Determination Number: AA 99/03
File Number: AEA 223/03

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Christine Graham, Applicant
AND	Airways Corporation of New Zealand Limited, Respondent
REPRESENTATIVES	Paul Wallace, for Applicant Stuart Dalzell, for Respondent
MEMBER OF AUTHORITY	A Dumbleton
INVESTIGATION MEETING	3 April 2003
DATE OF DETERMINATION	11 April 2003

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The problem brought by Ms Christine Graham to the Authority for investigation is her dismissal, both in respect of the grounds on which that action was taken against her by Airways Corporation of New Zealand Limited ("Airways") and the procedure used for termination of the employment. Ms Graham challenges the justification for her dismissal which she was told about by Airways on 3 March 2003. On that date Ms Graham was given notice of one month but during this period was not required to continue working in her position of Air Traffic Controller (subject to passing a final performance assessment) at the Whenuapai tower.

[2] To have her grievance resolved Ms Graham lodged a statement of problem in the Authority on 13 March 2003. She wants the problem dealt with by the making of an order for her immediate reinstatement until final resolution of the grievance, the making of an order for her permanent reinstatement, an order for payment of compensation to her for humiliation, hurt feelings and distress caused by her contended unlawful suspension and unjustifiable termination of employment, and an order for reimbursement to her of remuneration lost as a result of the grievance.

[3] Following a telephone conference between the Authority and representatives of the parties, a timetable was drawn up for mediation (to take place on 21 March 2003), the lodgement of Airway's statement in reply (by 27 March 2003), the filing and service of affidavits from Airways in opposition (by 28 March 2003), the filing of service of any affidavits from Ms Graham strictly in reply (by 1 April 2003) and an investigation meeting to consider the application for interim reinstatement (on 3 April 2003).

[4] Upon being advised that mediation had not been successful the Authority held the investigation meeting on 3 April 2003 to consider the application by Ms Graham for her interim reinstatement.

[5] Airways has opposed reinstatement as an interim remedy for Ms Graham. The employer contends that none of its actions have been unlawful in any respect with regard to its obligations under the employment relationship. Airways contends that despite having the opportunity to do so Ms Graham was unable to complete the training and assessment required for her validation as an Air Traffic Controller at Whenuapai. The employer contends that as a consequence there was no position of employment at Whenuapai that Ms Graham was competent to perform and her dismissal was justified accordingly. Airways argues that as well as having good grounds for dismissal it acted in all respects in accordance with its obligations as a fair and reasonable employer.

Interim reinstatement

[6] Ms Graham's application has been brought and considered under s.127 of the Employment Relations Act 2000. As required, in lodging her application she has given a formal undertaking to abide by any order made by the Authority in respect of damages that may be sustained by Airways through the granting of an order for interim reinstatement. It is also a requirement under s.127 for the Authority, when determining whether to make an order for interim reinstatement, to apply the law relating to interim injunctions and do so with regard to the object of the Employment Relations Act. An order for interim reinstatement may be subject to any conditions that the Authority thinks fit. Under s.123 of the Act reinstatement is expressed to be the primary remedy for a personal grievance, to be provided by the Authority wherever practicable.

[7] In applying the law relating to interim injunctions, the Authority has confined its investigation to the untested evidence contained in the affidavits of various witnesses including Ms Graham. It has heard careful and comprehensive submissions from Mr Wallace and Mr Dalzell about the well established legal principles that are to be applied to the facts at least in so far as they are disclosed by the affidavit evidence. Inevitably, given the investigatory role of the Authority and the relative informality of its meetings, some information has been presented in addition to that contained in the affidavits. In relation to such information the Authority must consider what if any value as evidence that information has, or what weight should be given to it, in coming to a provisional view of what happened.

Interim reinstatement – legal principles

[8] These require the presence of an arguable case or serious question to be decided on the substantive issue which, in this case, is the existence of justification for Airways actions in suspending Ms Graham and later in dismissing her. To be justified the employers actions must be based on grounds existing in fact and law and its actions must be accompanied by treatment that is fair and reasonable according to all the circumstances. Further, the legal principles require that a broad discretionary assessment is to be made of how best to regulate the positions of Ms Graham and Airways until, after a full investigation meeting by the Authority has been able to take place, the grievances are finally determined. This test is also referred to at the interim stage as the balance of convenience. Another consideration is whether effective remedies other than interim reinstatement are available to an applicant. Finally, in assessing an application for interim reinstatement the Authority is to take a global view of the justice of the case and decide what should best be done to attain that. A good description and discussion of the legal principles applicable in an application for interim reinstatement can be found in *McKay v Order of St John* [1999] 1 ERNZ 519.

