

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 274/09
5159196

BETWEEN DOREEN JANE SALTON
 Applicant

AND PACIFIC BLUE
 EMPLOYMENT & CREWING
 LTD
 Respondent

Member of Authority: James Wilson

Representatives: Lisa Keys for the applicant
 John Rooney for the respondent

Investigation Meeting: 28 & 29 May 2009

Submissions received: 9 & 17 June 2009 from the applicant
 8 June 2009 from the respondent

Determination: 12 August 2009

DETERMINATION OF THE AUTHORITY

Doreen Salton's employment problem

[1] Doreen Salton was employed as a flight attendant by Pacific Blue Employment and Crewing Ltd (Pacific Blue) for nearly 5 years. On 31 March 2009 Ms Salton was the Cabin Supervisor on the return flights from Auckland to Coolangatta. In the early hours of 1 April 2009 Ms Salton was due to fly as Cabin Supervisor on the return flight to Melbourne. Immediately prior to the flight Ms Salton was asked to attend a meeting with the Cabin Crew Development Manager Mr Dean Cullen. At that meeting Mr Cullen asked her a number of questions regarding the previous day's flights, including how many DigEplayers were given out during the flights and the accounting for the money collected. At the end of the meeting Mr Cullen handed her a letter stating:

Pacific Blue is currently investigating your conduct on 31 March 2009 on board DGO77 and DGO76. Information has been brought to our attention that indicates you may have misappropriated Company product and/or money.

As a result of the serious nature of the investigation and pursuant to clause 38 of your individual employment agreement, you are being suspended from duty on pay whilst Pacific Blue conduct an investigation into your conduct.

[2] Ms Salton's first alleged grievance is that her suspension was unjustified in that the decision to suspend her had been made prior to any meeting and before she had been given an opportunity to respond or comment on the need to suspend her.

[3] The letter of 1 April 2009 went on to advise Ms Salton that the company required her to attend a meeting on 3 April 2009 to formally discuss the details of the investigation and to present any allegations that may have arisen as a result of that investigation. The letter also advised Ms Salton that she would be entitled to bring a support person or representative to the meeting.

[4] The company representatives met with Ms Salton and her representatives on 3 April, 22 April, 23 April and 24 April 2009. At the meeting of 24 April the Company advised Ms Salton that, having taken into account her responses and length of service, they had reached the conclusion that all but one of the allegations against her were substantiated and that their preliminary view was that she should be dismissed.

[5] On 28 April 2009 the company wrote to Ms Salton formally advising her that she was summarily dismissed and:

The decision is made on the basis that your conduct in respect of (3 allegations out of 10) amounts to serious misconduct and other aspects of your conduct amount to misconduct. This conduct goes to the heart of the employee/employer relationship which we place great trust in. As a result of your actions this trust has been irreconcilably broken down.

[6] Ms Salton's second grievance is that, she says, her dismissal was unjustified. She seeks reinstatement to her position, wages lost since she was dismissed, compensation for the hurt and humiliation her suspension and dismissal have caused her and costs.

[7] Pacific Blue say that both Ms Salton's suspension and dismissal were justified and even if the Authority were to find that the dismissal was unjustified they oppose her reinstatement on the grounds that this would be impracticable.

The issues for determination

[8] Section 103A of the Employment Relations Act (the Act) requires that when the Authority is considering whether or not an employee has a personal grievance this *must be determined on an objective basis, by considering whether the employer's actions and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[9] The first issue for determination is whether or not Pacific Blue's actions in deciding to first suspend and then dismiss Ms Salton were what a fair and reasonable employer would have done. This assessment includes:

- a. Whether, prior to suspending her, Pacific Blue should have consulted with Ms Salton as to whether suspension was warranted.
- b. Whether or not Pacific Blue carried out a full and fair enquiry into the allegations against Ms Salton, including whether or not she was given a proper opportunity to rebut those allegations,
- c. Whether, having carried out their enquiries it was reasonable for Pacific Blue to conclude that Ms Salton was guilty of serious misconduct and
- d. whether dismissal was the appropriate sanction in all the circumstances.

