Determination Number: AA 99A/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	Alastair Dumbleton
INVESTIGATION MEETING	26 & 27 June, & 2 July 2003
DATE OF DETERMINATION	10 September 2003

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated the problem brought to it by Ms Christine Graham in relation to her dismissal from employment with Airways Corporation of New Zealand Limited ("Airways"). Ms Graham has challenged the justification for her dismissal in respect of both the grounds on which that action was taken and the procedure used by Airways in bringing her employment to an end.

[2] After training to be an air traffic controller Ms Graham was posted by Airways to Ohakea aerodrome where she undertook further training, on the job, until satisfying the licensing or validation requirements for her to be able to perform the work. The offer of an air traffic controller position at Ohakea was duly made to Ms Graham by Airways on 19 July 2002. Shortly after commencing in the position, on 27 August 2002 she accepted a transfer to Whenuapai where, in accordance with Airways requirements, it was necessary for her to obtain a validation for that particular aerodrome.

[3] Since Ms Graham had successfully validated at Ohakea only a short time before her transfer to Whenuapai, Airways anticipated that one month of on the job training at Whenuapai would be sufficient for her to pass the Final Performance Assessment ("FPA"). Airways expectation was not met and for various reasons the training period had to be extended beyond the predicted 1 October 2002 completion to January-February 2003, with the FPA being scheduled to take place on 13 February. However events that occurred on Friday 7 February at Whenuapai, lead to Airways suspending Ms Graham that day from employment and conducting an enquiry into the way she had performed in training. The employer's enquiry extended to a meeting with Ms Graham and her representative, held on 14 February 2003, and the offering of a detailed explanation by Ms Graham in relation to aspects of her performance that had been considered unsatisfactory by her training instructor, Ms Kim Markwick. This was followed by a meeting on 3 March 2003 at which the

Airways Regional Manager, Mr Fred Hansen, announced to Ms Graham and her representative his intention to terminate her training and consequently her employment with Airways. Ms Graham received four weeks notice of termination and was told that she was not required to work during that time. She was however paid wages and holiday pay due for the period of notice, which expired on 31 March 2003.

Application for interim reinstatement

[4] Almost immediately after her dismissal Ms Graham notified Airways of her intention to bring a claim of personal grievance against it. On 13 March 2003, Ms Graham applied to the Authority for an interim order requiring Airways to reinstate her until a full investigation could be carried out by the Authority and the grievance could be finally resolved. Following an unsuccessful attempt by the parties to resolve the problem in mediation, the Authority considered the application for interim reinstatement on 3 April 2003. A determination dated 11 April 2003 issued under AA 99/03, gave the reasons for the finding made by Authority that the application for interim reinstatement was unsuccessful. The determination noted that a delay of only a few weeks from 11 April until a final investigation meeting could take place and a final determination given, would not significantly affect any opportunity to become validated at Whenuapai, if the resolution of Ms Graham's problem opened that door to her again. Although the parties representatives Mr Wallace and Mr Dalzell were not directed to do so, I asked them to confer with the mediator with a view to resuming mediation and I understand the parties did make further attempts to settle the grievance.

What Ms Graham wants to resolve her problem

[5] Ms Graham strongly seeks permanent reinstatement to the position she was dismissed from at Whenuapai. She is determined to resume training there so that she can eventually pass the required FPA, become validated and work as an air traffic controller. Dismissal has not only shattered her hard won new career but has left her with little if any opportunity of being employed in New Zealand in that occupation, as Airways is the sole employer for that work. Even overseas Ms Graham's chances of employment are lessened by the limited experience she has had as an air traffic controller. In addition to reinstatement Ms Graham seeks payment from Airways to reimburse her for all wages lost from the date of dismissal until the date of this determination, during which time she has not been in paid employment. Ms Graham also seeks payment of $15,000.00 from Airways to compensate for humiliation, embarrassment and injury to feelings caused to her by the dismissal and the inevitable publicity it generated.