Circumstances giving rise to the employment relationship problem

[9] To achieve her long time dream of becoming an air traffic controller, Ms Graham resigned from a well paid executive position and undertook a course of training which she eventually passed. The cost and associated expenses of the training amounted to about $22,000.00, which Ms Graham paid for herself and did so apparently without any certainty that a job with Airways would be offered to her at the end of the course. However Ms Graham was given a post by Airways at Ohakea where she was required to undertake on the job training and achieve validation before being legally competent to perform the job. She did this and, on 19 July 2002, was made an offer by Airways of a position as Air Traffic Controller. By that time Ms Graham had also been advised that her wish to be posted to Whenuapai could be met and she would be transferred there once her training had been consolidated at Ohakea. She duly commenced on 27 August 2002 at Whenuapai, where she was required to achieve local validation.

[10] The process of training for validation consists mainly of on the job instruction given by a qualified instructor ("OJTI") who is an experienced Air Traffic Controller. Although it was anticipated by Airways that one month of training would be sufficient for Ms Graham's required validation at Whenuapai and that she would therefore pass her Final Performance Assessment ("FPA") by 1 October 2002, this date was later extended due to other training and business requirements. After this period a point was reached where Airways considered that Ms Graham was not making satisfactory progress and her training was further extended. Then, on 3 December 2002, a formal process of 'training intervention' was initiated by the Chief Controller at Whenuapai after a 'critical error' caused Ms Graham to fail a '100% check' then being carried out. The aim of training intervention is to provide clarification of the issues that are affecting a controllers training and to provide recommendations to assist the employee to successfully complete training.

[11] The employers policy in relation to intervention is described in an Airways manual as follows;

> *A Training Intervention can be defined as any action that has to be taken by an agency from outside the immediate training process to investigate and offer advice on repairing any breakdown in the training process.*

Further, the policy states;

> *An intervention is not an implied criticism of anyone involved in that training process. It is part of the training process with the sole requirement of improving that process and avoiding what ISO refers to as a "non-conforming product". It is therefore concerned with systemic analysis and repair and not with apportioning blame.*

[12] At the completion by Ms Graham of this remedial process of intervention, on about 11 December she was given a copy of the Training Intervention Report highlighting a number of recommendations that both Ms Graham and her OJTI were advised to adopt so that training could be progressed. Because air traffic levels at Whenuapai were not expected to be sufficient for training purposes around Christmas and the New Year at the end of 2002, Ms Graham was placed on special leave until 6 January 2003. She was advised that upon her return to Whenuapai on that date she would undergo several cycles of training, at the end of which her controlling would be assessed as to whether it was adequate for her to be recommended to sit the FPA for Whenuapai. The requirements in this respect were set out in a letter dated 11 December 2002 from the Airways Regional Manager, Mr Fred Hansen, as follows;

> *At the end of this time* [of training] *you may be recommended for and must subsequently pass your FPA. If you do not pass the FPA or you have not demonstrated adequate controlling*

> *consistently to enable you to be recommended to sit your FPA your training will be terminated. This will mean that your employment with Airways will be terminated with four weeks notice.*

In his letter Mr Hansen emphasised to Ms Graham the commitment of Airways to helping her succeed with her training, and Mr Hansen invited Ms Graham to contact him if she wished to discuss any aspect of the training process to that point.

[13] The training of Ms Graham under the eye of several OJTI's at Whenuapai continued during January 2003 until, on 7 February, a critical discussion took place between Ms Graham and Ms Kim Markwick, the Senior Controller (Training) at Whenuapai who was then performing the role of an OJTI in respect of Ms Graham. Ms Markwick told Ms Graham that she harboured reservations about making the required recommendation for sitting the FPA and said she wished to discuss with Ms Graham some things she had seen and noted during her training. Whether Ms Graham abruptly cut short the discussion by leaving the room or whether she was given permission to suspend the discussion until Mr Chub Roberts, the Chief Controller at Whenuapai, arrived at work that day, is a matter of difference between the witnesses concerned but in the result a doubt was raised whether Ms Graham was going to be recommended for her FPA and her training was suspended by Mr Roberts. She received a letter dated 7 February 2003 from Mr Hansen confirming that action, and also that;

> *… in the event that you are not recommended for your FPA your training will be terminated which will mean that your employment with Airways would be terminated.*

Mr Hansens letter of 7 February 2003 went on to say;

> *The failure to be recommended for your FPA is obviously a serious issue and I would like to give you to opportunity to discuss this with me before I determine what should happen next.*
>
> …
>
> *As this is a serious matter which has the potential to result in dismissal you may wish to bring a representative to the meeting with you.*

[14] Ms Graham was advised that the meeting with Mr Hansen would be held on 14 February 2003 and that until then she was suspended from work but would continue to receive pay. The meeting of 14 February was attended by Ms Graham, her union representative and a supporter. Discussion took place with Ms Markwick as to why she had felt unable to recommend Ms Graham for the FPA. Ms Graham was given an opportunity to respond to this in writing, an offer she subsequently took up. There were differences of view or opinion between Ms Markwick and Ms Graham about the training and standard achieved by the latter. In respect of these differences Mr Hansen felt that he had to place more weight on Ms Markwick's view, because she was an experienced OJTI who was validated at Whenuapai. Mr Hansen concluded that Ms Graham was unlikely to validate at Whenuapai and he therefore terminated her training. Dismissal was viewed as having to follow as a consequence and Ms Graham was advised of her dismissal in person and in writing on 3 March 2003.

<u>Contended lack of justification</u>

[15] The lack of justification in respect of Airways actions in suspending and later dismissing Ms Graham is contended to arise in the following ways. It is claimed that in breach of clause 49.7.3 of the applicable Air Traffic Controllers Collective Agreement, Ms Graham had not been permitted

two attempts to qualify at Whenuapai. Airways have acknowledged the application to the circumstances of clause 49.7.3, which provides as follows;

> *Except where the employee has been appointed under VBS, where an employee has been appointed to a vacancy and fails to qualify for that position on a second attempt or fails to achieve the advertised criteria within six months of taking up the appointment, s/he shall lose the right to the appointment and, if at the same unit, return to her/his former position.*

It is also contended on behalf of Ms Graham that her employment was terminated before the expiry of the six month training period referred to in the above provisions. Further it is contended that Airways made a number of mistakes in the course of Ms Graham's training, such as failing to provide an Individual Training Plan. It is also argued that Airways was not able to demonstrate that Ms Graham had failed to achieve the objective standards of the FPA which, it is claimed, Ms Graham would have passed had she been given the opportunity to take the test.

[16] Further it is contended on behalf of Ms Graham that such disciplinary warnings as were given to her were defective in that the first warning was issued after an intervention meeting, the stated purpose of which is not disciplinary but remedial. It is claimed that Ms Graham was not advised prior to the December 2002 intervention that she faced the possibility of disciplinary action and that her employment was in jeopardy, nor was she advised that she was entitled to bring a representative to the intervention meeting. As to the warning issued to Ms Graham after she had been suspended, it is claimed that this action was unfair or unreasonable as Ms Graham had not been given the opportunity to demonstrate any improvement in her performance. Principles set out by the Employment Court in *Trotter v Telecom Corporation of N Z Limited* [1993] 2ERNZ 659, are held up by Mr Wallace as standards Airways failed to meet in its overall treatment of Ms Graham's performance as a disciplinary matter. In this regard it is claimed that warnings given by Airways were simply for the sake of procedure, rather than having a practical purpose of encouraging improvement in the employees performance. Also the point is raised that Airways did not exhaust all possible remedial steps including further training, counselling, or the exploration of redeployment, before terminating Ms Graham's employment. It is claimed that there was a secret watching of Ms Graham rather than an open supervision of her performance while training. It is also claimed that the suspension of Ms Graham from training was unfair because it occurred while she was away from the workplace and she had not been consulted about this action before it was taken.

Arguable case

[17] I find that the relatively low threshold under this test has been reached and that an arguable case is present in several respects to do with the justification or lawfulness of Airways actions in suspending and later dismissing Ms Graham. To begin with, there is an arguable case as to whether, when Ms Graham's training was suspended on 7 February 2003, she had been making a second attempt to become validated at Whenuapai within the meaning of clause 49.7.3 of the employment agreement

[18] Further, I find there is an arguable case in respect of the basis on which Airways may decline to recommend an employee for the FPA. Airways has put this forward as being a matter of judgement to be exercised by the senior controller or other OJTI'S, although acting reasonably in doing so and taking into account only relevant considerations. For Ms Graham however, derived rom the history of her training particularly in 2003 a prediction is offered that she would have passed the FPA, had she been given the opportunity to take the test. The issue seems to be whether the sitting of a formal test and the ability to pass that is more important than the preliminary assessment of whether the employee is likely to meet the standards required.

