

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 320
5365888

BETWEEN HELEN WATSON
Applicant

AND AIR NEW ZEALAND
LIMITED
Respondent

Member of Authority: R A Monaghan
Representatives: H White, counsel for applicant
D France, counsel for respondent
Investigation Meeting: 28 and 29 March 2012
Additional submissions received: 5 April 2012
Determination: 12 September 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Helen Watson says she was dismissed unjustifiably by her former employer, Air New Zealand Limited (Air New Zealand).

[2] The dismissal followed an incident in which, while waiting to board the international flight on which she was rostered to work, she became interested in boarding an aircraft operated by another international airline, Emirates, in order to view the aircraft. She also wished to enquire about how the aircraft was crewed. The way she acted on these matters was described in general terms as a breach of security, and more specifically as a breach of the conditions of use of her airport identity card.

[3] Ms Watson's subsequent behaviour was also taken into account when Air New Zealand concluded that her conduct overall amounted to serious misconduct. In

particular she was said to have been sarcastic to a member of the staff of the Emirates' staff, her involvement in the aftermath of the incident was said to have contributed to the late departure of her own flight, and she did not report the incident to her immediate manager. In addition the captain of the Emirates flight sought clarification of Ms Watson's involvement before he would complete his flight's departure process, and Emirates' staff members filed security reports with Emirates' head office.

[4] Air New Zealand says it conducted a fair and reasonable investigation into the matter, and the conclusions it reached and the action it took as a result were what a fair and reasonable employer could have done.

Background

[5] At the relevant time Ms Watson had been an employee of Air New Zealand for 26 years. She held the position of Flight Service Manager (FSM). The position of FSM is a senior position and is part ground based and part flight based. The role is to manage the provision of services by international cabin crews.

[6] On 6 February 2011 Ms Watson was rostered on an Air New Zealand flight to Rarotonga. The flight was to depart from gate 7, but the inbound flight was late and Ms Watson had some spare time.

[7] An Emirates aircraft was stationed at gate 5, which was adjacent to gate 7. The same departure lounge area served both gates.

[8] The aircraft was a new 777-300 aircraft not yet being operated by Air New Zealand, hence Ms Watson's curiosity. She said in evidence that she observed the Emirates crew proceeding to gate 5 on their way to board, and approached them to ask whether she could have a look at the aircraft. She had made a similar approach about a year earlier, and had boarded another Emirates aircraft without any difficulty. On this occasion the crew members did not respond and continued to walk towards the gate lounge desk at gate 5. Ms Watson persisted in her approaches to the crew members, walking alongside them until she also reached the gate lounge desk.

[9] The door to the gate 5 air bridge was open. The crew members checked in with the gate lounge agent¹, Riana Shlemun, and passed through to the aircraft. Ms Watson was behind them. She said in evidence that she moved to a position near the gate lounge desk, looking for an opportunity to speak to Ms Shlemun about whether she could board the aircraft. She said she had one foot or leg inside the airbridge area, but she was not seeking to move onto the air bridge and through to the aircraft without permission. However Ms Shlemun perceived that Ms Watson intended to continue through the air bridge and onto the aircraft. She said firmly 'no, no'.

[10] Ms Watson did not attempt to proceed any further, but while she was standing near Ms Shlemun she noted that Ms Shlemun was holding the crew manifest (or 'Gen Dec'). The manifest listed the crew members' names and dates of birth, and contained details of their passports. Ms Watson's interest in the crewing of the aircraft led her to ask Ms Shlemun questions about crewing and - on her evidence - to glance at the manifest thereby gaining some awareness of crew numbers. She then returned to her aircraft.

[11] Accounts which Air New Zealand obtained during its subsequent investigation suggest one of the Emirates crew members, who did not recognise Ms Watson or her Air New Zealand uniform, also perceived that Ms Watson intended to continue through the air bridge and onto the aircraft and further that Ms Watson was stopped forcibly from doing so. The crew member perceived in addition that Ms Watson had taken the crew manifest and looked at it. She commented on Ms Watson's actions to her colleagues and the matter came to the attention of their purser.

[12] Information about the incident was in turn passed to the captain of the Emirates aircraft, who conveyed to Ms Shlemun that he sought clarification of what had occurred before he would allow boarding to commence.

[13] To that end Ms Shlemun - in the company of Air New Zealand's gate lounge agent Jackie Taylor - boarded the Air New Zealand aircraft to obtain Ms Watson's name and identification details. When Ms Shlemun asked Ms Watson why she

¹ Emirates' ground handling services were provided by a subcontractor, but no distinction has been necessary for the purposes of this employment relationship problem.

wanted to board the Emirates aircraft Ms Watson responded that she acted out of curiosity, and offered to spell 'curiosity'.

[14] Meanwhile it came to the attention of another member of the Emirates' ground staff, the airport services officer Wanda Millar, that the Emirates captain was concerned about an apparent attempt to board the aircraft and was unwilling to allow the aircraft to be pushed back from the gate until he had more information. Ms Millar, too, sought to speak to Ms Watson. She, too, boarded the Air New Zealand aircraft to do so, and advised Ms Watson that the Emirates captain was refusing to allow the aircraft to be pushed back from the gate.

[15] Ms Watson was alarmed at Ms Millar's advice about the reaction of the Emirates captain. Although boarding of her flight was some three-quarters completed she left her aircraft to speak to the captain. She was accompanied by Emirates staff members when she boarded the Emirates aircraft. She explained to the captain that she had wanted to see the aircraft because she was curious about it, and apologised for the confusion that had resulted. The captain was satisfied sufficiently to allow the boarding of his flight to continue and the aircraft to be pushed back from the gate. The flight departed on time.

[16] When Ms Watson returned to her own aircraft, her flight was ready to depart. It was common ground that the departure was delayed for some 36 minutes.

[17] On Time Performance (OTP) summaries are prepared for every flight. They are generated electronically from the input of the captain of the flight, the FSM and the ground staff. In her own emailed OTP report on the delay Ms Watson recorded the cause as the acknowledged late arrival of the inbound flight without mentioning the contribution, if any, of her own absence from the aircraft while passengers were boarding.

[18] The OTP summary attributed 9 minutes of delay to 'cabin crew shortage -- other', recorded the times of Ms Watson's departure from and return to the Air New Zealand aircraft and the time at which a passenger loadsheet was completed, and gave an account of the reason for Ms Watson's absence from the aircraft.

[19] Ms Watson's immediate manager was John Flett, a performance and development manager. The matter came to his attention as discussed below, he wrote Ms Watson a letter dated 8 February 2011, and began leaving messages asking her to contact him about the matter on 10 February. Ms Watson responded on 23 February.

The preliminary investigation

[20] In emailed reports dated 6 February, both Ms Taylor and Ms Millar gave brief accounts of the incident. Neither account was based on direct observation of all of the events in the area of the gate lounge desk, but both suggested Ms Watson had moved down into the air bridge before being stopped, and had taken possession of the crew manifest to look at it.

[21] Ms Taylor went on to describe Ms Watson's conduct as casual and flippant, and to refer in that context to the offer to spell 'curiosity' which she had witnessed. Finally, she asserted that the departure of the Air New Zealand flight was delayed while Ms Watson went to speak to the Emirates captain.

[22] Ms Millar described the concern of the Emirates captain about a possible security breach, and gave her account of the explanation Ms Watson gave to the captain. She ended by saying:

To sum this up our Captain, myself and the ground staff have to now file security reports which need to be sent back to DXB. The Captain would like some action to be taken on this matter and wants some feedback.

I hope you can understand and see from our point of view that security is taken very seriously by Emirates and all other operating carriers should be equally vigilant and sensitive to this matter.

[23] After the matter was referred to Mr Flett he wrote the letter of 8 February to Ms Watson, and advised her there would be an investigation.

[24] Investigatory interviews began on 7 March.

[25] In addition to questions and answers about the incident Air New Zealand's record of an interview with Ms Taylor on that date contains Ms Taylor's statement that Ms Watson had expressed an interest in boarding the Emirates' aircraft before she

moved to do so, and Ms Taylor commented that was not a good idea. Ms Watson did not recall that exchange. Ms Taylor also told Air New Zealand that when Ms Watson returned from speaking to the Emirates captain she commented:

'What a bloody fuss;' and 'you would have thought they were going to stone me'.

[26] Ms Watson did not deny making the comment, and it is likely it was made.

[27] Ms Millar was interviewed on 17 March. She provided further detail of the matters set out in her 6 February report, and added that she and the captain had provided a security report to Dubai. She ended by saying:

... we as Emirates don't mind letting crew see things if they are escorted but they can not just walk onto the aircraft. If it happened before it should not have happened before.

[28] Ms Shlemun was interviewed on 1 April 2011. She told Air New Zealand she viewed the matter as a security breach. Part of her account was recorded in the company's interview notes as:

... Air New Zealand cabin crew from gate 7 was talking to our crew at first and I was keeping an eye on her. She went past the door, still talking, and was halfway through the air bridge. I told her to stop and that she needed permission to be there. She came off and then she started looking at my manifest. She asked me questions like how many crew there were. I didn't tell her much.

[29] At the time Ms Shlemun's account was understood to mean Ms Watson had proceeded further into the air bridge than Ms Watson says was the case, and, coupled with the other reports, to support a view that Ms Watson was attempting to board the aircraft without seeking permission.

[30] Ms Shlemun's supervisor was interviewed on 1 April. The account he gave amounted to his understanding of what Ms Shlemun had told him and again was not based on his direct observation. He said Ms Watson had taken the manifest from Ms Shlemun to have a look, and that Ms Shlemun had stopped Ms Watson 'halfway down the air bridge'. Neither of these two things had occurred.

The disciplinary investigation

[31] By letter dated 13 April Mr Flett informed Ms Watson that the allegations to be investigated were whether she:

- attempted to board the Emirates aircraft through a secure area;
- spoke sarcastically to Ms Shlemun when questioned about her actions;
- was partly responsible for the late departure of her flight;
- did not disclose this; and
- conducted herself in a way that fell below the standard expected of her position, minimising the safety sensitive nature of the FSM role and breaching security protocols.

[32] The breaches of her obligations were said to arise from:

- The Red Back Airport Identity Cards Conditions of Use;
- Air New Zealand's Code of Conduct;
- Cabin Crew General Operating Procedures; and
- The FSM Position Description.

[33] The Red Back and Yellow Back Airport Identity Cards – Conditions of Use provided:

1. You are only permitted to use your Civil Aviation Authority approved airport identity card to gain access to or remain in a Security Area for the purpose of your duties. The card may only be used in the course of the holders approved duties in a Security Area. It does not constitute an authority to enter or remain in a Security Area for any other purpose.

...

Breach of any of these security conditions could result in the withdrawal of your identity and access card and may result in disciplinary action up to and including dismissal. Furthermore, failure to comply with any of the above may constitute an offence against Civil Aviation Rules and may incur a penalty. Prosecution in court could also follow.

[34] The alleged breach of these conditions concerned Ms Watson's use of her identity card to access a security area for reasons other than for the purposes of her duties.

[35] The Code of Conduct required employees to:

Act in such a way as to maintain and promote the company's image.

...

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

[36] The Cabin Crew General Operating Procedures (CCGOP) provided that the regulatory responsibilities of an FSM required:

... compliance with all legislative and regulatory requirements and adherence to all company policy and procedures.

[37] The legislative and regulatory requirements included security provisions in the Civil Aviation Act 1990 (CAA) and the Civil Aviation Rules (CAR). In particular the CAA and the CAR provide that no-one may enter a security area unless that person is wearing an airport identity card issued under the CAR. The CAR provide further that a person who is authorised to enter a security area may remain there only for the purposes of his or her duties, a provision which also appeared in the conditions of use of the airport identity card. Breaches of these provisions can result in prosecution.

[38] The FSM position description required the creation of:

... strong internal and external relationships ensuring positive outcomes designed to drive successful performance.

[39] The combination of: Ms Watson's possible breach of security and of the conditions of use of her airport identity card; her conduct towards Ms Shlemun; her failure to report both the incident and her role in the late departure of the Air New Zealand flight; and the effect of the possible breach of security and her conduct towards Ms Shlemun on Air New Zealand's reputation comprised the alleged breaches of her obligations.

1. First interview with Ms Watson

[40] A meeting went ahead with Ms Watson on 15 April. Her account of the 6 February incident was that she approached some Emirates crew members to enquire

about crew numbers, and walked alongside them to gate 5 while she made her enquiries, but they put their hands up at her and carried on walking. She repeated herself. By then the group had arrived at the desk. Ms Watson was beginning to feel embarrassed and to think the crew did not want to speak to her.

[41] Her account of what happened next was:

There was [Ms Shlemun] at the podium with the form ticking the crew of which I now found out 14 had proceeded down to the gate. Then at the desk, the door was open (re-enact) – door was open (air bridge to desk) and she had let 14 crew go down, I was standing down there, no-one was standing, I went through. As I went through the door, she stopped me and I stood back and said 'oh sorry'. I got the feeling that they didn't want to talk to me in front of the passengers. She had the form and she ticked the last 2 that went down and shut the door.... I said to her 'how many crew have they got?' She said 16. I said 'okay that is fine'. I walked back to the gate. Just before that everyone had ignored me, I was embarrassed, I suppose I wanted a conversation filler, I just wanted to have a look. She was very strong in her reaction 'No, No'.

[42] Mr Flett construed this description of the crew's movement through the air bridge, then Ms Watson's own movement, as a statement that Ms Watson walked through the door to the air bridge after the crew, without making any attempt to stop until Ms Shlemun spoke to her.

[43] Ms Watson re-enacted for the Authority what she said she re-enacted during the interview. When Ms Shlemun stopped her she was standing near the gate lounge desk, in the doorway to the air bridge so that a part of her body was on the air bridge. She denied walking with or following the crew down the air bridge, and denied taking the manifest. As she put it in the Authority, she moved there to wait for an opportunity to ask permission to board while the crew were passing by the desk. Ms Shlemun stopped her at that point, pre-empting her request. As Ms Watson put it during the interview:

'I wanted a posy [position] to stand (right on door), then she said no.'

[44] Regarding the remainder of the company's concerns, during the interview Ms Watson agreed she offered to spell 'curiosity' for Ms Shlemun, but denied being sarcastic. She said she offered to spell the word because she thought English was Ms Shlemun's second language.

[45] At the time Ms Watson did not believe the departure of her flight was delayed because of her actions. She agreed boarding was complete when she returned to her aircraft, and acknowledged the crew was waiting for her to close the door. When she spoke to her captain later in the flight she asked what he put the delay down to and he replied it was the late arrival of the inbound flight. As she had no reason to believe her actions had contributed to the delay, she did not include them in her report.

[46] When asked whether, given what had occurred, she should have contacted her manager, Ms Watson explained that she preferred to wait until he returned from an overseas trip as he would probably be busy, and that she was embarrassed and afraid of what he would say.

[47] Finally, Mr Flett drew Ms Watson's attention to the conditions of use for her airport identity card. Ms Watson said she believed she had adhered to those conditions because she had been security screened and was entitled to be mingling in the lounge area serving gates 5 and 7. She had not used a swipe card to access the air bridge at gate 5, and the door was open. She had one foot in the doorway. She did not agree that it looked as if she was about to walk down the air bridge and would have continued if she had not been stopped.

[48] Ms Watson's explanation of her conduct overall was that she had been in a playful mood when she arrived at the airport, and was very embarrassed at her behaviour. She was sorry.

2. Additional information received

[49] Meanwhile there had been exchanges between Emirates staff in Auckland and Dubai. These resulted in an emailed message dated 15 May from the purser on the Emirates flight, in which he confirmed he had raised a security report about the matter and set out his account of the 6 February incident.

[50] The purser repeated the allegation that Ms Watson had taken the manifest and looked at it, and said she had taken 'about two steps' into the air bridge when she was 'grabbed' and stopped.

[51] The purser also gave an account of the reaction of the Emirates captain. In effect the purser confirmed that he brought the matter to the captain's attention, and he said the captain intended to delay boarding until the possible breach of security was investigated. According to the purser, the captain took account of Ms Watson's explanation and her apology, deciding there was no security breach in respect of the aircraft itself and that boarding could commence.

3. Second interview with Ms Watson

[52] In a letter to Ms Watson dated 24 May Mr Flett advised of his view that Ms Watson's actions were a breach of the conditions of use of her airport identity card.

[53] A second meeting went ahead on 27 June. Although Mr Flett again set out the company's findings and concerns to date, the meeting was intended to give Ms Watson an opportunity to comment on the purser's email, which had been attached to the 24 May letter. She repeated her earlier denials. When it was put to her that the purser, the captain and Ms Millar had been obliged to file security reports, she questioned the need to do so as well as whether there was a breach of security. Indeed she maintained throughout that her actions did not amount to a breach of security. As she said at the time, she regarded the incident as a misunderstanding, for which she had apologised.

[54] A further matter which attracted attention in evidence and in submissions was whether Ms Watson intended to obtain permission before boarding the Emirates aircraft. Regarding that intention - although in answer to another question - Ms Watson said on 27 June that:

... it appears it is the flight attendant that has blown this up. I was gaining permission, I wasn't running down the aircraft. They said no. ...

The outcome of the investigation

[55] Mr Flett prepared a written report of his findings, ending with the view that Ms Watson's actions amounted cumulatively to serious misconduct and advising that termination of employment was being considered. He presented the findings to Ms Watson at a meeting on 24 August.

[56] The findings were:

- Ms Watson had access to the airside terminal in order to operate the Air New Zealand flight to Rarotonga, but breached the conditions of use of her identity card by approaching the Emirates flight attendants, standing with them at the gate 5 desk, perusing the crew manifest and going through the door into the air bridge before being stopped;
- Ms Watson's offer to spell 'curiosity' for Ms Shlemun, and the later comment to Ms Taylor about the 'fuss' being made, breached the obligations to act in such a way as to maintain and promote the company's image, and to act with integrity, trust, respect and in accordance with the law;
- Ms Watson was involved in the late departure of her flight as a result of her leaving the aircraft to explain her actions to the Emirates captain, but had neither acknowledged nor reported her role in the late departure as she should have;
- the leadership responsibilities associated with the FSM position meant Ms Watson should have disclosed her role in the late departure of her flight, reported the matter immediately to Mr Flett, and responded to Mr Flett's attempts to contact her after he had become aware of the incident;
- Ms Watson's actions in approaching the gate 5 departure area led her to become involved unnecessarily in Emirates' operation and security;
- Ms Watson's actions had brought Air New Zealand into disrepute in that the captain and the purser of the Emirates aircraft were obliged to file security reports in Dubai, and in the way she had spoken to Ms Shlemun.

[57] Overall, Mr Flett considered that as an FSM Ms Watson was aware of the standards required of her, and of the importance of compliance with regulatory requirements and company policies and procedures. On 6 February she showed poor judgment. By her questioning of whether a breach of security occurred at all, she failed to see the seriousness with which Emirates handled security.

[58] Mr Flett found Ms Watson's reaction to the incident was dismissive, and resulted in sarcastic comments to Ms Shlemun and Ms Taylor. As a leader, once she became aware of the seriousness with which her actions had been taken, Ms Watson should have offered further apologies, in particular to Ms Shlemun. She had shown

little remorse, did not accept responsibility for her actions and continued to maintain that there was no breach of the terms of her airport identity card.

[59] Ms Watson was offered an opportunity to comment on the findings and the proposed outcome.

The decision to dismiss

[60] A further meeting was convened for that purpose on 31 August 2011.

[61] In reply to Mr Flett's findings, Ms Watson's representative said Ms Watson:

- accepted she was not required to be at the gate 5 departure desk for the purposes of her duties and acknowledged she should have returned to her aircraft when the Emirates crew did not respond to her enquiries, but some flexibility in the application of the conditions of use of the identity card was appropriate;
- accepted she should not have been looking at the crew manifest, but did not believe she had moved onto the air bridge and noted there was conflicting information in that respect;
- accepted she did not react well when she was approached by the ground staff;
- accepted she was responsible for some of the delay in the departure of her flight;
- accepted she should have reported the incident to her manager, but noted she raised it with the captain of the Air New Zealand flight; and
- did not accept the construction placed on her response once she became aware of the seriousness with which her actions had been taken, but rather was apologetic, shaken and nervous at the time, had apologised at the 15 April interview and had begun drafting written apologies.

[62] Ms Watson's length of service and unblemished record were also raised, as was the likely impact on her family if she lost her job. Further, as Air New Zealand had not seen fit to suspend her as a result of the incident, and she had continued to

work well since it occurred, this suggested there was no loss of confidence in her as an employee. Dismissal was not what a fair and reasonable employer could do in those circumstances.

[63] After considering the submissions presented on Ms Watson's behalf, in the light of the seriousness of her behaviour and the nature of the cumulative breaches Mr Flett decided that her employment would be terminated with immediate effect.

[64] The decision was conveyed in a letter dated 31 August 2011.

Was the dismissal justified

[65] Ms Watson says her dismissal was not justified because:

- Air New Zealand's findings were unreasonable or unjustified, including the findings that Ms Watson,
 - breached the conditions of use of her identity card,
 - was sarcastic to Ms Shlemun,
 - caused or contributed to the delay in the departure of the Air New Zealand flight,
 - failed to report the incident to her manager,
 - became involved unnecessarily in Emirates' operations and brought Air New Zealand into disrepute, and
 - was not remorseful.

- the conduct did not amount to serious misconduct
- the decision not to suspend Ms Watson during the company's investigation indicates there was no real loss of trust and confidence in her;
- the investigation took an unreasonably long time; and
- there was disparity of treatment.

[66] I address Air New Zealand's findings with reference to whether the conclusions were genuinely held, and whether they were reached following a full and fair investigation.

1. Unreasonable or unjustified findings

(i) Breach of conditions of use of identity card

[67] I accept that ensuring the observation of aviation security requirements is significant and important to airline operations.

[68] Against that background the principal submission on behalf of Ms Watson was that there was no breach of security, or more specifically there was no breach of the conditions of use for the airport identity card. There are two aspects to the submission: the first concerns the findings of fact made about Ms Watson's movements and whether the findings were open to a fair and reasonable employer following a fair and reasonable investigation; and the second concerns whether the findings supported the existence of a breach.

[69] Mr Flett said in his statement of evidence in effect that he concluded Ms Watson followed the crew through the door of the air bridge and was in the act of progressing down it before she was stopped. He did not accept she was seeking to stand in an empty space with the intention of speaking to Ms Shlemun as she described to the Authority, or that she gave such a description to him during the disciplinary investigation.

[70] Mr Flett pointed in support of his conclusion about Ms Watson's movement into the air bridge to the observations of Ms Shlemun, Ms Taylor, and the purser. The purser was the only other person who gave specific information about how far into the air bridge Ms Watson progressed, and the difference between his account and Ms Watson's amounted to whether Ms Watson had one foot through the entrance to the air bridge or two. Ms Shlemun was not asked what she meant by 'halfway through the air bridge', Ms Watson was not asked what she meant by 'I went through' and Ms Taylor did not see the full incident. Overall, although those accounts created an unfortunate impression at the time, I accept Mr Flett's evidence that he did not rely on any view that Ms Watson had proceeded more than two steps into the air bridge. I also accept a finding to that effect was reasonable.

[71] As for whether Ms Watson actually intended to progress further into the air bridge without seeking permission, or whether she explained that she was standing where she did because that was where empty space was available, I accept she did not give to Mr Flett the fuller account she gave the Authority. Otherwise there was no suggestion in the accounts given to Mr Flett that Ms Watson had moved other than purposefully to the position she had reached by the time she was stopped, and it is significant that, even if only slightly, she had by then moved into the air bridge.

[72] While I have the benefit of the fuller account and accept Ms Watson's evidence regarding her intention to seek permission before boarding the aircraft, the focus must be on the information available to Mr Flett at the time the decision to dismiss was made.

[73] There was a lack of clarity in Ms Watson's account during the disciplinary process, so that Mr Flett had reason to take the view that the explanation given to the Authority was not the same as the explanation given to him. I accept there were indirect references to an intention to seek permission, for example Ms Watson told Mr Flett on 15 April that she was seeking 'a posy' to stand before Ms Shlemun said 'no'. Earlier in the interview she had told Mr Flett that, when stopped, she stood back and said 'sorry'. Even so, she did not go further and explain that movement or her intentions in the way she explained it to the Authority.

[74] The second limb of the submissions for Ms Watson regarding the use of the identity card concerned whether Mr Flett's findings supported the existence of a breach. The submissions took a broad view of what being '*in a security area*' and '*for the purpose of your duties*' meant. Ms White submitted that the 'security area' in question was the departure lounge area servicing gates 5 and 7. Ms Watson was authorised to be in that area. In that she was a member of the crew of a flight that was to depart from gate 7, she was in the area for the purpose of her duties. She was not in the area for any other purpose and was not in breach of the conditions of use of the identity card.

[75] Ms White submitted further that, to the extent Ms Watson sought to proceed through into the air bridge and onto the aircraft, she was intending to seek permission before she did so. Moreover the door to the air bridge was already open, and Ms

Watson had not sought to use her identity card to gain access to the air bridge. Accordingly her actions did not amount to a breach.

[76] Air New Zealand took a narrower view. Mr France submitted that, while gates 5 and 7 shared a common lounge area they did not share a departure desk or a security doorway entry to the respective air bridges. There is a distinction between being in the common lounge area, and being present at the departure desk being operated by the staff of another airline for the purposes of that airline's passengers and flights. Further, Ms Watson had moved into the air bridge, which was not part of any common area. Her presence in those areas was not for the purpose of her duties.

[77] The application of the narrow view had prompted the criticism that no clear line could be drawn in a shared gate lounge area in those circumstances, as well as a specific criticism that, for example, a crew member on a flight departing from gate 7 could not approach a passenger sitting in the gate 5 lounge area without breaching security. There was also a criticism that there were times when crew members were authorised to be present in a security area but carried out other activities not for the purpose of their duties, such as buying coffee.

[78] The first criticism can be answered by accepting the shared departure lounge area was in general an area crew members of a departing flight would be authorised to enter, and that speaking to a passenger in that area could be an action carried out for the purpose of the crew member's duties. As for buying coffee while on duty in a security area it is a matter of common sense that, although such action would probably not be an action carried out for the purpose of an employee's duties, it is unlikely to be viewed as a breach of the conditions of use of the identity card. Similarly, passing and casual conversation with the crew members of other airlines operating in the area is unlikely to be viewed as a breach.

[79] Whether a breach could arise out of something occurring at or around another departure desk - or elsewhere in the departure lounge or other area in which individuals were authorised to be present for the purpose of their duties - would depend on whether the employee's presence in that particular area and the action being carried out in the area were for the purpose of the employee's duties. If not, then whether the breach could be seen as technical or trivial, or a significant breach

warranting further attention, would depend on factors including whether the action was covered by another rule or policy, and the nature of the action. The outcome in turn would be determined as a matter of fact and degree.

[80] In that they were incorporated into Ms Watson's terms of employment, I find Ms Watson was in breach of the conditions of use of her identity card. She was authorised to be in the departure lounge for the purpose of her departing flight, and that authority continued while she continued to engage in that purpose. Her approaching the gate 5 departure area was not necessarily in itself a breach, depending on her purpose in doing so. That purpose was to seek information about Emirates' crewing and to board its aircraft - a purpose not related to her duties. The resulting breach was not technical or trivial.

[81] I do not accept that distinguishing between the departure lounge (where Ms Watson was in general authorised to be) and the gate 5 air bridge (where she was not authorised to be) is a defence to this allegation of breach. If Ms Watson's evidence that she intended to seek permission before moving into the air bridge was intended to support such a defence, it was not necessary because I do not accept that the defence is available. The distinction does not recognise that an employee's purpose is relevant regardless of whether the employee is otherwise authorised to be present in a particular security area.

[82] For these reasons I find Mr Flett's conclusion that Ms Watson had breached the conditions of use of her identity card was reached after a fair and reasonable investigation and the conclusion was one a fair and reasonable employer could have reached.

(ii) Sarcasm toward staff member

[83] Mr Flett's characterising of Ms Watson's offer to spell 'curiosity' as sarcastic was reached following a fair and reasonable investigation and the conclusion was one a fair and reasonable employer could have reached.

[84] Nothing in the remainder of Ms Watson's conduct at the time supported her explanation that the offer was made light heartedly or in a spirit of helpfulness, and even if that was the case the offer can at best be described as patronising.

(iii) Contribution to late departure of Air New Zealand flight

[85] Mr Flett was entitled to rely on Ms Watson's acceptance in August 2011 that she had contributed to the late departure of her flight, as well as on the documentation available to him at the time, although in her evidence to the Authority Ms Watson disputed her contribution to the delay. Overall the accounts of her activities, the fact that boarding was complete when she returned to her aircraft, and the supporting documentation support the probability that she had contributed to the delay.

[86] Mr Flett's conclusion was reached following a fair and reasonable investigation, and the conclusion was one a fair and reasonable employer could have reached.

[87] There was a corresponding concern that Ms Watson did not seek to identify for herself whether she contributed to the delay, or include any reference to the matter in her report. Instead she relied on her captain's statement to her about the reason for the delay. In Ms Watson's view this was appropriate since the captain had overall command of the aircraft, although such reliance, if acceptable, would defeat the purpose of obtaining input to the OTP summary from more than one source.

[88] Mr Flett's conclusion that Ms Watson's failure to address the matter did not accord with the leadership expected of an FSM was one a fair and reasonable employer could have reached.

(iv) Failure to report incident to manager

[89] Mr Flett found unacceptable Ms Watson's explanation that she was embarrassed about the incident and sought to wait till she could speak to him directly.

[90] Mr Flett's conclusion that the explanation was unsatisfactory and did not accord with the leadership expected of an FSM was one a fair and reasonable employer could have reached.

(v) Involvement in Emirates' operations and Air New Zealand brought into disrepute

[91] To the extent that Mr Flett's view of Ms Watson's involvement in Emirates' operations was intended as a reference to her activities at the gate 5 departure area, the matter is dealt with in the finding that Ms Watson was in breach of the conditions of use of her identity card.

[92] To the extent that the involvement goes further and encompasses aspects of bringing Air New Zealand into disrepute, even on Ms Watson's account it is probably to be expected that the Emirates captain would react to the accounts of her behaviour which were passed to him and that Emirates' staff members would report the incident as a security matter. Even taking into account that the accounts of some of the Emirates' staff were variously exaggerated or inaccurate, Air New Zealand was entitled to be concerned that Ms Watson's behaviour was sufficient to cause those reactions. It was also entitled to be concerned that, when known to be an Air New Zealand cabin crew member, she had spoken to Ms Shlemun as she did.

[93] With reference to the expectations of Ms Watson as an FSM, and to the code of conduct, Ms Watson failed to create strong internal and external relationships and failed to maintain and promote the company's image. As she was reported to have acknowledged, her behaviour was at least 'not a good look'. In those respects Mr Flett's findings were those a fair and reasonable employer could have reached.

(vi) Not remorseful

[94] The finding of lack of remorse and failure to accept responsibility appeared in the additional considerations Mr Flett took into account when deciding to dismiss. It did not in itself amount to a finding of misconduct. It was concerned with the views Ms Watson had expressed prior to August 2011 to the effect that she had not breached the conditions of use of the identity card and had done nothing wrong, and that the

Emirates' staff members and others involved had blown the incident out of proportion.

[95] I accept Ms Watson was and had shown herself to be upset and embarrassed about the incident, and in that respect what was said on her behalf in August was a reflection of her true feelings. Her remorse was, however, more concerned with the effect her conduct had than with the conduct itself. While she was not without remorse at an earlier stage, it could still be said that until 31 August she had not taken responsibility or shown remorse for the conduct.

2. Conduct did not amount to serious misconduct

[96] The classic test of the kind of conduct that will justify summary dismissal is:

Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.²

[97] In concluding serious misconduct occurred, Mr Flett considered Ms Watson's overall conduct on 6 February, rather than relying on any one or more of his findings individually.

[98] Commencing with the breach of the conditions of use of the airport identity card, although Ms Watson genuinely believed there was no breach, the contents of an AVSEC³ bulletin which I detail later in this determination mean she should at least have been aware it is possible to commit a breach even while otherwise authorised to be present in a security area. Because Ms Watson was an FSM Air New Zealand was entitled to expect this of her.

[99] Secondly, as an FSM Ms Watson should have recognised the extent to which her actions suggested to the Emirates' staff an intention by a person not recognised by them to proceed to board their aircraft without permission. Their perceptions were not groundless, and Ms Watson's actions were reasonably capable of creating a security concern from their perspective. She should not have persisted in her approaches to the crew when she was rebuffed and ignored, and rather than

² *Northern Distribution Union v BP Oil NZ Limited (CA)* [1992] ERNZ 483, 487

³ Aviation Security

questioning Ms Shlemun about crew numbers after she had been stopped she should at least have apologised and explained herself.

[100] Thirdly, in subsequent exercises of poor judgment she was sarcastic to Ms Shlemun when asked for information she should have offered at the gate lounge desk, and in her comment on the reaction of the Emirates' crew she was dismissive and showed a continuing failure to appreciate how important it was to address the perception she had created.

[101] The explanation and apology provided to the Emirates' captain redressed matters in that the departure of the Emirates' flight was able to proceed, but did not cure the fact that an incident had occurred. Ms Watson must have appreciated the likelihood that there would be further consequences as far as her employer was concerned, and should have been proactive in bringing the matter to the attention of her manager.

[102] Similarly, Ms Watson was content to record the reason for the late departure of her aircraft as the reason given to her by her captain. That action was an avoidance of the responsibility she should have taken for reporting what she must have appreciated was a possibility that her actions had contributed to the late departure.

[103] Conduct of this kind, on the part of a person in Ms Watson's position, was sufficient to deeply impair or destroy the basic confidence and trust essential in the employment relationship. It amounted to serious misconduct.

3. No suspension

[104] Air New Zealand's disciplinary policy referred to the possibility of suspension on pay during the preliminary investigation, in cases of serious misconduct. The policy went on to set out a procedure for suspension.

[105] Ms White submitted that the decision not to suspend indicated the conduct was not as serious as Air New Zealand later said it was, and that the circumstances

suggested there were no grounds for Air New Zealand to say it had lost trust and confidence in Ms Watson.

[106] As was pointed out, suspension is not obligatory. Ms Watson was not suspended because Mr Flett considered there were no grounds for that action. In his view Ms Watson's conduct did not raise a health and safety concern, when suspension is usually considered, and there was no reason to believe she would interfere in the investigation process. He took the approach that, until the outcome of the investigation indicated otherwise, Ms Watson should be treated as if she had not committed any act of misconduct.

[107] I do not accept that in itself the decision not to suspend means the conduct was less serious than Air New Zealand says it was.

4. Unreasonable length of investigation process

[108] Ms White submitted that the length of time taken for Air New Zealand's investigation process was unreasonable, and is another factor calling into question whether the conduct actually destroyed Air New Zealand's trust and confidence in Ms Watson.

[109] It is unfortunate that Ms Watson accused Air New Zealand of delaying the investigation deliberately, in order to take advantage of the change to the statutory test of the justification for a dismissal which was to come into force on 1 April 2011. The accusation was groundless and should not have been made.

[110] The timeline for the process which led to Ms Watson's dismissal was:

- 6 February - incident occurred and emailed reports followed;
- 7 March to 1 April – investigatory interviews;
- 15 April - Ms Watson interviewed;
- 27 June - Ms Watson interviewed;
- 24 August - findings compiled and presented;
- 31 August – submissions on outcome heard and outcome decided.

[111] Similar delays, involving Air New Zealand in particular, have been raised in other cases some of which Mr France cited. As here, the delays were explained by difficulties with the availability of the employee, the decision-maker, and witnesses. Here I was provided with a detailed account of Mr Flett's and Ms Watson's availability with reference to their work commitments, hours of work and leave arrangements. As well as the need to arrange time to speak with other witnesses who were under similar constraints, Air New Zealand's internal checking and sign off procedures meant there was further delay associated with the availability of the staff involved in those procedures.

[112] I find that the overall delay was adequately explained for the purposes of Ms Watson's personal grievance. However the occurrence of delays in the order of 6 months or more, as illustrated by the cases Mr France cited as well as by this one, is of concern. While I accept there is inherent potential for delay in that the disciplinary procedure is comprehensive and detailed, and Air New Zealand's operational requirements affect the availability of the participants, the completion of the procedure should be better co-ordinated and prioritised to prevent delays of that degree.

5. Disparity of treatment

[113] The applicable legal test when disparity is alleged is set out in *Chief Executive Officer Department of Inland Revenue v Buchanan (No 2)*⁴. It poses three questions, namely, -

- is there disparity of treatment?
- if so, is there an adequate explanation?
- if not, is the dismissal justified notwithstanding the disparity?

[114] Further to the third question, even without an explanation the mere existence of disparity does not necessarily render a dismissal unjustified. All of the circumstances must be taken into account.⁵

⁴ [2005] ERNZ 767 (CA); leave to appeal declined in [2006] NZSC 37, [2006] ERNZ 512

⁵ *Samu v Air New Zealand Limited* [1995] ERNZ 636

[115] One of the allegations of disparity of treatment concerned another employee, A, who held a management position. While off duty in January 2009 A entered a gate lounge in order to farewell a spouse who was departing on an international flight. The explanation was that A was unaware such action was a breach of security. No disciplinary action was taken but A was required to attend a training course.

[116] On the face of the matter A had entered and remained in a security area other than for the purpose of A's duties, amounting to a clear breach of the conditions of use of the identity card. A was not disciplined. For her part Ms Watson had entered a security area for the purpose of her duties, but while there had engaged in an activity that was not for the purpose of her duties.

[117] In that respect the conduct was comparable, and there was disparity of treatment in that A was not subjected to a disciplinary procedure at all.

