

**Attention is draw to the order
prohibiting publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 155
5401200

BETWEEN GRAEME REYNOLDS
Applicant

AND MOUNT COOK AIRLINE
LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Tim McGinn, Counsel for Applicant
 Tim Cleary, Counsel for Respondent

Investigation Meeting: 30 July 2013 at Christchurch

Submissions received: 30 July 2013

Determination: 6 August 2013

DETERMINATION OF THE AUTHORITY

- A. The applicant was not unjustifiably dismissed, and was not unjustifiably disadvantaged in his employment. Accordingly, his personal grievance is declined.**
- B. No penalty is imposed against the respondent.**
- C. Costs are reserved.**

Prohibition from publication

[1] Evidence was put before the Authority in relation to a casual member of the respondent's staff and her husband who had been issued with flight tickets by Mr Reynolds. These two individuals played no active part in the Authority's

investigation and it is not necessary for their identity to be disclosed. I therefore prohibit publication of their names. They shall be referred to in this determination as the *casual crew member* and *the husband*.

Employment relationship problem

[2] Mr Reynolds raises a personal grievance in respect of his dismissal from the respondent company on 18 September 2012. He claims that the dismissal was unjustified. He also raises an unjustified disadvantage personal grievance relating to the disciplinary process followed leading to his dismissal. He also seeks a penalty for breach of good faith arising from the same process.

[3] The respondent denies that Mr Reynolds was unjustifiably dismissed.

Brief account of the events leading to the dismissal

[4] Mr Reynolds worked for the respondent company as an operations controller and a crew controller. His role as operations controller was to coordinate and control the requirements of flight operations. His role as crew controller was to coordinate and control the movement and training requirements of the technical cabin crew. Mr Reynolds had worked for the respondent company for 16 years.

[5] Part of his responsibilities involved the issuing of tickets to enable crew to fly in circumstances associated with their duties. On 6 September 2012, Mr Reynolds arranged a Free-of-Charge (FOC) ticket for the husband of a casual member of staff together with a *On Company Service* (OCS) and crew re-positioning ticket for the staff member, so that they could travel from Christchurch to Auckland on Friday, 14 September, returning on Sunday, 16 September 2012. The husband was characterised in the ticketing system as a contractor. However, he was not a contractor, and had no dealings with the respondent, and the staff member was not travelling to Auckland to commence duty but was doing so to attend a social function unconnected with the respondent.

[6] On or around Wednesday, 12 September 2012, the Finance and Administration Manager of the respondent company discovered the ticket that had been booked for the staff member's husband and, on that day, wrote an email to the Flight Operations Manager, Mr Ward, as well as to the staff member's line manager and to the respondent's General Manager, Ms Williamson, drawing attention to the booking for the husband.

[7] The email stated that the staff member was a member of casual cabin crew and not entitled to any staff travel concessions and that, not only had an FOC contractor ticket been issued, but that it also had an Over Booking (OB) profile on it “*so is a firm FOC ticket booked on the two busiest days of the week*”. The email went on to say that the husband was not a contractor and so should not be going to Auckland that weekend on that ticket and that Mr Reynolds did not have the authority to issue the ticket or to use the OB profile. The email went on to state:

This puts Graeme in a precarious position and subject to possible disciplinary action.

[8] The email also stated:

This sort of thing puts our Ops at risk of losing all ticketing capability which would be very awkward for us as a company.

[9] A member of the HR team, Mr Crooke, spoke to Mr Reynolds on 13 September 2012 to set up a preliminary investigation meeting to investigate the problem and during this conversation Mr Reynolds admitted making the booking for the husband and for the casual cabin crew member because he had made a personal commitment to the crew member some time earlier following the earthquakes to assist her with flights in recognition of her efforts on behalf of the company after the February 2011 earthquake. During the conversation Mr Reynolds undertook to cancel the bookings, which he did subsequently.

[10] Mr Ward wrote to Mr Reynolds on 13 September 2012 in the following terms:

Dear Graeme,

Investigation meeting

This is to formally advise you that I require a meeting with you on Monday 17 September 2012 at 10.30am at Paul Crooke’s office, Mount Cook Head Office. If this is not convenient please let me know and I will reschedule another time.

The purpose of this meeting is to investigate with you travel bookings made under your sign in code. One, a FOC Contractor booking which has an over booking profile on it and one an OCS booking, crew repositioning positive travel.

Paul Crooke, HR Manager, called you on my behalf on 13 September 2012 to set up a preliminary investigation meeting to discuss a booking for [the husband] made under your sign in code – the FOC Contractor booking. In this conversation you admitted making the booking for [the husband] and another one other [sic] for [the casual cabin crew] (Casual Cabin Crew) which related to a personal commitment you had made to [the casual cabin crew] some time

earlier following the earthquakes. You advised you would cancel these bookings.

I now need to fully investigate these two bookings you have made. I am concerned you may have made them without authorisation and contrary to Company policy. This matter, if found to have substance, would be in breach of Company Code of Conduct.