[6] For its part Airways has maintained that in all respects it acted lawfully when it suspended Ms Graham and later decided to terminate her training and then her employment with Airways. Airways claims that there were no reasonable options or alternatives to dismissal. In the event that the dismissal is found by the Authority to have been unjustified, Airways strongly resists reinstatement as a remedy. While it acknowledges that reinstatement is the primary remedy under the Employment Relations Act 2000 for unjustified dismissal, Airways claims reinstatement would be impracticable in the circumstances. The employer claims that there will be real difficulties in obtaining a suitable instructor to train Ms Graham and that the position she held has now been filled by another controller. Airways also considers that if she did resume employment and training Ms Graham would in all probability still not be able to reach the standard necessary for her to become validated.

Grounds for dismissal

[7] In a letter to Ms Graham dated 3 March 2003, these were stated by Mr Hansen to be;

> *The basis on which I have reached the decision* [to terminate your employment] *is that you have not been recommended for your Final Performance Assessment.*

[8] The Airways National Training Plan, which sets out the training to be undertaken by air traffic controllers to obtain validation, provides that the purpose of the Final Performance Assessment is to determine a candidates practical ability to exercise the privileges of the controllers rating or validation sought. Before recommending a trainee for a FPA the plan requires the instructor to ensure that the candidate has reached the standard prescribed for that assessment. Confirmation that the instructor is of that opinion is given by filling in a recommendation form. Extensive requirements are stated for the FPA, which comes at the conclusion of a planned phase of on the job training. Instead of recommending a trainee for a FPA the assessor or instructor may recommend an extension of training time or the calling of a training intervention to improve a candidate whose progress is regarded as unsatisfactory. There is an issue as to whether the termination of training (with dismissal the probable consequence) is a further option permitted under the terms and conditions of employment.

[9] Ms Graham's instructor, Ms Markwick, decided on 7 February 2003 not to recommend Ms Graham for the FPA. Ms Markwick had earlier that day indicated to Ms Graham her dissatisfaction with her progress in training, but before any further discussion could take place Ms Graham became upset and left the control tower. A short time later the Whenuapai Chief Controller, Mr Chubb Roberts, spoke first to Ms Markwick and then to Ms Graham. Consideration was then given to the situation by management including Mr Hansen, before Ms Graham was advised later on 7 February that her training and consequently her employment had been suspended from that date. The decision not to recommend was reviewed by Mr Hansen following the meeting held on 14 February 2003. He then advised Ms Graham, on 3 March, that he concurred with Ms Markwick's decision not to recommend and that he rejected proposals put forward by Ms Graham's representative for training time to be further extended. In the circumstances where Ms Graham had not been validated as an air traffic controller at Whenuapai and where training for validation had been permanently withdrawn from her, it would seem that the objective of her employment could no longer be achieved and dismissal became almost inevitable.

Employer's enquiry – Authority's investigation

[10] The decision to dismiss Ms Graham was made after Airways had conducted an in depth enquiry into the training itself and the circumstances in which Ms Graham had received that at Whenuapai. For the purposes of its enquiry the employer met with Ms Graham and her representative on 14 February 2003 for several hours, and later received from her a detailed response written with reference to an equally detailed account that had been supplied by Ms Markwick about the training. It was for Mr Hansen to review everything that had been done as part of the training of Ms Graham and to decide whether Airways had provided her with a proper standard of training and had also discharged its obligation to be fair and reasonable in its general treatment of her up the point where dismissal was under consideration. By contrast, the approach to be taken by the Authority is as stated by it in the interim decision of 11 April 2003;

> *At the stage of a full investigation meeting, in considering the exercise of judgement of Ms Markwick to withhold her recommendation for the FPA, the Authority should not and indeed obviously could not assume the role of an OJTI* [on the job training instructor] *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.

