

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 107
5291260

**See paragraph (2) names
prohibited from
publication**

BETWEEN	ANDREW STANDISH Applicant
AND	CIVIL AVIATION AUTHORITY OF NEW ZEALAND Respondent

Member of Authority:	P R Stapp
Representatives:	Graeme Gowland, Counsel for the Applicant Geoff Davenport, Counsel for the Respondent
Investigation Meeting:	2 March 2011 at Wellington
Submissions by:	6 April 2011
Determination:	17 June 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem arises from a claim made by Mr Standish that he was unjustifiably disadvantaged when the Civil Aviation Authority of New Zealand (CAA) unilaterally and without consultation prohibited him from performing his full range of duties. This related to the CAA deciding that he was not allowed to be involved in a mediation concerning an employment relationship problem involving a senior manager and an employee of that manager (the employee employment relationship problem mediation).

[2] The CAA's decision was made when there was a complaint from a Union representing an employee who was supervised by the senior manager with whom Mr

Standish was allegedly having a relationship. The names of the employee and the senior manager have been prohibited from publication because they are not directly involved in the employment relationship problem lodged by Mr Standish and to protect their privacy.

[3] Mr Standish has claimed that when CAA raised with him the rumour of the relationship he allegedly was having with the senior manager, it placed him in a difficult position. Mr Standish believed this was exacerbated by CAA's request for him to be involved in assisting with the employment relationship problem between the senior manager and another employee. Mr Standish became further concerned about his role because there were rumours circulating around CAA about the alleged relationship.

[4] Although CAA considered that there was no conflict of interest involved in the employment relationship problem involving the senior manager and other employee, a question was asked of Mr Standish if there was more than a personal relationship with the senior manager. Mr Standish refused to answer the question. The senior manager was also asked if she had a personal relationship with Mr Standish, but she too refused to disclose any personal information. Both of them say that they did confirm that they had a close personal friendship. CAA denied that it was informed of that at the time.

[5] CAA then asked Mr Standish if he had a personal relationship with the senior manager in a wider context of any conflict of interest in his work. He took exception to this. CAA believed it had the right to pursue this in managing any potential conflict of interest. Mr Standish raised a number of concerns and claimed that the CAA did not have trust and confidence in him.

[6] On 15 January 2010 Mr Standish resigned his employment from CAA. He claimed that CAA has breached and repudiated the terms and conditions of his employment, constituting an unjustified constructive dismissal.

Issues

[7] The issues in this matter are:

- (1) Was CAA entitled to remove Mr Standish from his role in assisting in mediation on an employment relationship problem between two employees?
- (2) Was CAA entitled to request Mr Standish to provide information on an alleged relationship between him and the senior manager?
- (3) What did Mr Standish and the senior manager tell CAA when they were asked for information about the rumours of their relationship?
- (4) Did Mr Standish and the senior manager tell CAA that they had a close personal relationship at the time?
- (5) Did the CAA repudiate Mr Standish's terms and conditions of employment, thus to cause him to resign (did this constitute a constructive dismissal)?

The facts

[8] Mr Standish had an individual employment agreement with CAA. He was employed as the Manager Human Resources and Support Services (MHRSS).

[9] On 24 November 2009 a union raised an issue about Mr Standish and a personal relationship he allegedly had with a senior manager at CAA, because the member it was representing was managed by that manager. The union asked CAA not to permit Mr Standish to attend mediation on an employment relationship problem. The complaint was later withdrawn. It was accepted by CAA that the mediation should go ahead with the senior manager. Also it was confirmed that there was no conflict of interest at least involving the senior manager.

[10] In early December 2009 CAA's CEO/Director heard the rumour for the first time that Mr Standish could be involved in a personal relationship with a senior

manager. The CEO/Director raised this with Mr Bowron, general manager business support, and said that he had a concern that if the rumour was true it could give rise to a potential conflict of interest if Mr Standish had to have any human resource dealings that could affect the senior manager's relationship with employees. The CEO/Director asked Mr Bowron to make further inquiries of Mr Standish.

[11] On 7 December 2009 Mr Bowron met with Mr Standish. Mr Bowron asked him if he was in a personal relationship with the senior manager. Mr Standish responded by requesting proof of that relationship and declined to either confirm or deny whether he was in a personal relationship.

[12] On 8 December 2009 there was a further meeting and Mr Bowron advised Mr Standish that he was not happy with his answer and asked him again whether he could confirm whether he was in a personal relationship with the senior manager. Mr Bowron explained why this was potentially important given Mr Standish's role as Manager Human Resources and Support Services. Mr Standish denied that the wider issue involved here was raised at this time.

[13] On 10 December 2009 Mr Standish wrote to the CEO/Director and requested various written confirmations from CAA in regard to his integrity, professional standing and trust and confidence (four demands). The CEO/Director wrote back noting that Mr Standish had not provided the information that he had requested and that the issue was a concern to the organisation. Importantly, the CEO/Director informed Mr Standish that he was not in possession of the full information to be able to give the commitments that Mr Standish was looking for.