Enclosed are:

- A copy of the booking for [the husband] for travel on flight 516, Friday 14 September 2012 and for the flight 547, Sunday 16 September 2012.
- A copy of the booking for MN Crew for travel on flight 516, Friday 14 September 2012 and for the flight 547, Sunday 16 September 2012

I have also enclosed the following documents for your reference:

1. Code of Conduct
2. Disciplinary Procedures & Guidelines.

Graeme, I need to make you aware, your actions in making these bookings are potentially serious. Depending on the outcome of this investigation, formal disciplinary action, up to and including dismissal, may be taken against you. I advise that your [sic] may bring a representative and/or support person(s) with you to the meeting. I will be representing the Company and we will have Paul Crooke, HR Manager, attending the meeting as a second Company representative.

Yours sincerely,

Andrew Ward
Flight Operations Manager

[11] The code of conduct enclosed with the letter included a section on “*standards required in order to perform duties*”. One of the standards was:

To ensure all resources are only used for Company business. This includes money, equipment, material or time. Employees should only use resources they are authorised to use and must complete all necessary documentation.

[12] Another standard set out was:

To take necessary steps to protect the Company assets and resources, including the prevention of theft. This includes intellectual property.

[13] The disciplinary policy set out a list of reasons for disciplinary procedure. It stated that the purpose of any disciplinary procedure is to address unacceptable behaviour, which may include:

- *Misconduct (whether or not considered to be in breach of the Code of Conduct)*
- *Behaviour that is harmful or potentially harmful to any person or to the Company.*

[14] Amongst the list of “*more common reasons for a disciplinary investigation that may lead to disciplinary action*” featured the following:

- *Falsification (or being party to falsification) of any Company or customer document or record.*
- *Breaching the Code of Conduct and/or normal work practices, including Standard Operating rocedures [sic] and/or Company policies,*
- *Undermining the trust and confidence of the employment relationship.*

[15] The code of conduct included “*principles of fairness*” which included employees being provided with relevant information, subject to the provisions of the Privacy Act and the Company’s right to preserve confidential information.

[16] The disciplinary policy also stated that managers acting as the company’s representatives must ensure that any disciplinary action taken is consistent with the principles of fairness, reasonableness and consistency.

[17] Mr Reynolds asked his former manager, Mr Smith, to be his representative and met with Mr Smith on a couple of occasions to prepare for the meeting. However, when Mr Reynolds and Mr Smith turned up at the disciplinary investigation meeting at 10.30 a.m. on 17 September 2012, Mr Ward expressed a concern that Mr Smith was an inappropriate person to be a representative in this case as he held a senior manager’s position in the respondent company (MCA Passenger Services Manager). Mr Ward’s reasoning was that Mr Smith had a conflict of interest between his role as a manager and his role as a representative. Accordingly, Mr Ward told Mr Reynolds that he should find another individual to be his representative.

[18] Mr Reynolds was unable to choose his wife, Ms MacKenzie, as she also worked within the respondent company as Mr Reynolds’ direct line manager. Mr Reynolds elected to be represented by another individual, Mr Sissons, but this individual was also rejected by Mr Ward as Mr Ward had already spoken to Mr Sissons, who used to be Operations Manager at the time of the 2011 earthquake in Christchurch, as part of the preliminary investigation. Eventually, Mr Reynolds chose Mr Maxwell, a flight examiner, to be his representative. Mr Reynolds says that he did not have much time to brief Mr Maxwell as the latter had just come off a flight. In

addition, Mr Reynolds said he had not wanted to adjourn the meeting because he was due on duty the following day and, I infer, he wanted to get the meeting over with.

[19] The Authority was shown a copy of the notes made from the investigation meeting that took place on 17 September 2012. Mr Reynolds accepted that these notes were accurate save in respect of one aspect which I do not believe was material. When asked by Mr Ward why Mr Reynolds had booked the tickets, the notes show that Mr Reynolds explained that, after the earthquakes, Operations did a lot of bookings for displaced crew and families and that, the previous year, the casual staff member had told him that she had requested a ticket for her children to accompany her on an overnight duty but that her manager had denied the request and this had upset the casual crew member. Mr Reynolds said that he then made “*an undertaking/commitment*” to the casual crew member some time in 2011 to help her out at some stage.

[20] Mr Reynolds said that Operations had been providing travel for families during the earthquakes “*like a welfare centre for crew and families*”. He said that over 100 bookings had been made for families to accompany crew on duties or for crew to be based temporarily outside of Christchurch. He said that Operations had the authority to do this through two managers. He said that, if it did not affect revenue, then he thought *there was authority to issue the tickets*.

[21] The notes record that Mr Ward asked Mr Reynolds if the situation with the casual crew member was different and the notes record that Mr Reynolds “*accepted this was a different [sic] because it was not an overnight and [the casual crew member] was not working*”.