[11] In this regard the following general statement of the Employment Court in *Drummond v Coca Cola Bottlers NZ* [1995] 2ERNZ 229 at 234, applies equally to the role of the Authority;

The initial question for the Tribunal is solely this; on the basis of the enquiry that the employer carried out, was the decision to dismiss one that was open to a fair and reasonable employer? This involves a value judgment about the quality of the enquiry and the quality of the decision based upon it.

Issues for determination

[12] Broadly and in no strict order, some of the distinct issues arising out of this investigation for consideration by the Authority are as follows;

- Length of the November 100% training check;
- Whether training error was 'critical' or 'major';
- Nature of the training intervention and purpose of the 11 December 2002 letter;
- Whether further training intervention required after suspension;
- Adequacy of the training plan;
- Application of clause 49.7.3 of the employment agreement;
- Whether suspension was justified;
- Whether dismissal was justified.

Length of November 100% training check

[13] Because Ms Graham's training progress in October 2002 had been slower than expected and was considered to be unsatisfactory by Ms Markwick, a training check was commenced on 16 November 2002. Usually such checks take only one or two days but this one ran for five days and was then further extended to 23 November 2002. On that sixth day of the check Ms Markwick observed Ms Graham to make what she eventually assessed to be a critical error within the definition contained in the National Training Plan published by Airways to employees in training. This error had been initially assessed by Ms Markwick as 'major' rather than 'critical'. The latter is a more serious error than the former and leads automatically to failure of the check. For this reason the length of the 100% training check became an issue for Ms Graham who did not accept as correct the 'critical' designation of her error.

[14] There is no dispute that through her qualifications and experience Ms Markwick was eligible to perform the role of on the job training instructor ("OJTI") in respect of Ms Graham. I found Ms Markwick to be measured and careful in giving her evidence to the Authority. It seems likely to me that she displayed the same care and thoroughness when performing her role as an OJTI, particularly so with Ms Graham who I think Ms Markwick found cause for treating with some caution or circumspection. My overall assessment of Ms Markwick is such that I have preferred her evidence to that of Ms Graham where there is any material difference between the witnesses. I have had the same preference for the evidence of Mr Roberts whose extensive qualifications and experience are also not in dispute. As a measure of Ms Graham's regard for Mr Roberts professionally, on 7 February she had wanted him to take over from Ms Markwick the role of OJTI.

[15] The complaint has been made by Ms Graham that the extension of the 100% training check through to a sixth day on 23 November 2002 had been unfair and unwarranted by the actual traffic levels on the earlier days, which she claims had been high enough for her to be fairly tested then. I consider Ms Graham's comparative assessment of aircraft movements to be inaccurate. It was I find a matter of judgement to be reasonably exercised by the OJTI Ms Markwick and her supervisor Mr Roberts, as to whether traffic levels were too low and whether because of that there were not enough aircraft conflict situations on any day for a fair test to be conducted. It appears that Mr Roberts did consider the possibility that Ms Graham might be put at a disadvantage by the extension of the check period, because he invited Ms Graham, I find, to have the assessment rescheduled on account of the low traffic levels and lack of aircraft conflicts. I note that the 8 December 2002 intervention report mentions that Ms Graham was told that she did not have to continue with the check but that she had chosen to do so because she was keen to become validated. According to the intervention report Ms Graham acknowledged, no doubt in hindsight, that her decision had not been a good one.

[16] The point seems to me to be that Ms Graham had felt confident her level of performance would carry her successfully through a sixth day of the 100% check. Unfortunately this proved not to be the case, but I do not think Ms Graham can later turn around and complain that she should not have been offered the chance she took to complete the check on a sixth day. Rather than her not wanting to be seen as "protesting" about the extended check, as Ms Graham put it, the extension occurred with her agreement or consent. I do not consider the length of the check gave Ms Graham grounds for a valid personal grievance.