[14] The CAA then sought to discuss the issues further to try and get some agreement, and to do this, suggested they have a meeting.

[15] On 17 December 2009 the CEO/Director wrote to the General Manager reiterating what the broader issue was and the potential effect of that on Mr Standish giving advice and assistance on matters that could affect the senior manager's employment or performance and the relationship with other employees.

[16] On 17 December 2009 Mr Standish advised CAA that he wished to have a mediation (Mr Standish's mediation) provided by the Department of Labour as the most appropriate way forward. The CAA agreed to attend mediation.

[17] On 21 December 2009 Mr Bowron wrote to Mr Standish. Mr Standish says this was the first time that the broader issue in regard to the conflict of interest was raised. Mr Bowron says that that is not correct and that the issue was raised during the meetings on 7 and 8 December 2009.

[18] On 23 December 2009 there was mediation with the Department of Labour in regard to Mr Standish's employment issues.

[19] In the week of 7 January 2010 emails were exchanged about a response following Mr Standish's mediation. It was CAA's wish that the matter would not be escalated and it hoped that the issues could be resolved.

[20] On 8 January 2010 Mr Standish wrote an email referring to his escalation of the issues to the CEO/Director.

[21] In the week of 11 January 2010 Mr Bowron endeavoured to delegate various duties to Mr Standish to perform while he was absent on annual leave through until the beginning of February. Mr Standish decided to decline the delegations, and has subsequently referred to the attempt to delegate those duties as *insincere*.

[22] On 12 January 2010 Mr Bowron wrote to Mr Standish stating:

In your email to me last Friday you raised the question of whether CAA has trust and confidence in you as its Manager Human Resources and Support Services. I can state categorically on behalf of CAA that it does ... In conclusion, I look forward to our continuing positive and professional working relationship, and to working with you to best meet the challenges ahead.

[23] Despite the content of that letter, Mr Standish informed Mr Bowron that it was his belief the CAA did not have any trust and confidence in him. In this regard, on 13 January 2010 Mr Bowron further wrote to Mr Standish stating:

You mentioned in the meeting that your (sic) felt, despite the contents of my last letter, that the CAA does not have trust and confidence in you. That is not correct ... What I ask, however, is that you do not seek to escalate the issues beyond that of a dispute. For example, your referring to CAA not having trust and confidence in you is not correct, and does not help to try and work through a solution.

[24] Mr Bowron expressly stated that it was his wish that the parties would keep discussing the issue to try and resolve the dispute *expeditiously*. Mr Bowron then went on annual leave.

[25] On 15 January 2010 Mr Standish resigned his employment with CAA in writing.

[26] Mr Bowron, upon returning from annual leave, responded to various assertions made by Mr Standish in his letter of resignation, including that CAA has acted in a *deliberate and calculated manner*. Mr Bowron expressed that the CAA was surprised by Mr Standish's decision to resign and stated:

CAA is very surprised by your decision, given the matters referred to above, including the processes available for working through a dispute via the Employment Relations Authority. The option of having the dispute determined in that matter, and in good faith, is one that would still be open to ... If, in the alternative, you are agreeable to continuing in your employment on the basis that our current dispute is progressed in good faith by both parties to the [ERA] for resolution, please let me know as soon as possible this week.

[27] Mr Standish rejected the option of continuing his employment and confirmed that his last day would be 15 February 2010.

[28] Following his last day of employment with CAA, Mr Standish commenced a new job. Subsequently he departed overseas on a family holiday.

[29] A personal grievance was raised on 24 February 2010.

Determination

[30] This has become a matter of great principle to both parties and in particular Mr Standish about his right to protect his privacy. Unfortunately for Mr Standish there is an impact on his privacy, which is affected by the employer's right to avoid any potential conflict of interest arising from his role in CAA. First, this is underpinned by the employment agreement. Although there is a responsibility placed on an employee under that agreement to appropriately disclose any conflict, the employer still has the right to deal with potential conflicts by reasonably raising them as issues. Second, the potential conflict came to light in the circumstances of the union complaint, and employee employment relationship mediation. The escalation of the

potential conflict occurred when rumours abounded of a relationship between Mr Standish and a senior manager that came to the notice of the CEO/Director.

[31] On the employee employment relationship mediation the CAA was entitled to decide not to allow Mr Standish to attend. This was a decision a fair and reasonable employer would make considering the decision was made on genuine grounds. A complaint had been made. There was nothing prescriptive in Mr Standish's employment agreement that required him to attend that mediation. Also, there were rumours in the work place about the relationship that also supports this conclusion. CAA based its decision on concerns about any perceptions that might arise. Therefore I am satisfied that the decision was made on operational grounds for the senior manager to deal with the matter without Mr Standish's attendance. In any event I hold that there was no disadvantage to Mr Standish in his employment, or his terms and conditions of employment, which stayed the same.