[19] There is an issue about the construction of a written statement made to Ms Graham following the delivery to her of the training intervention report on or about 11 December 2002. This has been regarded by Ms Graham as a disciplinary warning to her, whereas it may be open to be read as an express reiteration of consequences that the collective agreement had made provision for at clause 49.7.3. If the intervention meeting was a disciplinary situation then the issue arises as to whether Ms Graham ought to have been told of that and allowed an opportunity to take a representative to the meeting. There is an arguable case as to whether if a second warning was issued to the applicant, that was done without allowing her a reasonable opportunity to improve her performance.

[20] I find that there is a serious question to be decided as to whether in the circumstances of an Air Traffic Controller attempting to meet the regulatory standards required before being legally competent to perform the position, this was the type of case the principles set out in the *Trotter* case applied to. *Trotter* is about dismissal for poor work performance. There is also an issue as to whether principles referred to in *Nelson Air Limited v New Zealand Airline Pilots Association* [1998] 3ERNZ 332, are of relevance. That was a case about the treatment of an employee while in a probationary period.

[21] I consider that there is an arguable case as to whether Airways did consider alternatives to the termination of Ms Graham's training and alternatives to her dismissal. The question seems to me to be whether Airways investigated fully enough the circumstances in which Ms Graham had earlier been accepted for training as an Air Traffic Controller and had then been appointed to Ohakea, where she had been validated even after certain relevant behavioural traits had been identified as present although they were later addressed by Ms Graham. Whenuapai is officially rated as a less demanding place to control at than Ohakea. What was it about the transition to Whenuapai that caused Ms Graham to be regarded so adversely by some of her peers and instructors? Did Airways look hard enough at its own screening, assessment and training of Ms Graham in the period before she transferred to Whenuapai to see whether the employer had been thorough and careful enough in letting Ms Graham advance?

[22] I find there is an arguable case that Airways acted in breach of its own policy in a material way, in relation to its failure to provide Ms Graham with an Individual Training Plan (ITP). Clause 2.1 of the Airways National Training Plan provides that prior to commencing training for a rating or validation at an operational unit (such as Whenuapai), the trainee shall receive an OJT Folder which is to contain an ITP. This is to be provided at Phase 1 of OJT training. The National Training Plan clearly contemplates that the ITP will be a discrete document. Airways, it appears from a letter written on 20 February 2003 by Ms Beth Hemlock, Human Resources Manager, has acknowledged that a single individual document was not produced as an ITP for Ms Graham. In the letter Airways said however that there was a clear and mutually understood process in relation to the elements that formed Ms Grahams training at Whenuapai. Ms Hemlock said in her letter that this process had been clearly communicated to Ms Graham whose training had been closely monitored to a point where an Intervention had become necessary.

[23] Airways has sought to downplay the significance of an ITP by saying that it is intended primarily for trainees at the Training College stage. The contents on the National Training Plan suggest otherwise, that the ITP during training for validation at an operational unit has more than peripheral significance. In this regard I note that under clause 12 of the National Training Plan, Unit Training Plans (UTP), of which there was one for Whenuapai, are to be controlled documents which contain ITP's. I note that under clause 123 at the Training College stage ITP's may be communicated as part of an interview, but in respect of the process of mandatory intervention, as set out at PRCT-13 of the National Training Plan, there is reference to the training period, as agreed in the "ITP". It is also made clear that the training period laid down in the UTP is to be confirmed in the trainees ITP. The occurrence of an intervention marked a highly critical stage in the training of

Ms Graham, yet part of the specified mandatory process seems not to have been present. There is therefore an arguable case as to whether it was the actions of a fair and reasonable employer to invoke a particular part of the National Training Plan, clause 4.3, yet purport to waive for itself other parts which, in the preamble (at page TEM-2), are required to be included as a minimum of all operational training.

[24] I also find there to be an arguable case as to whether Airways ensured the training programme for Ms Graham allowed for continuity, as expressly required under clause 2 of the National Training Plan. It is provided at clause 2 that annual leave should be kept to a minimum during OJT, to ensure training continuity. Where more than one weeks annual leave has been taken for example, a period of review and consolidation is to be programmed. An unsatisfactory feature of Ms Graham's training appears from the affidavit evidence to have been the placement of her on special leave for several weeks in December and January while air traffic was light at Whenuapai. There is a question as to what if any review and consolidation was programmed for Ms Graham after she returned from special leave on 6 January 2003. Was it sufficient to ask her to read manuals for a few days before resuming training in the tower? There is another question about the fairness of continuing the 100% check in November 2002 over six days, even although Ms Graham agreed to that. Might that situation also have been provided for in some way in an ITP, if there had been one in existence?

[25] Another important provision, the observation of which by Airways seems questionable, is clause 4 which requires a continuous series of Periodic Training Reports from instructors during OJT, and which also requires;

- *Scheduled assessments to check the progress of a trainee against the Individual Training Plan.*

The absence of a formal ITP has been referred to above. In my view there is also a question about the fairness of the employers actions during the training phase, this being whether at the point at which it became aware from her instructors of the training difficulties they were encountering with Ms Graham it should have checked progress with her as part of scheduled assessments. It has seemed in this case that only with its unfolding has Ms Graham come to realise some of the training difficulties the employer experienced, particularly in relation to the level of her interpersonal skills.

[26] In the above respects I consider there is a serious question to be decided on the issues at the substantive heart of Ms Graham's employment relationship problem. The strength of the case, particularly with regard to whether the primary remedy of reinstatement is likely to be given by the Authority to Ms Graham, is an important consideration but one that is to be looked when assessing the overall justice of the case.

Whether alternative remedies are available to Ms Graham

[27] The test in this regard is whether, if Ms Graham is successful in obtaining permanent reinstatement after the full investigation meeting to be held in the future, monetary payments will make up for any loss or harm she may suffer by not being reinstated in the interim. In my view the reimbursement of wages and compensation is an adequate remedy for any possible detriment that Ms Graham might suffer, particularly when the interim period may be a relatively short one. A full investigation meeting is likely to be held by June in a few weeks time, although there may then be a delay of several weeks while the Authority finds time to consider and issue a determination. I do not think that Ms Graham will be prejudiced by this degree of delay through diminishment or loss of the opportunity to qualify at Whenuapai. It does not seem to me open to Airways to argue that the qualification opportunities or period continued to run after it had carried out actions which the

Authority might yet determine to be unjustified. If Ms Graham had not been permitted two attempts to qualify then her reinstatement must be to a position where she still has the same rights in this regard as she ought to have had prior to dismissal. If the six months allowed for qualifying had not elapsed at the time any unjustified action was taken against Ms Graham then, if permanent reinstatement is given to her, the intervening time between the unjustified action and her reinstatement should not be taken into account in anyway that would penalise Ms Graham for the employers unlawful actions.

Balance of convenience

[28] I consider that this test favours Airways. The affidavit evidence given on behalf of the employer persuades me sufficiently that Airways will have real difficulty providing on the job training for Ms Graham to enable her to have an opportunity to become validated for Whenuapai. I am not persuaded that the employers operations at Whenuapai should become disrupted by an order of reinstatement, which may happen if the only person at the moment apparently prepared to train Ms Graham would have to relinquish another role to do so. It seems to me from the evidence that Ms Graham, whether deliberately or otherwise, generated considerable antipathy through the attitude she displayed towards those who were or would have been her peers or colleagues. There is a question as to whether an employer, particularly in an industry highly regulated for safety reasons, should compel by direction other employees to provide on the job training to a person who has expressed some distrust of them.

[29] Ms Graham has indicated that her attitude towards her OJTI's has changed considerably since 14 February when she told Airways management that her trust in Whenuapai instructors was very limited. She now claims to have been awakened to problems about herself she was not previously aware of when undergoing training at Whenuapai. She has expressed embarrassment at the situation and has retracted a requirement that only certain people should instruct her even if that would have caused inconvenience to Airways to arrange for this. I consider that there is still a risk that any training undertaken in the interim period would be forced or guarded and that the Authority should treat cautiously the apparent change of heart by Ms Graham in this regard. While it is an express object of the Employment Relations Act to build productive employment relationships through the promotion of mutual trust and confidence, Ms Graham herself has raised a question about the degree of trust she has in the employers OJIT's. For this reason it will not be in disregard of the object of the Act if reinstatement is declined as an interim remedy.