[22] The notes also show that Mr Reynolds stated that he had never “*done this before when not associated with duty*”. The notes also record that Mr Reynolds agreed that he knew issuing the ticket was “*over and above normal and accepted practice*” but that Mr Reynolds did not believe that he had displaced revenue from the company because he had monitored bookings and there had been spare seats when the flight had departed. He said that the casual crew member and her husband had travelled on a commercial standby ticket after their FOC tickets had been cancelled and the cost of those tickets had been \$280 return for both.

[23] Mr Reynolds replied to a question from Mr Ward that he was not aware of another situation like this in Ops where a FOC ticket had been issued that was not

related to a rostered duty. Mr Reynolds also stated that he had not sought permission from anybody but that he had spoken to other Ops staff about it (although Mr Reynolds clarified during his evidence to the Authority that this had been after he had issued the tickets).

[24] When asked by Mr Ward why Mr Reynolds had not approached Ms Mackenzie or a line manager for permission to issue the FOC tickets, Mr Reynolds replied that the crew member's manager had said no to a similar request from the crew member in the past. Mr Reynolds stated to Mr Ward that this had been an example of him "*thinking outside the square*". He said he had a record of solving problems for the company but that his flexibility of thinking could get him into trouble. He said that when he started with the company he had been taught "*to look after customers, owners and employees*" and that is what he does. When asked by Mr Ward if what he had done was within the rules, the notes record him as having "*accepted that it was wrong*". When asked about the likelihood of doing this again, the notes record that Mr Reynolds gave a personal undertaking he "*would not do it again*".

[25] After a 10 minute adjournment, Mr Ward returned to the meeting and stated that the issue was about giving free tickets on Air New Zealand flights rather than the post-earthquake situation (of being flexible in allowing staff and their families to travel), where the tickets were supposed to be authorised by management in any case. Mr Reynolds' representative asked Mr Ward to ensure that, when he talked to other managers to assist in coming to a decision, that he took into account the whole picture and that Mr Reynolds "*had not given a ticket to Jo Public*". Finally, the notes record that Mr Ward accepted that Mr Reynolds had not done this for personal gain and that Mr Reynolds said he had nothing else to add.

[26] Mr Ward's evidence is that, after the disciplinary investigation meeting, he considered what was known and drew up an Investigation Findings Report. In doing so, he made inquiries of three line managers, who he said had experience of the ticketing arrangements that were made for staff, as well as Ms Williamson. He said that he could find no other example where a staff member had made FOC bookings unrelated to duty travel.

[27] Mr Ward's evidence was that he proceeded with the investigation on the basis that Mr Reynolds had accepted that what he had done was wrong and the only question was what was the appropriate sanction; namely, dismissal or a second chance

with a final warning. Mr Ward also gave evidence that he considered an example given by Mr Maxwell of his wife attending a flight duty with him on a FOC ticket. However, Mr Ward rejected this as analogous given that Mr Maxwell was travelling for the purpose of his company duty. He also said that he had authorised the issuing of the FOC ticket to Mr Maxwell's wife in any event. This was denied by Ms Mackenzie, although I do not believe it is necessary to resolve this conflict of evidence given that I accept Mr Ward's evidence that the example is not analogous Mr Maxwell had been travelling for the purpose of a duty.

[28] Mr Ward also said that he consulted with the company's legal counsel and Ms Williamson about whether dismissal was an appropriate option.

[29] Mr Ward met with Mr Reynolds and Mr Maxwell the following day and read out his Investigation Findings Report, which ran to three and a half pages. He said that he was considering dismissal and asked for comment on that. He said that Mr Reynolds said that the process was not fair and dismissal was too severe. Mr Ward adjourned for around five minutes and then, on resuming the meeting, told Mr Reynolds that he was dismissed.

[30] In his Investigation Findings Report, Mr Ward's findings are recorded as including:

- a. The casual flight attendant and her husband were not entitled to receive FOC tickets, there being no valid operational reasons for the ticket issue;
- b. Mr Reynolds did not seek permission to make the booking, despite knowing that he did not have authority to do so;
- c. Mr Reynolds' actions went to the heart of the employee/employer relationship in that the employer must have trust and confidence in the employee;
- d. Air New Zealand takes ticketing misuse seriously; and
- e. Mr Reynolds had no way of knowing when he booked the tickets whether or not he would be denying Air New Zealand revenue from the seats that had been booked.

[31] Mr Ward concluded that Mr Reynolds' actions had:

... impacted on the implied term of trust and confidence necessary between an employer and an employee, particularly as he knew he didn't have authority to issue tickets in these circumstances and that a request for FOC travel associated with a duty had previously been denied by [the casual crew member]'s manager.

[32] He also found that, during the investigation:

... it was clear that Graeme did not fully grasp the gravity of his actions and believed that as the amount of potential revenue was, in his opinion, relatively small that no serious action should be taken. This lack of judgment again, impacts on the trust and confidence necessary for a continued working relationship.

[33] Mr Ward concluded that serious misconduct had been committed and that dismissal was the appropriate outcome. This was confirmed in writing by way of a letter from Mr Ward to Mr Reynolds dated 19 September 2012.

Issues

[34] It is the applicant's case that there were procedural and substantive flaws leading to the decision to dismiss Mr Reynolds being unjustified. A summary of the concerns raised by Mr McGinn on behalf of Mr Reynolds is as follows:

- (a) It was not made clear to Mr Reynolds that he faced dismissal for serious misconduct;
- (b) Mr Ward ignored the general discretion inherent in Mr Reynolds's role;
- (c) The policy which Mr Reynolds is said to have breached was unclear in any event;
- (d) The respondent failed to follow its own Just Culture Policy;
- (e) Mr Reynolds was deprived of his right to have a representative of his choice;
- (f) Mr Ward failed to interview the Operations staff and Ms MacKenzie prior to making his decision;
- (g) Mr Ward did not advise Mr Reynolds that he was considering that there had been a loss of trust and confidence and poor judgment by Mr Reynolds;

- (h) Mr Reynolds' undertaking never to do it again was not given sufficient weight;
- (i) All relevant information was not given to Mr Reynolds in breach of s.4(1A) of the Employment Relations Act 2000 (the Act).

[35] It is the submission of Mr Cleary on behalf of the respondent that this is essentially an admission case. That being so, he submits, all the claims of procedural unfairness fall away and the only question before the Authority is one of substantive fairness. That is, could a fair and reasonable employer have dismissed Mr Reynolds for his admitted behaviour in issuing the tickets?

[36] In order to examine the conflicting submissions of counsel, it is necessary to consider the following questions:

- (a) What was the nature of the *admission* made by Mr Reynolds;
- (b) What is the effect of any *admission* by Mr Reynolds on the employer's obligation to comply with the procedural requirements of s.103A of the Act;
- (c) If the employer was obliged to comply with those obligations, did it do so;
- (d) Was the decision to dismiss substantially justified?

What was the nature of the *admission* made by Mr Reynolds?

[37] Mr Reynolds accepted that the notes of the disciplinary investigation meeting were accurate in all but one part, which is not material to the core issues under consideration. The notes record that Mr Reynolds said "yes" to the question of "*whether he knew issuing the ticket was over and above the normal accepted practice*". The notes also record that, when asked if what he had done was within the rules, Mr Reynolds "*accepted it was wrong*".

[38] Mr Reynolds has, in the statement of problem and in his brief of evidence, attempted to put a gloss on these admissions by saying that he was accepting that what he did was outside of the rules but that he had a discretion, effectively, to act outside the rules. However, in the light of what the notes record Mr Reynolds as acknowledging to Mr Ward, I accept that it was reasonable for Mr Ward to understand

that Mr Reynolds was accepting that he knew that what he had done was, effectively, not allowed.

[39] The notes of the investigation meeting do not show that Mr Reynolds stated that he believed that he had a discretion which enabled him to work outside of the rules. The notes show that Mr Reynolds was saying that there had been flexibility around the time of the earthquake in flying family members around when accompanying staff members but the issuing of the FOC tickets to the husband of the casual cabin crew was different because she had not been flying as part of a duty. The notes show that Mr Reynolds was attempting to argue that he felt that the casual staff member deserved a travel concession because of her flexibility and that of her husband during the earthquake period and also because Mr Reynolds had made a promise (*an undertaking/commitment*) to her.

[40] It was of interest that, during his evidence to the Authority, Mr Reynolds accepted that he had had reservations about giving the FOC ticket to the casual staff member's husband. There is also evidence that Ms MacKenzie had also been unhappy with this decision by Mr Reynolds when she had become aware of it.

[41] All in all, I accept that Mr Reynolds had agreed that he had acted outside of the rules and do not accept that he had explained that he felt that his doing so was allowed because of his wide discretion. Therefore, it was appropriate and reasonable for Mr Ward to understand his admission as an admission of wrongdoing.

[42] However, I do not accept that Mr Reynolds admitted that he had carried out an act of serious misconduct. It is clear from the representations that he made and those made by Mr Maxwell on his behalf that he felt he had a justification in acting outside of the rules (essentially, his commitment to the staff member and her flexibility during the earthquake period). In other words, I understand Mr Reynolds to be saying that, when all the circumstances of the case are taken into account, his actions were not serious misconduct.

What is the effect of Mr Reynolds's admission on the employer's obligation to comply with the procedural requirements of s.103A of the Act?

[43] Mr Cleary refers me to the 1998 Employment Court case of *Murphy and Routhan t/a Enzo's Pizza v. van Beek* [1998] 2 ERNZ 607. In that case, an employee admitted taking pizzas, not paying for them and not recording them over a three week period. Goddard CJ held at p.620 that:

An employer who has carried out no inquiry as to the possible existence of innocent explanations for apparently irregular conduct cannot claim to have reasonably reached an honest belief that the employee was guilty of serious misconduct justifying dismissal. However, that requirement does not extend to admitted conduct. ... The respondent ... admitted ... taking home five pizzas. This was enough for the appellants' purposes. The admission rendered it unnecessary for the respondent to be given any more time.