In other words, as the Employment Court said in *Air New Zealand vs. V.* (Unreported, AC15/09 3 June 2009), section 103A *requires the Authority or the Court to objectively review all of the actions of the employer up to and including the decision to dismiss.*

[10] Should I determine that Ms Salton's dismissal was unjustified, the second issue for determination is what remedies if any she may be entitled to including whether or not she should be reinstated, what compensation for hurt and humiliation she should receive and what wages if any she is entitled to receive by way of reimbursement.

The events leading to Ms Salton's dismissal

[11] Following the crew briefing on 31 March 2009 Ms Salton and other members of the cabin crew proceeded through security and customs prior to boarding the aircraft. One of the cabin crew members, Mr D, had an altercation with a customs officer. Ms Salton intervened and subsequently advised Mr D, in front of the other cabin crew members, that his behaviour towards the customs officer was entirely inappropriate. It is this incident that Ms Salton believes led to Mr D making a formal complaint regarding her actions on the subsequent flights and ultimately to her dismissal.

[12] After returning to Auckland, Mr D e-mailed Mr Ian Bishop (Cabin Crew Manager) and Mr Dean Cullen (Cabin Crew Development Manager) saying that he wished to bring to their attention some behaviours he observed by Ms Salton during the flights that day. Mr D said that during the flight he observed what he describes as an *unusual* procedure in the handing out of digEplayers. He said because of what he had observed he questioned a number of passengers regarding whether or not they had received a digEplayer and whether or not they had received a receipt for the purchase. The responses he received suggested that seven passengers received digEplayers but did not receive receipts. In his e-mail Mr D said:

A total of eight digEplayers were in use, and I asked the other two crew to double check and count that this was correct, and they confirmed yes it is. I am however concerned that this may not be reflected on the "global summary" print off of the sales for this flight.

In his e-mail Mr D also suggests that Ms Salton *opened and consumed some of the contents from the leftover hot breakfast meals and advised we can also eat them if we want to and throw the rubbish in the bin.* He says that Ms Salton *told us we could*

have something perishable from the catering instead (of the crew meals). Mr D concludes:

I am bringing this to your attention because I really feel both of the above mentioned examples of behaviour contradict (in my opinion) the procedures put in place for cabin crew and cabin supervisors to follow, and it has raised questions in my mind about this cabin supervisor's integrity, and that under the code of conduct of our company that it is my job to report to you as my managers if I observe other team members are not behaving in accordance with the code of conduct.

[13] When he received Mr D's e-mail Mr Bishop discussed its contents with Mr Beau Scott (Specialist People Adviser) and Mr Cullen. He requested Mr Cullen to collect and collate the paperwork associated with the relevant flights and he personally interviewed Mr D and other cabin crew members on the flight with Ms Salton. Following these initial interviews and after reviewing the paperwork Mr Bishop arranged for Mr Cullen to speak with Ms Salton. Mr Bishop says that he advised Mr Cullen that he should *prepare for possible suspension depending on the responses received by Ms Salton (as she may be able to provide mitigating reasons in response to the allegations made by Mr D.)* As outlined above Mr Cullen met with Ms Salton in the early hours of 1 April and after an initial discussion suspended her from duty and invited her to attend a further meeting on 3 April 2009.

[14] On 3 April 2009 Mr Bishop, Mr Scott and Mr Cullen met with Ms Salton and her representatives. At that meeting the company went through the allegations made against Ms Salton and handed Ms Sultan and her representatives a letter outlining those allegations in detail. The company also went through the evidence that they had gathered and gave Ms Salton a copy of the various interview notes and other evidence. The company's letter again outlined the allegations made and set out 10 points to which they requested Ms Salton respond in writing:

- 1. On DJO77 and DJO76 you conducted the digEplayer service on your own with one service cart and delegated the regular (customer service) tasks to other crew members.*
- 2. On DG077, you sold more than one digEplayer and accepted cash payment for those without processing sales in the OBT;*