[118] At the same time I take into account that, while Ms Watson's breach of the conditions of use of the identity card was a factor in her dismissal, it was not the only factor and Air New Zealand has relied on the cumulative effect of her conduct.

[119] In that respect the conduct is not comparable, so that on a view of the overall conduct of the employees concerned there was no disparity.

[120] If I am wrong in this, I turn to the explanation of the disparity.

[121] Air New Zealand pointed out that the incident was not raised during Ms Watson's disciplinary process. Further, the matter was dealt with by A's manager without human resources involvement. Because of this neither Mr Flett nor Jackie McManus, the human resources manager who advised Mr Flett, was aware of the incident.

[122] Secondly, in November 2009 AVSEC issued a bulletin on the use of airport identity cards which included a section on using the card for purposes other than an employee's lawful duty. It noted the difference between working airside and carrying out a work function, and working airside but engaging in activities which did not amount to a work function. It specified that the latter was not permitted. Ms

McManus gave evidence which I accept that, since 2010, a number of employees have been dismissed for being airside and in breach of security requirements⁶.

[123] Accordingly the need to limit activities to work functions for the purposes of the conditions of use of airport identity cards had been identified, and should have been recognised. Air New Zealand's explanation was adequate.

[124] A second allegation of disparity was made after the dismissal. The individual concerned was said to have gained access in 2011 to a security area in the domestic terminal in order to see a family member, although there was also a work-related purpose for accessing the area. I consider the conduct comparable with Ms Watson's, yet there was no dismissal.

[125] The difference was explained in that employee's union became involved, there was an issue concerning compliance with the applicable cea, and the matter was dealt with between the parties against that background. Since the incident had not occurred at the time of Ms Watson's dismissal and so could not be taken into consideration, and an additional issue arose in respect of it, the explanation is adequate.

6. Conclusion

[126] I have found the conclusion that serious misconduct occurred was one a fair and reasonable employer could have reached.

[127] I have also considered whether, despite its finding of serious misconduct, dismissal was not the action a fair and reasonable employer could have taken. In particular, I asked the parties after the investigation meeting to comment on whether demotion was considered, and if so why was it rejected. The query was prompted by the role failures in leadership had played in the conclusion that serious misconduct had occurred.

⁶ A personal grievance arising out of least one of these has been before the Authority.

[128] Neither party proposed or considered demotion as an alternative to dismissal at the time, although at the meeting on 31 August Ms Watson asked that an outcome other than dismissal be considered.

[129] Mr Flett did not regard demotion as an option and decided that dismissal was the appropriate sanction to impose in response to the findings he had made and the submissions he had received. It was also said that Air New Zealand does not have a practice of imposing demotion as a disciplinary sanction, and there is no provision for demotion as a disciplinary sanction in the parties' employment agreement. Thirdly, a list of demoted employees which Ms Watson provided included only one person who was demoted following a disciplinary investigation, and that action led to proceedings which were subsequently resolved.

[130] Demotion as an alternative to dismissal was addressed in the following terms by the Employment Court in *Secretary of Justice v Dodd*;

[119] *The other assurance that employers nervous of [imposing a sanction other than dismissal] may have is that the ultimate test of justification for unjustified disadvantage in employment is not whether a sanction less than dismissal is mandated contractually. Rather, it is whether what was done was, in all the circumstances of the case at the time, what a fair and reasonable employer would have done; s 103A. So, even if, unlike the position in this case, a collective agreement, an individual employment agreement, or an employer's policies do not address explicitly an outcome for misconduct such as temporary demotion, the Authority or the Court may nevertheless, in an appropriate case, determine that to have been a fair and reasonable disadvantage to an employee.*⁷

[131] *Dodd* was decided under the test of justification set out in s 103A and which applied before 1 April 2011. The dismissal in question was found to be unjustified in part because insufficient consideration was given to alternative outcomes to dismissal. A fair and reasonable employer would not have acted in that way.

[132] The test of the justification for a dismissal which came into force on 1 April 2011 is to be applied objectively, and addresses whether what was done was, in all the circumstances of the case at the time, what a fair and reasonable employer could have done. The most significant difference between the tests can be explained, as the court

⁷ [2010] NZEmpC 84

did in *Air New Zealand Limited v Hudson*⁸, as the difference between whether a person is able to respond in a certain way and whether a person who is able to respond in a certain way would actually respond in that way.

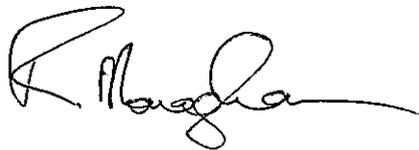
[133] Demotion was an alternative to dismissal which should at least have been considered. However, as the misconduct did not solely concern a failure in leadership and the evidence did not support an outcome such as the one reached in *Dodd* even without the changed test of justification, I conclude that the failure to consider demotion does not vitiate the decision to dismiss. Deciding to dismiss was what a fair and reasonable employer could do.

[134] For these reasons I find the dismissal was justified.

Costs

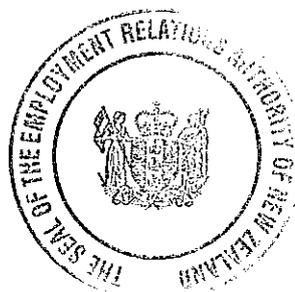
[135] Costs are reserved.

[136] The parties are invited to agree on the matter. Any party seeking a determination from the Authority shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days from the date of receipt of the memorandum in which to file and serve a reply.



R A Monaghan

Member of the Employment Relations Authority



⁸ [2006] ERNZ 415