

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 494
5411171

BETWEEN MATAIASI TUIOTI
Applicant

A N D AIR NEW ZEALAND
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Anne-Marie McNally, Counsel for Applicant
David France, Counsel for Respondent

Investigation Meeting: 16 October 2013 at Auckland

Submissions Received: 16 October from Applicant
16 October from Respondent

Date of Determination: 01 November 2013

DETERMINATION OF THE AUTHORITY

- A. The applicant, Mr Mataiasi Tuioti did not have one or more conditions of his employment affected to his disadvantage by some unjustifiable action by the respondent, Air New Zealand Limited (Air NZ).**
- B. Costs are reserved.**

Employment relationship problem

[1] Air NZ owns and operates a gas turbines business which specialises in the overhaul and repair of marine and industrial engines for customers throughout New Zealand and internationally.

[2] Mr Mataiasi Tuioti started his employment at Air NZ in 2002 as an apprentice in the gas turbines team (Gas Turbines). Since completing his apprenticeship, Mr Tuioti has been employed as a technician in Gas Turbines.

[3] In February 2012, Air NZ consulted with members of Gas Turbines and staff in other areas of its business about ways in which to cut costs. At a meeting on 24 February, staff in Gas Turbines were informed of the proposed positions to be disestablished as part of the cost cutting. Mr Tuioti was concerned about the proposed redundancies. Mr Tuioti believed if his manager, Mr John Callesen, addressed the turn around times within Gas Turbines and increased repeat business, significant improvements could be made and jobs saved. Mr Tuioti says he raised these issues at management meetings but Mr Callesen did not listen to him.

[4] In March and May, Mr Tuioti attempted to meet Mr Callesen to discuss his ideas for improving the Gas Turbines business and saving jobs. Mr Tuioti was asked to put his ideas in an email to Mr Callesen. Mr Tuioti prepared an email and while doing so formed the view that Mr Callesen's leadership was largely to blame for the situation in Gas Turbines and for what he believed to be an unnecessary loss of the jobs of loyal and long serving Air NZ employees.

[5] On 28 May, Mr Tuioti sent an email, the distribution list of which included members of Gas Turbines and senior executives of Air NZ including the then CEO, Mr Rob Fyfe. Mr Callesen was copied in on the email. The email was highly critical of Mr Callesen's leadership of Gas Turbines and sought his resignation.

[6] Members of Gas Turbines did not actually receive the email but senior executives of Air NZ did, one of whom was Mr Trevor Hughes, GM Commercial and Business Development who was concerned by the email and sought an investigation. An investigation was carried out by Air NZ which concluded that the contents of the email were highly inappropriate and that Mr Tuioti's actions in sending it amounted to serious misconduct in all the circumstances. Mr Tuioti was issued with a final written warning.

[7] Mr Tuioti says the issuing of the final written warning by Air NZ was unjustified and was not the action of a fair and reasonable employer in all the circumstances at the time.

[8] Air NZ denies the disciplinary action was unjustified and says it was action a fair and reasonable employer could take in all the circumstances. Air NZ says that even if the Authority finds the warning to be unjustified, any award of compensation should be modest. Further, Air NZ says Mr Tuioti's contribution to the situation that led to the final written warning was significant and any assessment of damages by the Authority should be reduced by 100%.

Issues

[9] The Authority must determine the following issues:

- (a) Was the issuing of a final written warning to Mr Tuioti by Air NZ action which has affected Mr Tuioti's employment to his disadvantage and was such action unjustified?
- (b) If the action in issuing a final written warning was unjustified, what remedies (if any) should be awarded?
- (c) If remedies are awarded, should there be a reduction on the grounds of Mr Tuioti's contribution (if any) and by what extent?

First Issue

Was the issuing of a final written warning to Mr Tuioti by Air NZ action which has affected Mr Tuioti's employment to his disadvantage and was such action unjustified?

[10] Air NZ accepts that the issuing of a final written warning has the potential to disadvantage an employee. However, Air NZ claims the issuing of a final written warning to Mr Tuioti in the circumstances was not unjustified.

[11] Justification is to be determined in accordance with the test in s.103A of the Employment Relations Act 2000 ("the Act"). This test requires the Authority to assess Air NZ's "*actions and how it acted*" to determine whether the decision to issue Mr Tuioti with a final written warning and the process it followed were "*what a fair and reasonable employer could have done in all of the circumstances at the time the...action occurred.*"¹

¹ Section 103A of the Act

[12] Shortly after Mr Fyfe's appointment as CEO of Air NZ in 2008, staff were offered the opportunity to attend a two day self development course called *Realise Your Potential*². The programme was described by Mr Fyfe in his memo to staff as follows:

The emphasis of the programme is to provide people with a personal development experience that will energise and engage them and enable them to unleash their personal potential.

[13] Mr Tuioti attended the course and was inspired by it. The course was a defining point for Mr Tuioti and together with his own experiences in learning as a member of the Church of Jesus Christ of Latter Day Saints changed his approach to life. Mr Tuioti felt he should "*step up*" and "*make a positive difference*" in his own life and work place and not be a "*silent follower, waiting for other people to take the lead*". Mr Tuioti says when he sent the email on 28 May 2012 which led to the final written warning, the subject of this determination, he was taking positive action to save jobs at Gas Turbines.

[14] Mr Tuioti became more proactive at work about matters he considered to be "*business concerns*". In May 2011, Mr Tuioti emailed all members of Gas Turbines about concerns he had with work flow and allocation and again in July 2011 over carparking issues.

[15] In relation to the workflow issue Mr Tuioti and his immediate supervisor, Mr Kevin Hawke met and discussed the issues raised. In an email to Mr Tuioti following the meeting, Mr Hawke wrote³:

I am open to hearing any ideas for continuous improvement, however I would encourage you to share any suggestions with your supervisors in the first instance...If they see some validity in the idea, I'm sure they will put what they can into practice or discuss it with me first. I suggest to you that ideas need to be put forward in a logical way that outlines the benefits of making any changes to processes.

[16] On 1 July 2011, Mr Alan Clarke, Business Development Manager, in response to an email to all staff at Gas Turbines from Mr Tuioti about carparking issues, informed Mr Tuioti his email was not an appropriate use of company communications and requested no further emails be sent to staff on the matter. Mr Clarke further

² Email from Air NZ Internal Communications 6 March 2008 subject Message from Rob Fyfe: Realise Your Potential

³ Email from K Hawke to M Tuioti dated 16 May 2011 12.51pm

stated ⁴: “... if anybody has a personal dispute, please use the official channels for dispute resolution via immediate supervisors in the first instance ...”.

[17] Minutes taken by Mr Hawke, of a meeting with Mr Tuioti on 11 July regarding his use of Air NZ’s email system to raise issues about carparking recorded:

Use of Company Email

I want to make it clear that the company email system is not to be used to air your views or grievances. This is not an appropriate use of the company email system. The method used causes staff to be disrupted and may have led to unproductive activity. The process that needs to be followed is to raise the issue with your supervisor in the first instance, if you then feel you have no success, go to the next level of supervisor.

Mata replied he has no issue with this ...

[18] In February 2012, Air NZ began a consultation process with staff in Gas Turbines about reducing costs. The outcome was that a number of positions within Gas Turbines were disestablished. A close workmate of Mr Tuioti who had been with Air NZ for 39 years was affected, his role disestablished and he was subsequently made redundant. Mr Tuioti was outspoken at management meetings about his views that redundancies could be avoided if turnaround times and repeat business within Gas Turbines were addressed. Mr Tuioti was not impressed with Mr Callesen’s understanding of the issues and felt his input was being ignored.

[19] Mr Tuioti did not provide feedback or actively participate in the consultation process that Air NZ commenced in February. Instead, Mr Tuioti sought one on one meetings with Mr Callesen to discuss the proposed cost cutting and his thoughts about improving the Gas Turbines business.

[20] In March 2012, two meetings between Mr Tuioti and Mr Callesen were scheduled. However, Mr Tuioti was not able to attend either meeting and failed to inform Mr Callesen on either occasion that he was unable to attend.