3. *There was not an "over bank" for an amount corresponding to the additional money taken on board during the digEplayer service;*
4. *You failed to follow correct banking procedures, specifically highlighting any discrepancies on the IRRF and entering "cash banked total" into the OBT.*
5. *You complimented a digEplayer to an (unaccompanied minor) without checking the paperwork as to whether there was parental consent;*
6. *You complimented a sandwich to a guest as "virgin flair" without justification on IRRF;*
7. *The digEplayer for the (unaccompanied minor) was complimented without justification and without being processed and recorded in the OBT;*
8. *You unilaterally decided that the crew meals loaded were insufficient and inappropriate and encouraged crew to select an item from the "saleable product" and you then complimented these items in the OBT as "crew consumed";*
9. *You refused payment for an item off the service cart from a team member attempting to follow due process;*
10. *You consumed and encouraged other crew members to consume items from the leftover hot breakfasts for guests.*

These matters are treated seriously by Pacific Blue and it is alleged that the behaviour you are engaged in on this flight amounts to misappropriation of company property and money that belongs to Pacific Blue and third parties.....

[15] On 22 April 2009 the company's representatives held a lengthy meeting with Ms Salton and her representatives. During this meeting Ms Salton was asked to respond to each of the 10 allegations. In his evidence Mr Bishop says that Ms Salton admitted a number of the allegations including:

- a. Conducting the digEplayer service on her own.
- b. That she had not entered any discrepancies in banking on the IRRF.
- c. That she did not enter the "cash banked total" into the OBT.
- d. That she complimented a sandwich to a guest as "virgin flair", and that she had not recorded it on the IRRF.

- e. She did not sign off on a receipt for digEplayer complimented to the (unaccompanied minor) (despite the fact that she had gone through the correct process with staff prior to the flight).
- f. That she had decided that the crew meals were not adequate, that she had authorised crew to take items from the saleable product, and that she had then complimented these items in the OBT using the "crew consumed" function.
- g. That she had refused payment from (a cabin crew member) for an item of saleable product (a blueberry muffin).
- h. That she had authorised the caterers to leave the leftover hot breakfasts on board for crew to pick at, and that she had consumed items from the breakfasts.

Also according to Mr Bishop's evidence, during the meeting Ms Salton was unable to explain why there appeared to have been 8 digEplayers handed out during the flight but that the money received was not properly accounted for

[16] At the end of the meeting the company advised Ms Salton that they would arrange another meeting at which their decision would be conveyed to her.

[17] The 24 April 2009 the company's representatives again met with Ms Salton and her representatives. At this meeting the company advised Ms Salton that they considered a number of the allegations were substantiated and in particular that:

- a. As a result of our determination of the previous allegation there is a minimum of \$40.00 and up to \$120.00 that has not been banked. It is our determination that this money has more than likely been misappropriated.*

They advised Ms Salton that, having taken into account her responses, closing statements, length of service and number of flights it was their preliminary view that the appropriate sanction for her actions was summary dismissal. However they also said that they wished to provide her with a final opportunity to make additional comment before they reached a final decision. Following further discussion the meeting adjourned to allow the Company representatives to consider their final

decision. Following the adjournment they advised Ms Salton that she was to be summarily dismissed. This decision was confirmed in writing on 28 April 2009.

Discussion

Was Ms Salton's suspension justified?

[18] In *Graham v Airways Corporation of New Zealand Limited* [2005] 1 ERNZ 587, the Employment Court said:

[104] Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. There is no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so. The passage from Tawhiwhirangi set out at paragraph 90 of this judgement confirms the case by case, flexible and sensible approach to these infinitely variable cases. Imminent danger to the employee or others and an inability to perform safety sensitive work are two examples of circumstances in which it might be held to be inappropriate to delay an intended suspension to give the employee an opportunity to be heard about that intention. Ultimately the test in each case must be the fairness and reasonableness of the employer's conduct. In many cases that will call for advice and discussion before determining whether to suspend; in others, it may not.

[19] Ms Sultan's individual employment agreement provides, under the heading "suspension":

Where Pacific Blue considers it necessary for the protection of its operational and business interests, it may require you to undertake reduced or alternative duties consistent with your abilities or remain away from work, on pay (salary only and without payment of any additional loadings, allowances or other payments), while it conducts an investigation into your conduct as an employee, or your performance....