[32] Turning to the wider issue of the conflict of interest in Mr Standish's employment nothing in the employment agreement prevented the employer from ensuring there was no potential conflict of interest; and an employer acting reasonably is not prevented from safeguarding its interests. Therefore Mr Standish's right to privacy is affected by the right of the employer to ensure there is no possibility of a conflict of interest in running its business. The rumours related to Mr Standish's alleged relationship with a senior manager in the employment setting. It was entirely reasonable for the employer to raise this with Mr Standish, given that a complaint had been made. The employer would have a direct interest in such a matter when one of its senior advisor's (Mr Standish) and another senior manager were the subject of rumours and a complaint based on an alleged relationship, where other employees could have concerns. The CAA reasonably believed that the alleged relationship had the potential to cause a conflict, given Mr Standish's role (senior HR manager) and that the senior manager was responsible for employees potentially seeking advice from Mr Standish, and the perceptions the employees might gain having also to deal with him. In addition Mr Standish had an obligation to be open and communicative with his employer under s 4 of the Employment Relations Act. Good faith cuts both ways. Thus, the CAA was entitled to ask him about the allegations, and he should have responded with an answer, because of the potential for a conflict of interest as described above. Given Mr Standish's obligation to be communicative and responsive this meant that if he had provided more information then the situation

could have been managed better, especially considering Mr Standish's own feelings and concerns about what he thought other people were thinking (although he produced no evidence to support any disadvantage on this).

[33] I hold that in any event any breach is not sufficiently serious enough to make it foreseeable that Mr Standish would resign in regard to the grounds he has relied upon. I hold that the issues of the broader nature of the possible conflict of interest based on rumours were raised with Mr Standish. He held the most senior HR role at CAA. Thus the knowledge of the alleged personal relationship between him and the senior manager meant that the creation of perception amongst other employees about the relationship was an important issue for the CAA.

[34] Also, I hold that it would have come as a surprise to the CAA that Mr Standish decided to resign. This is because:

- a. The matters between both parties related to a dispute capable of being resolved through the dispute resolution procedures under the employment agreement.
- b. The CEO/Director did not state that there has been a loss of trust and confidence in Mr Standish. CAA envisaged that Mr Standish would respond. The CAA was still seeking information about the allegations and rumours.
- c. Mr Standish was making demands on wider issues for resolution than just the employee relationship problem mediation (letter 10 December).
- d. Mr Standish did not reply further to the CEO/Director's letter date 14 December 2010 to advise him of any of his own concerns and his interpretation of the CEO/Director's position in the letter.
- e. CAA's issue was not about trust and confidence, but moreover to do with the perception of a conflict of interest. CAA confirmed it did have trust and confidence in Mr Standish. In that regard CAA was being very careful given that Mr Standish had escalated the matter. CAA reiterated its position.
- f. It was not until after Mr Standish had left the CAA that he raised a personal grievance regarding his concerns on 24 February 2010.

- g. I hold the themes of the parties' letters were not sufficient to make it foreseeable Mr Standish would resign. This is because the clear issue was that there was a dispute about the conflict of interest and whether or not Mr Standish had an obligation to provide information.

[35] I also hold (for completeness) that the CAA's decision for Mr Standish not to attend the employment relationship mediation (involving the senior manager and one of her subordinates and the union complaint) could not be his reason for resigning because:

- a. The time lapse involved between that issue and Mr Standish's resignation and the other wider matters that had been raised.
- b. Mr Standish confirmed at the Authority's investigation meeting that his reason for resigning was *...the Director's refusal to resile from the position that he did not have trust and confidence [in Mr Standish]*.
- c. Mr Standish's four demands (10 December 2009), three of which had nothing to do with the mediation. CAA needed more information to be able to give the commitments that Mr Standish was looking for at that time. CAA was entitled to take that point of view because of the wider issues being made by him, and even if they did relate to the decision on the employment relationship problem mediation.
- d. Any risk assessment on a potential conflict of interest affecting the CAA required input from Mr Standish and that was incomplete, given his refusal to provide the information requested. I accept that the CEO/Director was best managing operational risks pending further enquiries of Mr Standish and that is supported by the letter from the COE/Director dated 14 December 2010.
- e. There were genuine reasons for the decision that Mr Standish was requested not to attend the employee relationship problem mediation. I agree that was an operational issue.
- f. The CAA wanted to continue dialogue and discussion to maintain the employment relationship with Mr Standish. This was put in writing. Mr Standish disengaged when he resigned.

- g. The CAA did not know at the time that Mr Standish and the senior manager had a close personal relationship. This information came out later and has been referred to by them both during the Authority's investigation. At the time they both refused to provide direct answers to the CAA enquiries.

[36] This is an unusual situation in as much as Mr Standish has created much of the issues because of his own perception of the matter, when his employer was trying to establish the potential for any conflict of interest and thereafter manage that. It is noteworthy that the issues between the parties had nothing to do with any disciplinary action, but rather involved a genuine dispute over their rights and obligations to each other.

[37] Mr Standish's claims are therefore dismissed.

[38] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority