

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** John Wallace (Applicant)  
**AND** Air New Zealand Limited (Respondent)  
**REPRESENTATIVES** Bernard McIlhone, Advocate for Applicant  
Graeme Norton, Counsel for Respondent  
**MEMBER OF AUTHORITY** Helen Doyle  
**INVESTIGATION MEETING** 25 June 2004  
**SUBMISSIONS** 15 July 2004 (respondent), 16 July 2004 (applicant)  
**DATE OF DETERMINATION** 25 August 2004

DETERMINATION OF THE AUTHORITY

*The employment relationship problem*

[1] The applicant, John Wallace, was dismissed from his employment with Air New Zealand as Team Leader at the check in counter at Christchurch. He says that the dismissal was not justified and seeks reinstatement to his position with Air New Zealand together with lost wages and compensation.

[2] The respondent, Air New Zealand Limited (“the company”) says that Mr Wallace’s dismissal was justified.

[3] The parties did attend mediation but the matter was unable to be resolved.

*The background*

[4] Mr Wallace has been employed with the company and/or its predecessors since 1 February 1971. At the material time in November 2003 Mr Wallace was employed as a Team Leader at the check in counter at Christchurch airport. Mr Wallace could have up to forty employees reporting to him.

[5] On 25 November 2003 Mr Wallace received a letter from the Airport Manager at Christchurch, Paul Bradshaw. Essentially the letter conveyed to Mr Wallace that an investigation was to begin by the company into his sick leave usage on 4 August and 8 October 2003. He was asked to attend a meeting with Mr Bradshaw and the Human Resource Manager, Rachel Mason on 27 November 2003 to discuss his potential whereabouts on the days in question, which were claimed as sick leave and may have conflicted the information that he provided the company with on his timesheet. Mr Wallace was advised that the matter was potentially serious and the outcomes

from the investigation may lead to disciplinary action including dismissal. Mr Wallace was advised to bring an appropriate representative to the meeting.

### Meeting 27 November 2003

[6] Mr Wallace attended the meeting on 27 November 2003 with another employee Denis Wheeler. Ms Mason and Mr Bradshaw attended for the company. There was some discussion about the appropriateness of Mr Wheeler in terms of his knowledge of employment matters. Ms Mason reiterated that the matter was serious but Mr Wallace advised that he was comfortable with Mr Wheeler's involvement. Mr Wallace saw Mr Wheeler as a witness and support person. Mr Wallace generally accepted the record of the meeting which was taken down at the time by Mr Bradshaw during the meeting and then typed up.

[7] It became apparent during the investigation meeting that paragraph six of the record of the meeting on 27 November 2003 I was supplied with and paragraph six of the record in the applicant's possession was different. During the disciplinary meeting Mr Wallace was provided with information in the company's possession concerning sick leave. Mr Wallace was given a copy of the record of his sick leave and two pages taken from a New Zealand golf web site. On the pages from the golf web site there were three highlighted dates that corresponded with sick leave Mr Wallace had taken and seemed to indicate that Mr Wallace had played golf on those days. The pages from the golf web site indicated the dates the golfer played and the dates the information was entered on the web site. It also indicated the golf course played at and scoring and handicap information. A full round of golf has to be played by a golfer in order for it to be recorded on the web site. The third date highlighted of 19 April 2002 had not been referred to in the letter of 25 November 2003. It is clear from both records that Mr Wallace asked about the third date. I find the response from Mr Bradshaw was more probably than not that in the record of meeting that provided:

*Paul Bradshaw indicated that while this date also corresponded with a date on which he had claimed Sick Leave, it was recognised that it was over a year ago and so our attention was more on the more recent dates.*

[8] I have reached that view because when the two versions are carefully considered the wording in the above record of meeting flows more naturally than the wording in the other record of meeting that provided:

*Paul Bradshaw indicated that while this date also corresponded with a date on which he had claimed Sick Leave, it was recognised that it was over a year ago. And as such was also relevant because again – John had called in sick on this date.*

[9] Mr Wallace told those at the meeting that he had taken advice from his lawyer that morning and sought an adjournment to take information back to his lawyer. Mr Bradshaw and Ms Mason confirmed that was all the information they had in their possession at that time. There was also a discussion about arranging a further date to meet. Mr Wallace was unable to meet the following week so a date for the week after that was to be arranged. The meeting was then adjourned.

[10] Mr Wallace did consult a lawyer about the matter. Mr Wallace said that the lawyer laughed at the allegations.

Meeting 17 December 2003

[11] On 17 December 2003 Mr Wallace attended a further meeting with Mr Bradshaw and Ms Mason. Mr Wallace took Dale Dunlop with him to the meeting. He referred to Mr Dunlop as a *witness* to what was said. Ms Mason again confirmed with Mr Wallace that the matter was potentially serious and asked whether he was happy with Mr Dunlop. Mr Wallace confirmed that he was happy with Mr Dunlop. Mr Wallace and Mr Dunlop were given the minutes of 27 November 2003 to review and Mr Wallace confirmed the minutes were correct. Ms Mason advised that the purpose of the meeting was to hear Mr Wallace's explanation in relation to the information presented to him on 27 November 2003.

[12] Mr Wallace said that he could not recall if he was sick or if he had played golf on 19 April 2002. He then explored hypothetical situations about beginning and ends of shifts and said that when he finished work he could do what he wanted. Mr Wallace then said that it was possible that the days on the web site were incorrect. He gave an example of where he had, after the first meeting on 27 November, intentionally entered the incorrect day he had played golf on the score card. He had put a day on the card that he knew he had worked on. He then left the card in the box at the Templeton Golf Club and the data from the card had been entered into the web site. This would demonstrate a mistake on the golfer's part rather than a data entry mistake. Ms Mason then asked Mr Wallace to go back to the days in question so that she could understand his view on the dates.

[13] Mr Wallace said with respect to the 19 April 2002 date *I don't know*.

[14] Mr Wallace said with respect to 4 August 2003 he had two days off sick. He talked about feeling lousy with the flu and his mother's death on 22 July 2003. He said that he could not say whether it was the Monday or the Tuesday and he did play golf on one or other of those days but that he doubted it was the Monday. He then said *point I am making is I played golf on one day in August either the Monday or the Tuesday – my wife had said for goodness sake get out of the house and have a game of golf on one or other of those days. I doubt it was the Monday*.

[15] With respect to the date on 8 October 2003 Mr Wallace said that he played golf with his brother at McLeans Island or later in the week. He said *Dad had died and my stress levels were very high. I put sick on my timesheet there is no question of that and I did play golf but I cannot be sure of the day – it is feasible that there was inaccurate data that day -----Having felt better as the day progressed or I might have played golf after my shift ended. I can't be sure but I may have or I could have been at work. Seems to me and my lawyer that if I was feeling better and it was after my shift – would that be the answer – if I played golf after lunch on the 4<sup>th</sup> or 5<sup>th</sup> August I usually don't play golf in the morning. Re the second date 8<sup>th</sup> October I don't know Tuesday, Wednesday or Thursday*.

[16] Mr Wallace then explained that the card is filled in on the day that golf is played and put into a box at the end of the game. Once or twice a week the information from the card is entered into the internet site and data entry mistakes can occur.

[17] The minutes of the meeting then show Ms Mason summing up by putting to Mr Wallace – *so your response to this investigation is that you did play golf and that the internet site may be inaccurate and you played the Waikanae course deliberately to prove that?* The minutes reflect that Mr Wallace answered yes. Mr Wallace said in his evidence in answer to one of my questions that he was confirming that he played golf at some point around the days but did not state that he played golf on those days. He said that he could not and cannot recall with certainty what days he played on.

[18] Ms Mason advised Mr Wallace at the end of the meeting that it was unlikely the company would form a view before Christmas on the matter and that they would have to be in touch in the New Year. The meeting then finished.

[19] On 24 February 2004 Mr Wallace received a letter from the Acting Airport Manager Christchurch, Donna Garrettt. The letter advised Mr Wallace that a meeting was to take place on 4 March 2004 to follow up on the investigation undertaken with respect to the playing golf on a day claimed as sick leave. Mr Wallace was advised that the matter was potentially serious and it was recommended that he bring a representative with him to the meeting.

#### Meeting 4 March 2004

[20] Mr Wallace attended at the meeting on 4 March 2004 with Steve Dawn. Ms Mason and Ms Garrettt attended for the company. Ms Garrettt took notes at the meeting as did Mr Dawn. I was provided with both sets of notes and they are very similar. Ms Mason said there needed to be some reflection on the importance of representation and explained why representation was important. She said that she understood Mr Wallace had a lawyer engaged in the background and asked for clarification with respect to Mr Dawn's presence as a witness rather than a representative. Mr Wallace clarified that Mr Dawn was there to view what happened and that Mr Wallace was happy with that.

[21] Ms Mason went on to outline that the company had a view from the previous meeting and asked Mr Wallace if he had copies of the notes from the meeting. It was established that Mr Wallace had copies of the minutes from the meeting of 27 November but not from the meeting of 17 December. Ms Mason said that she would provide a copy.

[22] Ms Mason outlined that she would give a view of the information and Mr Wallace could then provide any information he had. Ms Mason said that she would then give the full view of the information and the company's consideration and then break for Mr Wallace to consider.

[23] Ms Mason said that the first issue was the use of the timesheet and the accuracy of the information recorded on it. She talked about the three occasions in question that he had signed the timesheet as ill. She then went on to say that Mr Wallace did not deny that he was playing golf and could not confirm that he may have. Ms Mason said that there were two views to be presented. The first, she said, was the company's view that when you call in sick, you are sick and there is no predetermined *I feel better so I can go and play golf*. The second she said was that the company did not accept that the electronic data was incorrect and said that there was not only one isolated incident but three.

[24] Ms Mason said that the outcome of the views was that the company did not accept any of Mr Wallace's explanations and that he did in fact play golf and falsified the time record. Ms Mason told Mr Wallace that the matter did strike at the heart of the contract and was serious misconduct and that the view of the company was that Mr Wallace's employment should be terminated. Mr Wallace said that he could not understand why the company did not believe him. There was then a break so that Mr Wallace could consider what had been presented.

[25] Mr Wallace on his return to the meeting said it had come as a shock and a huge disappointment. He was advised that he would be paid the notice period although would not be required to work it out. Mr Wallace queried why the minutes for the previous meeting were not available. Ms Mason said that she would arrange to have them sent to his home address and would follow up with a letter to Mr Wallace by 8 March confirming the discussion.

[26] Ms Mason asked Mr Wallace to confirm that there was no further information to be considered. Mr Wallace responded by saying that regardless of whoever it was [in terms of a witness] the company had made up its mind about the outcome. Mr Wallace also said *when you're not guilty, you don't treat it as seriously*. Mr Wallace also spoke of the fact that Mr Dawn had only been apprised of the meeting about one hour beforehand and that he did not expect anything to happen.

[27] A letter dated 31 March 2004 was sent to Mr Wallace confirming the outcome of the investigation undertaken and advising that Mr Wallace's employment was terminated effective from 31 March 2004. The reasons for the dismissal in the letter were that the company believed Mr Wallace had played golf as logged on the web site and then falsified his timesheets and claimed sick leave. Ms Mason said to me that she did consider other situations where employees had engaged in recreational activities whilst on sick leave and that she recognised the need to be consistent. She said that she did take into account Mr Wallace's long work history and that given that history he would understand the expectations around sick leave. She said that Mr Wallace was in a leadership role and that he was expected to be a role model.

### ***The arguments***

[28] Mr Wallace challenges the dismissal on both procedural and substantive grounds. He says that the actions of the company were not prompt, fair, or consistent in terms of the company's disciplinary policy and the process was not carried out with an emphasis on resolution and non-recurrence of the problem.

[29] In terms of the investigation the applicant says that there are a number of serious flaws in the handling of the investigation. He says that he believed that the investigation concerned two and not three dates and that there was information relied on to justify the decision to dismiss that was not presented to him.

[30] Mr Wallace also says that the company was not open to consider alternative explanations offered by him to support his position that he had not abused sick leave and that prior to the third interview the company had already formed a view that Mr Wallace would be dismissed and this was a meeting to convey the decision. Another criticism is the company relied upon evidence that it made no attempt to verify and which was inconclusive in relation to whether Mr Wallace played golf. Mr Wallace also takes issue with the fact that the line manager making the decision to dismiss him was not involved in the first or second meetings, that he was inadequately represented and that his employer should have taken more concerted steps to bring that to his attention.

[31] Mr Wallace says that if golf was played on the days or days in question then this did not constitute a breach of duty to his employer as he was genuinely ill and in any respect was entitled to use his time outside of his rostered hours without restriction and further, that the decision made to dismiss him is harsh and unjustified in the context of the employer's treatment of similar situations affecting individuals at Christchurch airport.

[32] The company says that a fair procedure was followed in investigating the allegations against Mr Wallace and that it was open to the company to consider the explanations offered by Mr Wallace and to decide that they were not acceptable. The company says that it was reasonable for it to form a view that Mr Wallace was playing golf on the three separate occasions that he claimed sick leave. The company says that there was misconduct of a serious nature and that the decision to dismiss was open to a fair and reasonable employer and that there was no disparity of treatment.

### *Analysis and conclusions*

[33] There is no dispute in this case that Mr Wallace was dismissed on notice. The reasons for the dismissal were those contained in the letter of 31 March 2004 namely, that Mr Wallace played golf on three days and claimed sick leave on his time sheets for these days.

[34] An employer must have reasonable grounds for believing that there has been misconduct of sufficient gravity to justify a dismissal. The employer must also carry out the dismissal in a procedurally fair manner. A fair process requires as a minimum that the employer has properly investigated the allegations, given the employee an opportunity to be heard and considered with an open mind that explanation before making a decision to dismiss. The standard of proof in these matters is the balance of probabilities however Mr Wallace was an employee of long standing with an unblemished record. It was important therefore that the company had sufficient proof of the allegations that golf had been played on the days in question when Mr Wallace was on sick leave and that the process adopted in investigating the allegations was fair.

[35] I consider firstly the issue of representation. Mr Wallace told me at the investigation meeting that he recognised he should have had adequate representation. The company I find did everything it could to indicate to Mr Wallace the importance of appropriate and competent representation and the seriousness of the allegations both in letters and at the meetings. Mr Wallace turned up with a different work colleague to every meeting although he had advance warning of some days prior to each meeting. Mr Wallace chose to seek advice from a lawyer who did not attend the meetings. Any difficulties in the inadequacy of representation cannot be the responsibility of the respondent in this case.

[36] Mr Wallace was advised formally of the allegations against him in a letter dated 25 November 2003. The allegations were with respect to his sick leave usage on two dates in August and October 2003. He was requested to attend a meeting and advised to bring a representative with him. A third date was highlighted on the golf web site printout of 19 April 2002 and handed to him during the meeting. The importance of that third date was played down at the first meeting quite fairly given the passage of time between that date and the investigation meeting. Whilst I do not think the words in the record of meeting go so far as to support a finding that the 19 April 2002 date was not to form any part of the matters under consideration by the company, I am of the view that more weight was given to this date by the employer than Mr Wallace was led to believe would be. A fair and reasonable employer would have continued to take into account, when considering the weight to be placed on this earlier date, what was said to Mr Wallace at the first meeting that the date was over a year ago. Instead, in the final consideration, considerable emphasis was placed by the employer on the fact that there were three dates on the web site that corresponded with sick leave taken. Ms Mason said in her written evidence that she believed there was a clear pattern of misuse of sick leave and referring to several instances. Reliance to that extent on the date of 19 April in coming to a decision in light of what had been said to Mr Wallace was unfair.

[37] Mr Wallace could not recall what the situation was on 19 April 2002. The company had considered his rostered hours for that day but they did not discuss that information with him. Such a discussion could have assisted Mr Wallace in recall. Mr Wallace had looked up the rostered hours himself for the other two dates in preparation for the second meeting and the putting forward of the explanation that if he played then it was outside of rostered hours. It would also have been fair to put to Mr Wallace the relevant policy for his consideration and the specific provision in the Leave and Time Off Work Policy and Procedures that the employer was clearly aware of in terms of the situation. The specific provision provides:

*If an employee declares sick but uses the time off for other personal reasons, whether business or recreational, this will constitute misconduct under the Code of Conduct and be dealt with accordingly.*

[38] Mr Wallace is also critical of the quality of the company's investigation into the accuracy of the Golfing New Zealand web site and that his explanations were not taken into account.

[39] In terms of the first criticism Ms Mason said that she accepted there was a possibility of inaccuracies with all manually entered data. Ms Mason said that from a statistical point of view given that there were three occasions that it was reasonable to conclude that golf had been played on the days in question and that the explanation that the electronic data was incorrect was not accepted. The cards from which the data had been entered into the web site were no longer available. Ms Mason said that she had the acknowledged sick leave on the three days in question, the golf web site showing golf played on the three same days and the time sheets filled in at the end of the week by Mr Wallace recording that he was sick on the three days in question. It was open to a reasonable employer to accept or reject the accuracy of the web site in the circumstances.

[40] The second criticism of the process is that the company was not open to Mr Wallace's explanations. I find that there was a failure to consider and further investigate the explanation Mr Wallace gave at the second meeting about the death of his mother and his father within a short period of time and possible impact on the nature of his illness. Mr Wallace's mother died on 22 July 2003 and his father at the end of September 2003. When I read the meeting notes there is no further consideration in terms of the impact of this on the nature of Mr Wallace's illness on the 4 August and 8 October dates. There is also no consideration as to whether, in assessing the seriousness of the matter, Mr Wallace telephoned in sick intending to take the day off to play golf or whether he was genuinely sick and then came right. If for example Mr Wallace was stressed or depressed as a result of grief then that may have had a significant impact on how the company viewed the matter in terms of its seriousness. The explanation, although rather inelegantly put at the disciplinary meeting of Mr Wallace relating his illness back to his mother's funeral and the flu, and his wife saying get out of the house and have a game of golf is not so implausible so as to be dismissed by the employer without further investigation, particularly where there was no history of overuse of sick leave and accumulated sick days. Nor is the explanation that in early October Mr Wallace was feeling very stressed with the death of his father and could have played golf with his brother later in the day. The rejection of these matters without further investigation would seem to indicate that the investigation was not approached with an open mind that one would expect from a fair employer particularly involving an employee of 33 years. The death of both parents within a relatively short timeframe of two months was clearly stressful to Mr Wallace. The two dates fell within this period. Within the leave and time off policy it does make mention that the company will make reasonable efforts to help employees who are experiencing personal problems. Mr Wallace's wife also works at the company and could have been approached and asked about the matter. There was no approach to Mr Wallace's brother. Whilst Mr Wallace's rather cavalier approach to the matter and his quite naïve view that he would simply be believed did not assist his employer, I do not find that sufficient reason to reject these explanations without investigating further. This failure rendered the process unfair.

[41] There was also issue taken with the fact that Ms Garrett did not attend the earlier two meetings that Mr Wallace attended and yet was the decision maker. Mr Wallace had a right to be heard by Ms Garrett. Ms Garrett I find was advised about the previous meetings by Ms Mason, the first meeting adjourning after the provision of information to Mr Wallace and the second meeting during which Mr Wallace had an opportunity for explanation. Whilst it would have been desirable for Ms Garrett to have been present at the earlier meetings, she was present at the final meeting and the explanations that Mr Wallace advanced were not of a complex nature and were quite narrow in

scope. They were therefore quite capable of being comfortably put to Ms Garrett by Ms Mason. I am not satisfied that Ms Garrett's non attendance at the two earlier meetings is fatal to the fairness of the process.

[42] There was a long period between the second interview and the third interview. I have carefully considered the evidence about the effect of this in light of the company's policy for promptness and overall fairness of process. Mr Wallace told me that he understood there would be an outcome at the final meeting but that he did not think the third meeting was to be a serious meeting. I find the period between the meetings of three months to be quite inconsistent with a conclusion by the company that the gravity of Mr Wallace's conduct was sufficiently serious that he ought in all the circumstances to have been dismissed. The company did not carry out any further investigation in the period between the second and third meeting and the issues were not complex. Mr Wallace remained at the company working for three months leading up to the meeting. The delay was unfair and not in accordance with the company's own policy.

[43] The process was unfair to Mr Wallace for the reasons I have found above.

[44] In terms of the substantive justification for the dismissal, I accept that in terms of the company policy, declaring sick but using the time off for recreational activities can be misconduct. However, I am not satisfied that the employer in this case carried out a full and fair investigation which would enable it to reach the conclusion that Mr Wallace had misused his sick leave. I do not find that a fair and reasonable employer would have reached the decision to dismiss Mr Wallace if his explanations had been properly taken into account or that the trust and confidence that is essential in an employment relationship had been undermined to a significant degree as to warrant the dismissal of Mr Wallace. Mr Wallace's dismissal is unjustified.

[45] Mr Wallace has a personal grievance and he is entitled to remedies.

### ***Remedies***

[46] Mr Wallace seeks to be reinstated to his former position. Section 125 of the Employment Relations Act 2000 provides that reinstatement is to be a primary remedy wherever practicable. I have taken into account the submissions by the respondent that it no longer has the required trust and confidence in Mr Wallace but in light of my findings I do not find that to be justified. I do not find there to be any real bar to reinstatement and I am of the view that reinstatement is both practicable and an appropriate remedy in this case.

[47] I order that Air New Zealand Limited reinstate Mr Wallace in his former position as Team Leader under section 123 (a) of the Employment Relations Act 2000.

[48] To allow some preparation for reinstatement I direct that such reinstatement is to be effective from Monday 6 September 2004 unless otherwise mutually agreed between the parties.

[49] I am required to consider in this case whether Mr Wallace's actions contributed toward the situation that gave rise to the personal grievance. The respondent submits that Mr Wallace's actions were fundamental to the dismissal. I have found that there was not a full and fair investigation. I do not find that Mr Wallace contributed to the situation that gave rise to his personal grievance in the circumstances.

[50] Mr Wallace is also entitled to payment of wages lost as the result of the grievance from 31 March 2004 to the date of reinstatement and I so order. I leave the calculation of those wages to the

parties but reserve leave for either party to come back to the Authority in the event that agreement cannot be reached.

[51] Mr Wallace suffered considerable stress as a result of his dismissal which he described as traumatic. He said that he had been experiencing sleepless nights and outlined in his evidence the financial impact on his family as a result of the dismissal as well as the effect of the strain in his relationship with feelings of anger, frustration and depression. I would expect that reinstatement would go some way toward reducing that stress. I have taken that into consideration in awarding less than may ordinarily be awarded in the circumstances for humiliation and loss of dignity and injury to feelings. I am of the view that an appropriate award in all the circumstances is \$5000.00.

[52] I order Air New Zealand Limited to pay to John Wallace the sum of \$5000.00 without deduction under section 123 (b) of the Employment Relations Act 2000.

### *Costs*

[53] I reserve the issue of costs. If costs are to be sought then the parties should attempt in the first instance to reach agreement. If agreement cannot be reached and the applicant wishes to file memorandum with respect to costs it is to file the same within 14 days after receipt of this decision and the respondent is to have a further 14 days to reply.

Helen Doyle  
Member of Employment Relations Authority