[20] Despite Mr Cullen's assertion that he had prepared the letter of suspension but that it may not be given to Ms Salton depending on her answers, there appears little doubt that the decision to suspend had been made prior to the discussion with Ms Salton taking place. The Company says that it believed that it had no option but to suspend Ms Salton because they could not run the risk of her continuing to carry out her duties while the allegations were being investigated. However I do not accept that the decision to suspend had to be made so precipitately. I am not persuaded that there was any major "risk" to other staff or the company had Ms Salton continued her normal duties for a day or so. Even if the Company did not wish to incur the risk of Ms Salton's undertaking her normal duties it would have been a simple matter for them to suggest that she stand down from flying duties for that day to enable her to seek advice and support and to respond on the narrow issue of whether or not suspension was appropriate. That, I find, is what *fair and reasonable employer would have done in all the circumstances*. **Pacific Blue's actions in suspending Ms Salton without giving her a proper opportunity to be heard on the question, was unjustified and she has a personal grievance in this regard.**

Was Ms Salton's dismissal justified?

[21] Ms Salton says that Mr D's motivation in making the allegations against her was in some way to punish her for admonishing him in front of his work colleagues regarding the incident with the customs officer. However Mr D's motivations are not at issue in this matter. Pacific Blue received written allegations regarding serious misconduct; they were obliged to carry out a proper investigation into those allegations and did so.

[22] As soon as practical after they were brought to its attention Pacific Blue advised Ms Salton of the allegations being made against her and the likely consequences should those allegations be sustained. Over the course of several weeks they gave her ample opportunity to respond to those allegations. They made available to her and her representatives copies of interview notes from the various people from whom they had gleaned information including from the original whistleblower. They considered her responses and reached the conclusion, based on the evidence they had, that on the balance of probabilities it was likely that the allegations were sustained and that Ms Salton's actions, in respect to a number of those allegations, amounted to serious misconduct. Having made a preliminary decision that dismissal was the

appropriate sanction they gave Ms Salton a further opportunity to put forward arguments in mitigation. It was only after considering these submissions that they made the final decision to dismiss her.

[23] I have reviewed the process Pacific Blue followed and the evidence they had in front of them. I have come to the conclusion that both the process followed and the the decision to dismiss Ms Salton *were what a fair reasonable employer would have done in all the circumstances*. **Ms Salton's dismissal was justified and she has no personal grievance in this regard.**

Determination

[24] By way of summary of the findings set out above I have found that:

- a. **Ms Salton she has a personal grievance against Pacific Blue in that suspension, without proper opportunity for advice and discussion, was unjustified.**
- b. **Ms Salton's dismissal was justified.**

Remedies

[25] I have found that Ms Salton's dismissal was justified. She is not therefore entitled to any remedies in that regard. However I have also found that her suspension was unjustified and it is therefore necessary to consider what if any remedies she is entitled to receive for that unjustified action on the part of her employer. During her suspension Ms Salton continued to receive her basic contractual entitlements and has therefore suffered no financial loss as a result. However she says, and I accept, that the suspension caused her unnecessary humiliation and embarrassment and for that she is entitled compensation. Had Pacific Blue provided her with the opportunity to seek advice and input into its decision it is very likely that Ms Salton would still have been suspended, albeit some day or so later. This time delay may, however, have given the parties an opportunity to discuss appropriate measures to mitigate the level of embarrassment. Taking into account all of the circumstances I assess the level of hurt and humiliation caused to Ms Salton by her unjustified dismissal to be relatively low. Nevertheless she is entitled to receive

some compensation for that harm. **In terms of section 123(1)(c)(i) of the Act, Pacific Blue is to pay Ms Salton \$1500, without deduction.**

Contribution

[26] In terms of section 124 of the Act I have determined that Ms Salton did not contribute to the circumstances which gave rise to her personal grievance i.e. her unjustified suspension.

Costs

[27] Costs are reserved and the parties are urged to attempt to settle this issue between themselves in the first instance. If they are unable to do so, if either party seeks costs they should file and serve a submission within 28 days of the date of this determination. The other party will then have 14 days in which to file and serve a response. I will not consider a request for costs outside of this timeframe except with leave.

James Wilson

Member of the Employment Relations Authority