

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 11
5365888**

BETWEEN HELEN WATSON
Applicant

AND AIR NEW ZEALAND
LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Helen White, counsel for the Applicant
David France, counsel for the Respondent

Investigation Meeting: On the papers

Determination: 13 January 2012

DETERMINATION OF THE AUTHORITY

- A. The application by Helen Watson for removal of this matter to the Employment Court to hear and determine is declined.**
- B. The Authority is to proceed with its investigation of Ms Watson's personal grievance application.**

[1] By consent the application for removal of this matter was determined on the papers.

The employment relationship problem

[2] Helen Watson was a flight services manager for Air New Zealand Limited (ANZL) with 26 years of service. ANZL dismissed her on 31 August 2011 after its Performance and Development Manager John Flett decided her behaviour during an

incident at Auckland International Airport on 6 February 2011 was serious misconduct.

[3] ANZL began a disciplinary investigation following reports that Ms Watson had attempted to board an Emirates aircraft, spoken “sarcastically” to an Emirates ground representative, and delayed the departure of the Air New Zealand flight on which she was rostered to work.

[4] Ms Watson was due to fly out on an Air New Zealand service to Rarotonga. She saw an Emirates flight at an adjacent boarding gate was using a Boeing 777-300, an aircraft of the type that Air New Zealand was to get in near future. She approached the Emirates gate agent and asked how many crew were used on the plane and if she could look at the aircraft.

[5] What happened next is in dispute. Ms Watson said she was told no and left. The gate agent later complained that Ms Watson had taken several steps down the air bridge and also picked up and read a document containing the Emirates crew list.

[6] Ms Watson returned to her work area. She was working on the boarding of passengers on the Air New Zealand flight when an Emirates representative approached her and asked for her name and employment number. The captain of the Emirates flight had asked for those details because he had security concerns after being told Ms Watson had looked at crew information and attempted to board the aircraft. When asked by the representative why she had attempted to gain access to the Emirates craft, Ms Watson replied: “Curiosity, do you know how to spell it”.

[7] Ms Watson accompanied the representative back to the Emirates aircraft where she spoke with its chief purser and captain and explained and apologised for her actions. She returned to the Air New Zealand craft where boarding had been completed in her absence. The flight was delayed around 36 minutes and ANZL attributed some of that delay to Ms Watson going to the Emirates aircraft.

[8] Mr Flett advised Ms Watson on 8 February that Emirates had complained about the incident and that inquiries of witnesses would be made. During March he interviewed Emirate agents and Air New Zealand staff who knew about the 6

February incident. On 13 April he notified Ms Watson of a disciplinary meeting. She was told the allegations for investigation were:

- a. attempting to board an Emirates plane through a secure area; and
- b. speaking sarcastically to an Emirates agent; and
- c. being partly responsible for the late departure of her flight; and
- d. not disclosing her role in the late departure; and
- e. demonstrating a lower than expected level of leadership and breaching security protocols.

[9] Ms Watson attended disciplinary meetings on 15 April and 27 June 2011 where she answered the allegations and provided explanations. On 24 August Mr Flett issued a report of his findings in the disciplinary investigation. This included his conclusion that Ms Watson's actions amounted to serious misconduct and that he was considering termination of her employment. At a meeting on 31 August Ms Watson made submissions on alternatives to dismissal but Mr Flett decided to proceed with her dismissal due to what he considered was the seriousness of her behaviour and breaches of her responsibilities.

[10] On 19 October 2011 the parties attended mediation without resolving the matter. Ms Watson lodged her personal grievance application in the Authority on 8 December 2011.

The removal application

[11] Ms Watson advanced two grounds for removing this matter to the Employment Court without prior investigation by the Authority:

- a. that an important question of law arose in this matter other than incidentally (s178(2)(a) of the Employment Relations Act); and
- b. the likelihood of challenge to any Authority determination.

[12] The question of law posited in Ms Watson's submissions on her application for removal focused on the fact she continued to work throughout the seven months between the date of the incident of alleged misconduct and the decision to dismiss her. It was asked this way in her submissions:

Where there has not been conduct that warranted a suspension is it fair and reasonable in all the circumstances to dismiss a worker after a delay of eight (sic) months and continued good conduct from the worker?

[13] It is a question that requires a finding of fact that the delay was without good reason and is said to be important because its answer could inform and affect the way employers conduct disciplinary investigations and use suspension.

[14] I do not accept this question posited a matter of law which realistically could be decisive or strongly influential in how the present case should be resolved and, consequently, had the relative importance necessary for removal.¹

[15] Rather I accept ANZL's submission that the length of time taken for the disciplinary investigation, and why Ms Watson was not suspended during it, are all factual issues. Its statement in reply claims the delay was due to the availability of other witnesses and Ms Watson. In the relevant period she was said to be out of New Zealand on tours of duty of up to 18 days duration in each 28 day roster and to have taken an extended period of annual leave.

[16] The length of time taken in the disciplinary investigation and what occurred during it is a factor to be considered under s103A(3) and (4) of the Act, including the sufficiency of investigation given the employer's resources. ANZL must have done what a fair and reasonable employer could have done in the circumstances at the time – and that, I consider, is a factual inquiry about Ms Watson's rosters and leave booking along with details about what impediments there were to the availability of the witnesses interviewed in the investigation. Evidence is also necessary about whether Mr Flett considered suspending her and, if he did so, why he decided not to put her off duty, and if he did not, why he was content for her to continue working during his seven month long disciplinary inquiry? What that evidence may say about the subsequent decision he made that Ms Watson's conduct on 6 February and her explanations of it was so unsatisfactory that she could no longer be trusted to carry out her duties adequately in the future will no doubt be an important issue for submission at the conclusion of the Authority's investigation – but it is one which relies on the facts, and only incidentally on the law.

¹ *Hanlon v International Education Foundation (NZ) Inc* [1995] 1 ERNZ 1 at 7 (EC).

[17] There is no obligation for an employer to suspend a worker while investigating an allegation of serious misconduct, rather, as a matter of reasonable conduct by the employer, the need to do so (if any) in the circumstances of that particular worker, employer and workplace should be fairly considered along with whatever contractual provisions may or may not apply and then, generally, be discussed with the worker before a decision is made. Relevant considerations may include health and safety concerns, risk to the worker or others if she or he stays at work, and any real risk of repetition of the alleged misconduct meanwhile if adequate supervision or other satisfactory safeguards are not able to be put in place.

[18] On the second ground for removal – the likelihood of challenge – it is a rare case (in my assessment) where that prospect is sufficient on its own to warrant removal. Rather in some cases, where other grounds favouring removal are established, the likelihood of challenge supports the exercise of the Authority’s residual discretion to grant a removal application. On the known and undisputed facts of this case, I consider:

- a. there is not sufficient certainty about the inevitability of challenge to override the general statutory obligation of the Authority to investigate employment relationship problems in the first instance; and
- b. even if this proved wrong and there were later to be a challenge to whatever determination was reached by the Authority, it is not appropriate to remove the parties’ right of access to two ‘triers of fact’ if necessary – firstly, through adjudication by investigation in the Authority and secondly, through adjudication by adversarial hearing in the Employment Court.

[19] The removal application is declined and costs in respect of it are reserved. Ms Watson’s personal grievance application will be referred to a member of the Authority to proceed with arrangements for an investigation.

Robin Arthur
Member of the Employment Relations Authority