[21] On 23 May 2012, at the time redundancies were taking place in Gas Turbines, including the redundancy of Mr Tuioti’s close workmate, Mr Tuioti emailed the PA/Administration officer, Ms Shelley McSwiney for the purpose of meeting with Mr Callesen “... for about half an hour ... to discuss ... some key pointer and indicators to help turn this business around ...”. Mr Hawke became aware of

⁴ Email Clark, Alan to Tuioti, Mata; Gas Turbines Staff dated 1 July 2011 7.56am

Mr Tuioti's request to meet Mr Callesen and asked Mr Tuioti to put the ideas he wished to discuss to Mr Callesen in an email. Mr Tuioti was not happy about putting his thoughts in an email because he wanted to speak with Mr Callesen personally about the matter. Mr Tuioti spoke to Ms McSwiney on 24 May and asked for a meeting with Mr Callesen. Ms McSwiney asked Mr Tuioti to bullet point his concerns in an email to Mr Callesen. Mr Tuioti did not do so.

[22] At the farewell of Mr Tuioti's close workmate on 25 May, Mr Tuioti approached Mr Callesen and asked to discuss his ideas. Mr Callesen asked him to put his ideas in to an email.

[23] Mr Tuioti prepared the email which was subsequently sent out on 28 May. Mr Tuioti did not bullet point his concerns, he wrote a 4 page email about the situation as he saw it in Gas Turbines.

[24] When Mr Tuioti sat down to write the email he decided Mr Callesen was not interested in hearing his thoughts and suggestions. Mr Tuioti said it became clear to him that Mr Callesen as the manager needed to be accountable for the situation in Gas Turbines. Mr Tuioti, "*a passionate follower of rugby*" likened Mr Callesen's role to that of a sports coach and formed the view that if the team was not performing the coach/manager should step aside. These were the views expressed by Mr Tuioti in his email of 28 May.

[25] Mr Tuioti said he felt he was being ignored and so decided to elevate the issue to Mr Callesen's superiors, as he said he had been told to do by Mr Hawke following the car parking issue in July 2011. On 28 May 2012 at 12.37pm Mr Tuioti requested Ms McSwiney to send him the email addresses of all of those above Mr Callesen responsible for Gas Turbines "*right up to and including Rob Fyfe our CEO*". Mr Tuioti did not receive a response and at 3.24pm the same day, sent the email of 28 May to all members of Gas Turbines and to Mr Trevor Hughes, Ms Vanessa Stoddard, Human Resources, and Mr Rob Fyfe. Mr Callesen was copied in on the email.

[26] Mr Tuioti did not speak to or send the email to Mr Callesen's manager. Mr Tuioti did not consider speaking with a representative from the EPMU or from Air NZ's Human Resources Department regarding his concerns about Mr Callesen's leadership before sending the email.

[27] Despite recent discussions with Mr Callesen about having a meeting to discuss “*key....indicators to help turn this business around*” and despite being requested by Mr Callesen to bullet point his concerns in an email, Mr Tuioti did not tell Mr Callesen that he was going to send such an email criticising him and his leadership to staff in Gas Turbines and members of the senior management team. Mr Tuioti says he was convinced that Mr Callesen was not going to listen to any concerns being raised by him and that he had to elevate the matter “*as he had been instructed to do*”. I do not accept Mr Tuioti’s explanation to be genuine. Mr Tuioti had been requested in July 2011 to raise issues with his supervisor in the first instance and if he felt this to be unsuccessful to go to the next level of supervisor. Mr Tuioti took neither of these steps, he did not email his concerns to Mr Callesen because he had convinced himself he would not be listened to and he did not contact Mr Callesen’s manager because he intended to make his personal views about Mr Callesen’s managerial abilities known to a wide audience including senior management.

[28] Mr Tuioti’s concern and upset about redundancies, including the redundancy of his close workmate, were understandable. However, from February 2012, Mr Tuioti was aware of Air NZ’s proposals to reduce costs in Gas Turbines. The collective employment agreement contains a comprehensive process to be followed in redundancy situations. Mr Tuioti claimed he was not aware of these provisions. However, Mr Tuioti was aware he could provide feedback on the proposed restructuring and knew he could participate in the consultation process. Mr Tuioti decided not to provide feedback or participate because he said “*management were already aware of [his] views.*” If the issue of the Gas Turbines business and its impact on jobs within the team was of such importance to Mr Tuioti the proper approach was participation in the consultation process. Mr Tuioti chose not to participate.

[29] When the redundancies in the Gas Turbines team became a reality, Mr Tuioti sought a meeting with Mr Callesen. Mr Tuioti was asked to bullet point his concerns and ideas for improvement in an email to Mr Callesen. Mr Tuioti chose not to. Rather, having formed the view that Mr Callesen was an incompetent leader and should resign, Mr Tuioti decided to “*air his views*” by way of group email to Mr Callesen’s staff in Gas Turbines and to senior Air NZ executives. Mr Tuioti was well aware following cautions by his own manager, in May and July 2011, such an email was not an appropriate way in which to communicate his concerns.

[30] It was only because of an error with the email communication system that staff in Gas Turbines did not receive Mr Tuioti's 28 May email. However, senior Air NZ executives namely, Mr Hughes, Ms Stoddard and Mr Fyfe all received the email. Mr Callesen was copied in.

[31] The subject line of Mr Tuioti's email stated: *Very Very Very Concerned Gas Turbine Employee!!!* The first line read:

(Management is not listening, who is next on the positional dis-establishment List ???)

[32] Mr Tuioti included a brief explanation in the email of his role within Gas Turbines and then wrote;

One thing I dislike and see evident around my work place, Gas Turbines, and in other areas of the company is people who serve in leadership roles who lack the basic people skills and leadership training.

[33] The email then described Mr Tuioti's view of the way in which Mr Callesen handled the restructuring of Gas Turbines:

With the likes of Saddam Hussein we learn that thousands of innocent lives were lost under his leadership and thousands more even some of the militaries best men were lost trying to remove him from power. I have just witnessed last Friday on the 25th of May 2012 one of my best mates been shown the door after 39 years of faithful service as an Air New Zealander, not due to any misconduct or disciplinary action of any sort, but due for lack of basic business fundamentals and business experience of those who are directly responsible and who are in charge of the decision making here in Air New Zealand Gas Turbines.

Due to their lack of action and incompetence the Gas Turbine ship is sinking ...

[34] Mr Tuioti referred to Mr Callesen as being:

... not teachable inflexible to adjust to new business trends and demands ... I can say in my honest opinion that I probably have more business experience and leadership skills than John would ever obtain in a lifetime.

[35] Mr Tuioti's email further stated:

Why is it that people who do not have the required business experience and skill are placed in charge of various business section

of Air New Zealand such as Gas Turbines. I am very concerned. How many more unfortunate faithful and experienced employees have to experience the shock career ending experiences a number of my work colleagues have already experienced. Those who are accountable I call need to "fall on their own sword". I call for them to save the sinking ship and do everyone a favour and admitted their incompetency and to step aside and resign to someone else who is qualified, skilled and experienced to step in and save this ship from sinking whilst it is salvageable.

... [John Callesen] continues to show his lack of leadership and by being immature and giving me the run around and having me waste eight hours of company time writing this email which he instructed me to do which could have been sorted in half an hour face to face meeting.

[36] Mr Tuioti concluded his email by requesting recipients to contact him to discuss it further and to pass on the email to others if they wished.

[37] Mr Tuioti says his email was to express his views and highlight how things in Gas Turbines could be improved. In response to questioning at the investigation meeting he said that the email was not a personal attack on Mr Callesen nor was it critical of him. Rather, he was providing positive feedback. I do not accept Mr Tuioti's evidence which I found to be contradictory and inconsistent. It is my view that in sending the email on 28 May, Mr Tuioti had no intention of raising constructive comments with Mr Callesen's manager, about how the business of Gas Turbines could be improved. Rather, Mr Tuioti launched a personal attack on Mr Callesen's leadership skills and sought his resignation. Mr Tuioti then sent the email to Mr Callesen's own staff and to members of senior management. Mr Tuioti could have just sent the email to Mr Callesen's manager but he chose not to. In my view it is reasonable to infer from Mr Tuioti's actions he was attempting to discredit Mr Callesen and have him removed as Manager, Gas Turbines.

[38] Mr Hughes, one of the recipients of Mr Tuioti's email, was concerned by the tone and contents of the email and contacted Ms Charmaine Morgan, People Manager at Technical Operations, Air NZ. Mr Hughes requested that an investigation be carried out into the circumstances surrounding the sending of the email by Mr Tuioti.

[39] Ms Morgan considered who would be the most appropriate person to conduct an investigation and decided upon Mr Kelvin Duff, head of Planning, Technical Operations, who was independent of Gas Turbines. Mr Duff formed a preliminary view after reading the email that:

The content of the email was of significant concern in relation to aspects of the Air NZ Code of Conduct and policy documentation ...

[40] Air NZ's code of conduct signed by Mr Fyfe includes in its policy statement that:

... employees are expected to act ethically at all times with integrity, mutual trust, respect for others and in accordance with the law.

[41] Clause 4 of the code states:

Standards required in order to perform duties include:

- *to adhere to email and internet policies ...*

[42] Clause 4 further states that the standards required in relation to treatment of colleagues are:

- *to adhere to the bullying and harassment policies*
- *to treat fellow employees fairly and respect their privacy.*

[43] The final statement in the code is that:

Breaches of this code of conduct may result in disciplinary action being taken, up to and including dismissal.

[44] Air NZ also has disciplinary procedures and guidelines which include Air NZ being able to undertake a preliminary investigation prior to a decision being made on whether to conduct a formal investigation. Mr Duff concluded that the content and tone of the email were sufficiently serious to warrant a disciplinary investigation. On 12 June, Mr Duff wrote to Mr Tuioti asking him to attend a formal meeting on 14 June. In the letter of 12 June to Mr Tuioti, Mr Duff states:

The contents and tone of the email are of very serious concern to the company. The email is generally critical of the business and the way in which work is secured and undertaken. In addition the email contains a number of very derogatory, demeaning and disrespectful comments about John Calleson, the overall manager of the area in which you work.

[1] Mr Duff provides examples in his letter of the parts of Mr Tuioti's email which are of concern to him and then sets out 9 areas of concerns to be investigated. Mr Tuioti is requested to attend a meeting on 14 June about the matter, is invited to bring a representative to the meeting and is informed that the outcome may lead to "disciplinary action up to and including termination of employment".

[2] The meeting was held on 18 June. Present at the meeting with Mr Tuioti was his EPMU delegate, Mr Joel Payne. Mr Duff was accompanied by Ms Morgan who took notes. The minutes of the meeting record that Mr Tuioti was aware of Air NZ's code of conduct and of Air NZ's policy on email and internet usage. However, Mr Tuioti felt that he had the right to voice his own opinion "*for the betterment of the business*". Mr Tuioti, both during the course of the meeting with Mr Duff and during the Authority's investigation meeting stated that the comments contained in his email about Mr Callesen were not "*personal comments*", rather he was providing "*positive feedback*". Mr Tuioti was, and at the Authority's investigation meeting continued to be, of the view that if Gas Turbines was not performing, Mr Callesen should be held accountable and that he was expressing these views as business concerns via the Air NZ email system.

[3] Following the meeting with Mr Tuioti, Mr Duff had further meetings as part of his investigation with Mr Callesen, Mr Hawke and Ms McSwiney. A further meeting was held with Mr Tuioti and Mr Payne on 20 July 2012. Mr Duff attended the meeting with Ms Morgan and Ms Shirley Gounder, personal assistant, who took notes. Mr Tuioti and Mr Payne had concerns about the minutes of the meeting on 18 June and following discussion, the minutes were revised to include amendments made by Mr Tuioti and Mr Payne. The minutes including the amendments made by Mr Tuioti and Mr Payne were emailed to Mr Tuioti on 25 July and a transcript of the meeting of 20 July was provided to Mr Tuioti by email on 13 August.

[4] A further meeting was held with Mr Tuioti and Mr Payne on 16 August. Mr Duff attended with Ms Morgan. At the meeting, Mr Duff informed Mr Tuioti of his findings that by sending the email of 28 May, Mr Tuioti had acted in breach of Air NZ's email policy, the code of conduct and his general obligations as an employee. Mr Duff also concluded that the email was "*inappropriate, highly personal and disrespectful and had the potential to significantly impact on perceptions of Mr Callesen by both superiors and his staff*". Mr Duff also concluded that Mr Tuioti "*... had acted in breach of clear direction and advice about how to raise any concerns*". Mr Duff informed Mr Tuioti that he considered Mr Tuioti had "*engaged in serious misconduct, and that Air New Zealand was considering an outcome up to and including dismissal*". Mr Payne accepted that disciplinary action in the form of a warning was appropriate but felt the circumstances did not justify a final written warning.

[5] Following further discussion with Mr Tuioti and Mr Payne, Mr Duff informed Mr Tuioti that he was to be issued with a final written warning and that “*any similar future conduct would be treated very seriously and likely lead to dismissal*”. Mr Duff confirmed his decision in a letter dated 27 August 2012.

[6] Mr Tuioti claims the final written warning issued by Air NZ was unjustified in the circumstances. At the Authority’s investigation meeting, Mr Tuioti stated in relation to the sending of the email that:

I had followed what I was instructed to do and I was being honest about my thoughts and opinions. I had done this to help the business move forward and save jobs. I felt I had a responsibility to step up and voice my concerns and I had believed the company would value personal integrity and respect this. It was quite devastating to be told I was to receive a final warning. It made me feel belittled and humiliated.

[7] Mr Tuioti also claimed that the investigation was unfair and that Mr Duff and Ms Morgan were biased against him from the outset. Mr Tuioti pointed to Ms Morgan’s tone of voice when she informed him an investigation was to be conducted in relation to the email of 28 May, and her “*inaccurate*” minutes of the disciplinary meeting, as indicators of her predetermination of his guilt and her bias against him. Mr Tuioti further claimed Mr Duff, in writing the letter of 12 June, had “*sided*” with Mr Callesen “*against*” him and had no interest in the bigger picture that he was addressing.

[8] I do not accept that Ms Morgan or Mr Duff were biased against Mr Tuioti. Ms Morgan informed Mr Tuioti that an investigation in to his conduct was to take place. This was a serious matter, no doubt delivered in a serious tone by Ms Morgan. This does not mean that she was biased. Ms Morgan took notes at the disciplinary meeting on 18 June. Notes taken by Mr Payne from EPMU were not available at the Investigation Meeting. However, Ms Morgan’s minutes were provided to Mr Tuioti and Mr Payne and additions made as a result of Mr Tuioti’s and Mr Payne’s input. Even if Ms Morgan was a decision maker, which she was not, I do not find her conduct during the disciplinary process indicated any bias towards Mr Tuioti.

[9] Similarly, I do not find Mr Duff’s letter of 12 June to indicate bias. Mr Duff was entitled to form a preliminary view of the tone and contents of Mr Tuioti’s email of 28 May. Mr Tuioti was given the opportunity by Mr Duff at subsequent meetings to give context and feedback in relation to his email which Mr Duff took in to account

before making any conclusions about Mr Tuioti's conduct in sending it. As stated, after giving Mr Tuioti and Mr Payne the opportunity to explain, Mr Duff formed the view that Mr Tuioti had engaged in serious misconduct.

[10] Air NZ must establish that the final written warning it issued to Mr Tuioti was justifiable. The statutory test of justification is contained in s.103A of the Act. That section states:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether a 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.*

[11] In *Angus v. Ports of Auckland Ltd*⁵, the Full Court considered the amendments to s.103A and the ambit of the Court's inquiry in the light of its decision in *Air New Zealand Ltd v. V*⁶ decided prior to the amendment. The Court stated in *Angus* as follows:

[24] *There are substantial and significant parts of former s.103A that are unaltered. The legislation does not preclude the Authority or the Court from examining and, if warranted, finding unjustified, the employer's decision as to consequence once sufficiently serious misconduct is established, as was argued unsuccessfully for the employer in V. That has never been the position and is not so under the most recent amendments. The Authority and the Court will have to continue to assess, objectively and carefully, both the conduct of the employee and the employer, and the employer's response to those conducts.*

[12] Further, in *Angus*, the Court emphasised that its role is not to substitute its view for that of the employer. The Court's role is to assess on an objective basis whether the actions of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. The Court stated:

[58] *Next, relying upon evidence, relevant legal provisions, relevant documents or instruments and upon their specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, of the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections (3), (4) and (5) must be applied to this exercise.*

[13] This approach was confirmed by Judge Couch in *De Bruin v. Canterbury District Health Board*⁷.

[14] Mr Tuioti was aware of Air NZ's expectations of its employees and how they are to act in the workplace. Mr Tuioti was familiar with Air NZ's code of conduct and email and internet and other policies. Mr Tuioti had been counselled on two

⁵ [2011] NZEmpC 160

⁶ [2009] ERNZ 185

⁷ [2012] NZEmpC 110

occasions in May and July 2011 about sending group emails. Mr Tuioti knew not to air his views by way of group email, the correct process was to speak to his manager and if not satisfied with his manager, then to his manager's superior.

[15] After carrying out a full investigation into the sending of the email, Air NZ was entitled to form the view that Mr Tuioti's conduct in sending it amounted to serious misconduct for which he could be dismissed. Having considered the evidence placed before the Authority, I find that the decision reached by Air NZ that Mr Tuioti's actions did constitute serious misconduct, was a decision it could make in all the circumstances.

[16] Mr Tuioti appeared at no stage of Air NZ's investigation, nor during the Authority's investigation, to have any insight into his actions. Mr Tuioti claimed to be simply providing positive feedback about Mr Callesen for the betterment of Gas Turbines. Having reviewed the email and having heard Mr Tuioti's evidence I cannot accept that to be the case. The email was not constructive, it was an inappropriate personal attack on Mr Callesen. Mr Tuioti knew his obligations under the Code of Conduct and knew he was not to communicate his personal views by way of group email, but did so anyway. Having decided Mr Tuioti's actions amounted to serious misconduct, Air NZ was entitled to take the view that a final written warning was justified in the circumstances.

[17] Section 103A(3) of the Act requires the Authority, when deciding if action is unjustified, to consider whether the employer:

- (a) Sufficiently investigated the allegations;
- (b) Raised concerns it had with the employee;
- (c) Gave the employee a reasonable opportunity to respond to the employer's concerns;
- (d) Genuinely considered the employee's explanation.

[18] I am satisfied the investigation by Air NZ was a full and thorough one which complied with each of the above elements of s.103A(3). I find that Mr Tuioti's final written warning was justified. Given this finding, issues (b) and (c) do not require determination by me.

[19] If I am not correct in determining that Air NZ could form a view that Mr Tuioti's conduct amounted to serious misconduct for which a final written warning was appropriate, an appropriate award would be no more than \$1,000 in the circumstances. Mr Tuioti had been cautioned previously about sending group emails containing his personal views and there has been no loss of employment. The warning expires in February 2014.

[20] I am required under s.124 of the Act, when considering remedies, to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If the employee's actions did contribute to the situation, then the Authority can reduce remedies that would otherwise have been awarded.

[21] It is my view, in the event Mr Tuioti's final written warning was unjustified, his contributory conduct was such as to deny him any remedies. The contributory fault was substantial and significant and as such any award of compensation would be reduced by me by 100%.

Costs

[22] Costs are reserved. The respondent has 14 days within which to file and serve a memorandum as to costs and the applicant has 14 days from receipt to file and serve his reply.

Anna Fitzgibbon
Member of the Employment Relations Authority