What then is to be said about the appellants' procedure? It was no doubt seen by the respondent as inconsiderate and uncaring. The point about procedure is that it is required not for its own sake; its purpose is to give the employer a better chance to arrive at the truth than exists without a full and fair inquiry into the facts and circumstances. The procedure then cloaks the employer's decision with the legitimacy that stems from credibility. But if the employer is, in the course of carrying out the procedure, presented with the truth by the employee admitting responsibility for the very activity that the employer to the employee's knowledge was looking into, then it does not matter that no further attempt was made afterwards to follow the procedure. It is the employee's admission that then cloaks the employer's decision with legitimacy. Nor does it matter that there are differences in detail between the admission and the complaint if the differences bear only on the extent or frequency of the apparent wrongdoing but do not contradict the basic premise that it had taken place. In this case, the differences between the parties prior to dismissal were that the employee admitted making up pizzas and taking them home but denied reselling them and admitted taking five in 3 weeks but denied taking 14. It cannot be said to be unfair or unreasonable for an employer to act at once on such an admission.

[44] Mr McGinn submits that *Enzo's Pizza* is not a relevant case since it was decided before s.103A was legislated. Section 103A provides as follows:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
- (3) *In applying the test in subsection (2), the Authority or the Court must consider –*
 - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*

- (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
- (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

[45] Mr McGinn argues that the phrase “*in all the circumstances*” referred to in s.103A(2) encompasses the procedural requirements in s.103A(3).

[46] It is my view that the basic principle expressed in *Enzo's Pizza* is still good law. If an employee admits that he did the act that is being investigated, then, depending on the act admitted, that admission could well obviate the need for further investigation. For example, if an employee admits without coercion to stealing money out of a till belonging to his employer, there is no need for the employer to trawl through CCTV footage or interview witnesses to see whether the admission is accurate, unless the admission is not credible.

[47] Furthermore, in such an example, where the admission would amount unequivocally to an admission of dishonesty, there would be no need for further investigation into whether the admitted act amounted to serious misconduct. An act which is clearly a dishonest one and where the employer is deprived of its property through that dishonest act, obviates the need to make further investigations in deciding whether or not the act amounts to serious misconduct. The only further inquiry that needs to be made in such an example would be to inquire whether there were any mitigating factors (such as previously unblemished record) which could or should persuade the employer that dismissal was not what a fair and reasonable employer could do in all the circumstances.

[48] In such an example, I do not believe that the s.103A requirements must be slavishly followed where they would make no difference to the knowledge that both the employer and the employee had at the time of the disciplinary investigation meeting. In that sense, I agree with Mr Cleary.

[49] However, it is important to consider exactly what is being admitted to. As I have already found, Mr Reynolds did not admit that he had committed serious misconduct. It appears to me from the notes of the investigation meeting that what Mr Reynolds admitted was issuing FOC tickets in circumstances that fall out of the usual practice but in which he felt he had a good reason for doing so; namely, he had made a commitment to the casual member of staff and that she had gone beyond the call of duty during the earthquake.

[50] As I found above, I do not see anywhere in the notes to suggest that Mr Reynolds stated that he believed that he had a legitimate discretion allowing him to work outside the rules, nor that the rules were unclear to him. If Mr Reynolds had spelled this out to Mr Ward, Mr Ward would have been obliged to have investigated those statements. However, Mr Reynolds did not do so.

[51] Mr Ward had the following knowledge based on what Mr Reynolds had told him when he concluded his investigation findings report:

- a. Mr Reynolds had issued the tickets;
- b. the tickets were issued outside of the rules;
- c. Mr Reynolds had issued the tickets knowing that he was doing so outside of the rules;
- d. Mr Reynolds had not sought authority to do so; and
- e. Mr Reynolds anticipated that if he had sought authority it would have been declined.

[52] In these circumstances, I believe that Mr Ward had sufficient information before him to enable him to make a finding that Mr Reynolds had carried out an act constituting misconduct. There were no material aspects of the investigation that were unclear. It was not evident to me that there was any other piece in this jigsaw that needed to be explored before a fair and reasonable employer could have found that misconduct had been carried out.

[53] In summary, in these particular circumstances, I accept Mr Cleary's submission that, once Mr Ward had heard that Mr Reynolds accepted his wrongdoing, there was no obligation on him to carry out any further investigation with respect to the act of issuing tickets outside of the rules. However, it does not necessarily follow from this that all of the obligations on Mr Ward pursuant to s.103A could be ignored. For example, if information of a material nature had been withheld from Mr Reynolds, conceivably, that could have adversely affected his representations in respect of his submissions on the sanction to be imposed. Therefore, I will briefly examine the procedural flaws that are alleged to have occurred, according to Mr McGinn.

Were there procedural irregularities adversely affecting Mr Reynolds?

[54] There are a number of alleged procedural irregularities as follows.

It was not made clear to Mr Reynolds that he faced an allegation of serious misconduct which could lead to his dismissal

[55] I am able to deal with this in relatively short order. The letter sent to Mr Reynolds by Mr Ward dated 13 September 2012 made absolutely clear to Mr Reynolds that his actions in making the bookings were potentially serious and that, depending on the outcome of the investigation, formal disciplinary action, up to and including dismissal, could be taken against him. This was also repeated to him orally at the disciplinary investigation meeting. Mr Reynolds said that this was wording that was standard and so he did not take it seriously. However, it is difficult to see how much more explicit Mr Ward could have been and I therefore reject the suggestion that the employer was in any way at fault in the way that it signalled to Mr Reynolds that he was facing serious allegations that could lead to his dismissal.

Mr Ward ignored the general discretion that Mr Reynolds says he had with respect to the booking of tickets

[56] As I have already found above, the notes of the meeting, which Mr Reynolds accepted as being materially accurate, do not record that he believed that he had a discretion which legitimately allowed him to book the tickets. In the absence of such an explanation, I do not believe that it could reasonably be expected that Mr Ward would have inferred that this was Mr Reynolds' position. If he had understood that, then it would have been incumbent on Mr Ward to have explored that issue. However, I do not believe Mr Ward failed in not doing so. Additionally, what Mr

Reynolds did say unequivocally amounted to an admission that what he had done had been outside of the rules and had been wrong.

The policy was unclear

[57] Again, Mr Ward was not told by Mr Reynolds or Mr Maxwell that the policy in relation to the booking of FOC tickets for non-staff members and non-contractors was unclear. The notes of the investigation meeting indicate that Mr Reynolds accepted that any discretions in relation to non-staff members travelling revolved around them accompanying staff members who were actually travelling for reasons of their duty. This is exactly what Mr Reynolds seems to be acknowledging when he *accepted that it was wrong* for him to have issued the tickets.

[58] Therefore, I do not accept that Mr Ward failed in investigating whether the policy was clear or not in light of the fact that this was not expressly raised by Mr Reynolds. I also do not believe that it is significant, as alleged by Mr Reynolds, that the respondent company issued a new *Duty Travel and Duty Time Instructions for Mt Cook Airline Operations Personnel* document after Mr Reynolds' dismissal. Although this document clarifies when the over-booking (OB) function or facility could be used, it does not spell out whether FOC tickets could or could not be issued to the relatives of staff when those staff are not travelling on business. I accept Mr Ward's evidence that this is because it is clear that they could not be issued with FOC tickets.

The company's Just Culture Policy was not followed

[59] Mr Reynolds alleges that this policy should have been followed, and if it had, he would not have been dismissed. This is because he relies on a Just Culture Policy flow chart issued by the company and accessible on its intranet which, if followed through, Mr Reynolds says, indicated that coaching and performance management would have been the appropriate outcome rather than dismissal.

[60] There was a fundamental difference of opinion between Mr Reynolds and Mr Ward as to whether or not the Just Culture Policy was even applicable. Mr Ward's evidence is that it is designed specifically to deal with health and safety risks. I believe that there is some force in Mr McGinn's argument on behalf of Mr Reynolds that, on its face, the policy is of a wider applicability than just health and safety. For example, in the company's WE Guide (key policies for employees of the Air New Zealand group), the Just Culture Policy is referred to in a section separate

from the section dealing with safe and secure work environments. Furthermore, the statement of purpose of the Just Culture Policy is “*to proactively manage all forms of risk*”. It is certainly possible to interpret that phrase as encompassing risks over and above health and safety risks such as, for example, the risk of failing to protect the company’s assets and income and/or the risk of ticketing misuse.

[61] However, if I accept that the Just Culture policy should have been applied by Mr Ward, I accept his view that the flow chart showed that Mr Reynolds should have been subject to the company disciplinary policy. This is because Mr Ward did not accept that Mr Reynolds acted *in good faith having a mistaken belief that his violation was justified*. Mr Ward argues that, given that Mr Reynolds knew that the casual staff member’s manager had declined travel to her for her children to accompany her on a duty, and that Mr Reynolds knew therefore that the tickets he issued on behalf of the casual staff member and her husband would have been denied if he had asked that line manager, he went ahead in any event. This, Mr Ward said, was bad faith. In addition, he said, the actions of Mr Reynolds were reckless (the next limb of the flow chart leading to a conclusion that the disciplinary process was appropriate).

[62] I do not see any fundamental flaw in Mr Ward’s reasoning and I believe that it was legitimately open to Mr Ward to conclude in the circumstances and for the reasons stated by him, that Mr Reynolds did not act in good faith and went ahead booking the tickets recklessly as to whether he could do so. Therefore, even if I accept that the Just Culture Policy was applicable, I accept Mr Ward’s conclusion that it was appropriate to follow a disciplinary process.

Mr Reynolds was denied using the representative of his choice

[63] First, with respect to Mr Sissons, I accept that there would have been a clear conflict of interest for Mr Sissons to have acted as Mr Reynolds’ representative given that Mr Ward had already consulted Mr Sissons with respect to the investigation.

[64] With respect to Mr Smith, I do not believe that it is necessarily the case that there would have been a conflict of interest in Mr Smith acting as Mr Reynolds’ representative just because Mr Smith was a senior manager. The conflict would have arisen if Mr Smith had been part of the decision-making process or directly or indirectly managed the Operations team.

[65] However, I do not find that Mr Reynolds being prevented from having Mr Smith as his representative resulted in any material prejudice to him. First, he and

Mr Smith had the time to work together on preparing Mr Reynolds' defence to the allegations against him. Mr Reynolds said they met on two occasions prior to the investigation meeting.

[66] Second, Mr Reynolds was offered the opportunity of adjourning to another date so that he could properly brief Mr Maxwell. It was Mr Reynolds' choice not to adjourn the meeting. Furthermore, nothing in the investigation meeting notes lead me to believe that Mr Reynolds was prejudiced by having Mr Maxwell as his representative. Indeed, Mr Maxwell spoke up on behalf of Mr Reynolds and it is clear that Mr Maxwell was able to grasp the relatively simple set of facts and the implications of the allegations against Mr Reynolds in the short time that he had available to him.

[67] Therefore, whilst I do not completely accept that Mr Smith should have been prevented from acting as Mr Reynolds' representative, I do not believe that this action resulted in any material prejudice to Mr Reynolds.

Mr Ward failed to interview the relevant staff

[68] It is Mr Reynolds' case that Mr Ward should have interviewed his wife, Ms MacKenzie and the other Operations staff to gauge what the company's ticketing practice was. However, given that I have already found that Mr Reynolds admitted wrongdoing and did not expressly say that he thought the policy was unclear or that he had a *de facto* discretion to work outside of the rules, I do not believe that Mr Ward's obligation to interview Ms MacKenzie and her staff prior to the decision to dismiss was triggered. Interestingly, Ms MacKenzie gave evidence that Mr Ward spoke to her and her staff after the decision to dismiss to work out whether further instances of the issuing of tickets outside of the rules had occurred. Ms MacKenzie's evidence was there was at least another example similar or identical to that of her husband's issuing of the tickets but that the staff member in question and she did not admit this at the time. This was because the staff member was fearful of being disciplined.

[69] Therefore, even if Mr Ward had spoken to the Operations team and Ms MacKenzie prior to the dismissal, it is likely that he would not have been given a truthful picture in any event.

[70] It is also interesting to note that Mr Reynolds himself said that he did not wish to implicate anyone else whilst he was undergoing the disciplinary process and that he

himself did not make mention of cases that were similar or identical to his own. Whilst this reluctance to implicate others may be morally understandable, if not in the best interest of the respondent, the respondent cannot be held responsible for not having in its knowledge something that Mr Reynolds could have made known to Mr Ward but chose not to.

Mr Ward did not forewarn Mr Reynolds that he believed that his actions amounted to a loss of trust and confidence and a lack of good judgment.

[71] Factually, this allegation by Mr Reynolds is incorrect as it is clear from the Investigation Findings Report that Mr Ward read out to Mr Reynolds prior to the decision to dismiss that he stated expressly that he believed Mr Reynolds' actions impacted on the implied duty of trust and confidence and that Mr Reynolds' actions amounted to a lack of judgment. Although Mr Ward adjourned for only five minutes before returning with his decision that he was going to dismiss Mr Reynolds, I accept his evidence that, if Mr Reynolds or Mr Maxwell had asked for an adjournment to consider the investigations findings in more detail or at greater length, Mr Ward would have allowed that. Therefore, I believe that Mr Reynolds was given the opportunity to comment on the provisional finding that there had been a breach of trust and confidence and a lack of good judgment on the part of Mr Reynolds.

Mr Reynolds' undertaking never to do it again was not given sufficient weight

[72] I address this issue under the heading of substantial justification, below.

Mr Reynolds was not given all relevant information prior to the decision to dismiss

[73] Mr McGinn is referring in particular to the failure by Mr Ward to advise Mr Reynolds of the contents of his conversations with Mr Sissons prior to his decision to dismiss and with the three line managers. Mr Sissons' evidence to the Authority was that he told Mr Ward that, immediately after the February 2011 earthquake, there had been flexibility around family members travelling with staff members for a duty shift but that it ended around four months afterwards. Mr Sissons said in evidence that he and Mr Ward had discussed that there had never been any authority to issue FOC tickets for personal use. The evidence of Mr Ward was that the three line managers could not think of any examples of FOC tickets being issued in relation to non-duty flights.

[74] Mr Ward admitted that he had not expressly passed this information on to Mr Reynolds. However, in light of the admission by Mr Reynolds which I have explored in detail above, and also in light of the fact that Mr Reynolds was not prepared to talk about other members of his team who had issued tickets in similar circumstances, I find that this failure by Mr Ward to pass on the information he had obtained did not prejudice Mr Reynolds in any way. Indeed, the effect of Mr Reynolds' admissions amounts to the same information as Mr Sissons and the three line managers gave Mr Ward. That is to say, around the earthquake period, there were lots of flights given to family members to accompany staff on duty shifts and that Mr Reynolds' issuing of FOC tickets to the casual staff member and her husband for what was a social trip fell outside of the rules.

[75] Clearly, if Mr Reynolds had not made admissions of this kind, Mr Ward's failure to pass on information to Mr Reynolds that he had obtained during his investigations could have constituted a significant flaw, leading to an unjustified dismissal.

Summary

[76] When examining all of these alleged procedural irregularities in detail, I cannot find that any of them amounted to a material prejudice to Mr Reynolds. Even if some of the defects referred to by Mr Reynolds were not *minor*, when taken together the admissions of Mr Reynolds detailed above obviated the need for the respondent to have gone further than it did in respect of these alleged defects.

Was the decision to dismiss Mr Reynolds substantially justified?

[77] It is also Mr Reynolds' case that Mr Ward failed to take into account his undertaking not to do such an act again when he decided to dismiss Mr Reynolds.

[78] Mr Cleary refers the Authority to the current wording of s.103A(2) and in particular the *Ports of Auckland v. Angus* [2011] NZEmpC 128 decision of the Employment Court. At para.[23], the Employment Court states:

The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in the circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified. So, to use the present tense of "would" and "could", it is no longer what a fair and reasonable employer would do in all the circumstances but what can be done.

[79] Mr Ward's evidence is that he did take into account the undertaking by Mr Reynolds never to do the act again, but that Mr Ward had doubts about the promise. He also says that he weighed up Mr Reynolds' good service record. Mr Ward said, however, that these features did not override the act that Mr Reynolds had carried out.

[80] It is certainly the case that a fair and reasonable employer could have decided that the appropriate action to take was to have issued Mr Reynolds with a final written warning and/or to have implemented some refresher training.

[81] Hardie Boys J in *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483 at 487 discussed the kind of conduct that will justify summary dismissal. He stated:

Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.

[82] In light of the fact that Mr Ward had found that the act of issuing the tickets to the casual crew member and her husband amounted to serious misconduct and that it resulted in him losing trust and confidence in Mr Reynolds' judgment, it is my view that the decision to dismiss also fell within the range of responses open to a fair and reasonable employer in all the circumstances. Whilst it might be said that the decision to dismiss fell at the harsh end of the spectrum of possible sanctions available to a fair and reasonable employer, I do not find that the decision to dismiss fell outside of the range of actions that a fair and reasonable employer could have made in all the circumstances.

Summary

[83] In light of my findings above, I dismiss Mr Reynolds' personal grievance claim.

Disadvantage claim

[84] In the alternative, Mr Reynolds brings a claim for unjustified disadvantage arising out of all of the procedural irregularities already examined above. However, it is my finding that the alleged irregularities did not cause any material disadvantage to Mr Reynolds for the reasons I have explored above. Accordingly, I dismiss this personal grievance as well.

Penalty claim

[85] Mr McGinn seeks on behalf of Mr Reynolds that a penalty be awarded in respect of the breach of s.4(1A) of the Act. Section 4(1A) of the Act expands on the duty of good faith referred to in s.4(1) of the Act and, at 4(1A)(c) states:

Without limiting para.(2), [the duty of good faith] requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of his or her employees to provide to the employees affected –

- (i) *Access to information, relevant to the continuation of the employees' employment, about the decision; and*
- (ii) *An opportunity to comment on the information to their employer before the decision is made.*

[86] Section 4A of the Act provides that a party to an employment relationship who fails to comply with the duty of good faith in s.4(1) is liable to a penalty if the failure was deliberate, serious and sustained; or the failure was intended to undermine an individual employment agreement or an employment relationship.

[87] For the reasons already stated above, it is not clear that the alleged failings by Mr Ward on behalf of the respondent amounted to a breach of good faith in any event. However, even if they did, I am satisfied that any such failure was not deliberate, serious and sustained and was not intended to undermine the individual employment agreement or the employment relationship between the parties. There is absolutely no evidence to support a contention that this was the case. Therefore, I reject the application to impose a penalty against the respondent.

Costs

[88] The parties are to seek to agree how costs are to be dealt with between them but, if within a period of 28 days from the date of this determination no such agreement has been reached, the respondent may seek a contribution to its costs by serving and lodging a memorandum of counsel and Mr Reynolds may respond to any such claim by way of a memorandum of counsel to be served and lodged within a further 14 days.

David Appleton

Member of the Employment Relations Authority