was described by quoting the company's policy on merit-based recruitment that reads:

Base your decisions about recruitment, selection, development, and advancement of employees on merit, their qualifications, demonstrated skills and achievements.

[40] What this claim appears to be about was Ms Rachelle's belief that she was the best candidate for a permanent job and, when she was not appointed, Air New Zealand failed by not making a merit-based decision. An obvious difficulty with this claim is that Ms Rachelle has failed to establish that Air New Zealand's policies and procedures applied to her at the point in time when she either applied for a permanent position or when her application was being considered. Even if that threshold had been overcome her claim would have failed given that Ms Guthrie's reasons for not offering her a permanent job were demonstrably merit-based.

[41] The exception referred to earlier was Ms Rachelle's claim that Mr Unno had breached the policies and procedures relating to her privacy by becoming a Facebook friend with her husband. This claim was struck out previously, but Ms Rachelle insisted on producing evidence about it at the hearing.⁴ Even if the claim had not been struck out it would have been unsuccessful. The evidence was that Mr Unno had become a Facebook friend for Ms Rachelle's husband and went no further than that. She did not explain how a social media contact between them could infringe her privacy or, for that matter, the privacy of anyone else.

[42] The absence of any further evidence to explain why Air New Zealand's policies and procedures had been breached makes it impossible for these claims to succeed. The references in each of the pleadings to named employees did no more than attempt to identify a person, or persons, to whom Ms Rachelle attributed a breach but those allegations were not supported by evidence. The employees she named in her evidence as involved in the breaches were a subset of those she listed in the statement of claim and what they were said to have done, and how it impacted on Ms Rachelle, was not explained.

⁴ *Rachelle v Air New Zealand Ltd*, above n 2.

[43] Ms Rachelle's evidence returned to some constant themes illustrating her dissatisfaction with what happened which may have a bearing on her attitude to her claim generally. One of those themes was her persistent and unwavering belief that the real reason she was not offered a permanent job was because of an unsubstantiated, and possibly false, complaint that she had sworn at a pilot.

[44] There is an insurmountable difficulty in Ms Rachelle maintaining in this hearing that she was dismissed for swearing at a pilot. That claim was one of the causes of action struck out previously.⁵ Even if that had not been the case, her claim would not have succeeded. The first difficulty she faced was that she did not establish a complaint had been made. Ms Guthrie explained that she was made aware of a potential complaint but no formal complaint was ever received and the matter was taken no further. Ms Rachelle disputed what Ms Guthrie said but not convincingly. I am satisfied there was no formal complaint. The second difficulty was that Ms Guthrie made a decision about Ms Rachelle's job application on 11 December 2015 and the possibility of a complaint did not emerge until several days later, on 19 December 2015. That was

well after the decision had been made. Ms Rachelle's belief that she had been the victim of a complaint for behaviour she did not engage in was deeply held but completely misconceived.

[45] Another theme was that her divorce had, in some way, created unwelcome difficulties for other staff members when she did work casually. In any event, there was no evidence to suggest that problems Ms Rachelle had in her obviously difficult divorce played any part in allocating casual work to her by either company, or her candidacy for permanent employment.

[46] Another theme was that Ms Rachelle considered Mr Holman had breached the company's policies and procedures because, in her opinion, he had promised to investigate why she had not been permanently employed but did not do so. There are two problems with this assertion. The first of them is that on Ms Rachelle's evidence the possibility of an investigation was only raised during the telephone call she had with Mr Holman. That call took place after both her casual employment had ended

5 *Rachelle v Air New Zealand Ltd*, above n 2.

and she had been advised that she would not be appointed to the permanent staff. A personal grievance could not arise in those circumstances because an employment relationship did not exist at that time. The second, more fundamental, reason was that Mr Holman did not accept he had promised to conduct an investigation as Ms Rachelle had requested. I accept his evidence.

[47] Finally, and for completeness, Air New Zealand did not accept that there was any improper reason or motive to employ permanent staff ahead of Ms Rachelle. Implicit in the company's decision was that it did not share her opinion that she was the best available candidate, so that when she was not offered permanent work it was in some way wrongly preferring less able people over her. Whatever may be the quality of Ms Rachelle's work, Air New Zealand did not breach any of its workplace policies or procedures in relation to her.

Outcome

[48] I am satisfied that Air New Zealand did not engage in any activity giving rise to a personal grievance by Ms Rachelle. Her challenge is unsuccessful and it is dismissed.

[49] Air New Zealand is entitled to an award of costs. It may file submissions within 20 working days of the date of this decision. Ms Rachelle may have a further 20 working days to respond and Air New Zealand may reply to her submissions within a further five working days.

K G Smith Judge

Judgment signed at 3.05 pm on 17 December 2019

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