[30] It also seems to me an unsatisfactory situation to put Ms Graham into, where she might be required to undergo testing for her validation while having the distraction of having to prepare for an investigation meeting. The need for Air Traffic Controllers to apply concentration to their work is no doubt very high and that situation can be no different at times when controllers are receiving instruction or training on the job for validation. It may be possible for the Authority to make it a condition of interim reinstatement that no training is required of Ms Graham until a final determination of her problem can be given. In that case however it would appear to be no function Ms Graham could perform for Airways and she might as well be in effect placed on garden leave. A speedy investigation and final resolution of the case is preferable to the making of interim orders and the creation of risks to both parties while they are in force. The alternative is that during a period of a few weeks Ms Graham is without pay or employment from Airways, but if her problem is finally resolved in her favour she is likely to be reimbursed for all or some of her lost earnings. I consider this to be the preferable course in the circumstances and in this respect the balance of convenience weighs on the side of the employer.

Overall justice of the case

[31] In *Madar v P&O Services (NZ) Limited* [1991] 2ERNZ 174, the Court of Appeal approved the approach that this test may extend to an examination of the strength of the employees case, particularly for permanent reinstatement, and the employers answer to the case. In *Madar,* even although the Employment Court had found that all other tests favoured the employee and that the lack of justification for her dismissal was more than merely arguable, it held the employee was unlikely to obtain reinstatement.

[32] I have reached a similar view in this case, that the contended lack of justification by the employer for all or most of its actions may not be found to be present after a full investigation by the Authority has been made. To any extent that Airways may be found to have acted without justification, that may not be sufficient to provide Ms Graham with reinstatement, even as a primary remedy.

[33] It is not of course a function at this interim stage for determinations to be made about issues of fact or law, but what can be given is an assessment of the likely findings. There is some likelihood that clause 49.7.3 will be found to have been observed by Airways in that Ms Graham had in fact been allowed a second attempt to obtain validation. It seems to me quite strongly arguable that the first attempt was ended by a training intervention when Ms Graham failed to pass her 100% check on 23 November 2002. What followed after then by way of training and opportunity for that, arguably constituted the second attempt which ended when Ms Markwick expressed herself unable to recommend Ms Graham for the FPA. I think it unlikely the argument will prevail that an attempt to qualify under clause 49.7.3, must include an opportunity to sit the FPA. The alternative situation under clause 49.7.3, that there was a failure to qualify within six months, did not arise in the timeframe in which events occurred in this case.

[34] I do not think it is open to speculate that Ms Graham would have passed the FPA if she had been given the opportunity to sit it. It seems to me strongly arguable that an important aspect of validation is the assessment to be made by the OJTI's as to whether a candidate for the FPA has reached the standard required. Arguably that is a clear threshold to be reached before the process of taking the FPA occurs. At the stage of a full investigation meeting, in considering the exercise of judgement by Ms Markwick to withhold her recommendation for the FPA, the Authority should not and indeed obviously could not assume the role of an OJTI to decide for itself whether in accordance with the applicable standards it would or would not have made the recommendation. The performance by Ms Markwick of her vetting role as an OJTI was a matter for the employer to fully consider before deciding whether to terminate training and whether to dismiss Ms Graham.

[35] Further, I do not think there is a strong argument that Mr Hansen's letter of 11 December 2002 to Ms Graham created a flaw in the dismissal because of the advice it contained that as a consequence of failing to pass the FPA training the employment itself would be terminated. It seems to me the employer was simply giving advice as to what action was open to it under clause 49.7.3 and under general principles of employment law. While an intervention report is intended to remedial and not disciplinary it seems to me arguable on the part of the employer that it could and perhaps should declare the consequences of a failure to respond to the recommendations and remedy the deficiencies shown up by Ms Graham during training. Just as night follows day, it seems that training terminates where an employee does not pass the FPA or is not recommended to sit the FPA. There is no point to further training and indeed clause 49.7.3 provides that an employee shall lose the right to an appointment where there is a failure to qualify on a second attempt. That arguably was the situation here with Ms Graham. The advice about termination flowed as a consequence of failure to achieve the standard of recommendation, rather than from the training intervention. Although the advice that in those circumstances Ms Grahams employment

with Airways would be terminated with four weeks notice was not expressed as conditionally as it should have been to reflect the employers obligations, Airways subsequently demonstrated that while there had been a failure to qualify so that a position could not be performed by an employee, the employer still needed to act fairly and reasonably before deciding to terminate ultimately. There is in my view a strong argument disclosed from the evidence that the employer acted with justification in respect of the procedure it followed after Ms Graham did not obtain a recommendation to sit the FPA. There was an enquiry carried out by the employer into the circumstances and Ms Graham was given an opportunity to consider the employers assessment of the situation and respond with anything she wished to say for herself.

[36] On this basis it seems to me arguable that the intervention was not required to be preceded by warnings of the possibility of disciplinary action or that Ms Graham's employment was in jeopardy. Neither therefore was it a situation where Ms Graham should have been given an opportunity to take a representative to the intervention meeting. I agree with Mr Dalzell that the argument is not a strong one that the suspension from training of Ms Graham by Mr Roberts on 7 February 2003 was unjustified in the circumstances. Before this was done Mr Roberts had spoken to Ms Graham for some time to obtain her views about the situation and whether she would continue training with Ms Markwick. When Ms Graham indicated she did not wish to do that it was arguably open to the employer to suspend further training, since it had little option.

[37] It seems to me also to be arguable that the principles set out in *Trotter* to be applied to cases of poor work performance, are not directly applicable to a situation where an employee must by law hold a personal qualification before an appointment can be taken up. In my view the argument is likely to favour the employer that the training process itself was fair and properly conducted and that the conclusion of Ms Markwick to withhold her recommendation was made as a proper exercise of judgement with regard being had to relevant considerations only. That was a matter for the employer to decide and in my view there is strength in the argument that it established what had taken place and gave proper consideration to the circumstances before deciding upon dismissal. Airways also gave Ms Graham an opportunity to respond and, arguably, it considered her response and explanations. The *Nelson Air* case may arguably be distinguishable in that it concerned an employee within a probationary period. The situation with Ms Graham was that she was attempting to obtain in effect a licence of a kind she had a short time earlier been able to obtain, although in respect of a different location. It might therefore be expected that the required standard of performance would have been well known to her during this period.

[38] Another matter that goes to the likelihood of permanent reinstatement, is the attitude and temperament Airways claims was displayed by Ms Graham, particularly towards several of the OJTI's. There is evidence suggesting Ms Graham lacked self-discipline and allowed herself to become overly egotistical in a job where perhaps excessive displays of individualism may compromise safe controlling. Permanent reinstatement will not provide validation for Ms Graham, who will still have to be recommended for the FPA and pass that test.

[39] Although I consider that a stronger case arises for Ms Graham in relation to the failure to provide her with an Individual Training Plan and that her training may have lacked continuity, I do not consider that these matters should swing the balance of justice in her favour in relation to interim reinstatement. The overall justice favours Airways for an interim period that can be quite short.

Determination

[40] For the above reasons I consider that the application for interim reinstatement must be declined. A delay of only a few weeks until a full investigation meeting can take place and a final

determination can be given, will not significantly diminish an opportunity to become validated at Whenuapai, if the resolution of her problem opens that up to Ms Graham. Any loss to Ms Graham can be made good by orders of reimbursement and compensation, and if there is to be reinstatement it seems more desirable for that to be permanent given the requirement for significant training still to be undertaken.

[41] It is anticipated that the investigation meeting will take more than one day. Shortly a Support Officer from the Authority, Ms Kerryn Oldham, will contact Mr Wallace and Mr Dalzell to settle dates for the investigation meeting. I will require written statements of evidence from the main witnesses to be exchanged between the representatives and filed in the Authority, no less than seven days prior to the date of the investigation meeting. Any further relevant documents should accompany those statements. If the statements do not substantially add to what is in any affidavit already filed, then that document can provide the basis of the statement with an opportunity for clarification and elaboration from the witness to be given at the meeting.

Further mediation

[42] The Authority will forward a copy of this determination to the mediator who attended on the parties on 21 March. Mr Wallace and Mr Dalzell are to confer with the mediator with a view to resuming mediation, particularly if they consider that process will constructively contribute to resolving the problem.

Costs

[43] The question of costs is reserved, to be raised again and dealt with in the final determination if one is required.

A Dumbleton
Member of Employment Relations Authority