Whether error was 'critical' or 'major'

[17] I have considered the circumstances in which Ms Markwick, on 23 November 2002, initially marked the error as 'major' but about an hour and a half later, after consulting the manual, upgraded the status of the error to 'critical'. In examining her reasons for doing so I can find no indication or suggestion that Ms Markwick was trying to make validation more difficult for Ms Graham or to set her on the road to failure. In my view Ms Markwick had safety at the front of her mind, as well as the need to ensure that trainees achieved the required standards of controlling. I consider that she fairly exercised her judgement in relation to the nature and the gravity of the incident as had been observed by her. It seems to me to be an aspect of applied safety in training for an instructor to be self attentive to lingering uncertainty felt about an earlier exercise of judgement and to be prepared to review the circumstances so as to reach a different conclusion, if necessary, in the light of any better information subsequently obtained.

[18] There was evidence that Ms Graham had questioned with Mr Roberts whether the incident had been critical or not and that the pair had listened to the tape recording made at the time. Ms Graham's evidence was that Mr Roberts had agreed with her that Ms Markwick had been wrong in her assessment of the incident as critical. Mr Roberts however denied that he had disagreed with Ms Markwick's final call about the incident and it seems he made his disagreement plain during the 14 February meeting. I accept Mr Roberts evidence that he had not agreed with Ms Graham that the incident on 23 November was other than a critical one. I think Mr Roberts was wishing to encourage Ms Graham and at the most may have displayed a sympathetic attitude towards her for having committed a critical error. From my observation of Mr Roberts and Ms Markwick, I think that if Mr Roberts had agreed with Ms Graham about the category of error he would have involved Ms Markwick in a discussion about his reasons for that, as it would seem to be a serious matter for a Chief Controller to override an OJTI while a training relationship remained on foot.

[19] For Ms Graham it was contended that the assessment of her error as critical had not been consistent with the way Airways viewed the performance of another controller after an aircraft

conflict situation that had occurred on an earlier occasion at Tauranga. As the Courts have held, disparity or inconsistency of treatment without adequate explanation may amount to unfair or unreasonable treatment. One exception however to this general principle arises when safety requirements must be observed. Safety is not to be made subordinate to consistency when comparing the employers treatment of employees on different occasions; see *Samu v Air New Zealand* [1995] 1 ERNZ 636. In the Training Plan at clause 6.2.1, a critical error is defined as a serious breach of Air Traffic Services standards or criteria, "likely to produce a life threatening situation." Clearly therefore safety is the primary reason for these standards.

[20] Certainly a marked lack of consistency might indicate an absence of competence on the part of the training instructor, or even the presence of ill-will towards the trainee perhaps for personal reasons. However I am satisfied that the 'critical' assessment made by Ms Markwick was the product of judgement exercised honestly and objectively by a qualified instructor motivated by the need for standards to be met as a matter of safety. The Tauranga assessment may have been too generous to the trainee concerned, or Ms Markwick's assessment of Ms Graham may have been too pessimistic about the danger or risk. I find however it was a genuine assessment made for training purposes. Further, under the Training Plan assessments are expressly to be viewed as "educative." It follows that there are difficulties with challenging the fairness of the actions of an employer on the basis that they may have lead to an employee becoming over-trained, particularly where matters of safety are concerned. Similarly, because safety is not to be subordinated, a successful argument that Ms Markwick had condoned a breach of the manual by allowing Ms Graham to continue controlling after a contended "Airspace incident", ought not to lead to a nullification of the final assessment of the error and the restoration of the original assessment.

[21] In relation to Ms Markwicks assessment of the 23 November 2002 error as 'critical', I find nothing to support the grievance claims of Ms Graham. The focus by Ms Graham on the extension of the 100% training check and the type of error leading to an intervention report, overlooks the nature and purpose of the training recommended by the report. That training, which was to commence in the New Year, was an opportunity for Ms Graham to correct and improve her performance rather than for her to be punished for earlier lapses. Even if the intervention had been innocently but mistakenly called for, Ms Graham could not be thought of as having been disadvantaged by receiving additional training.

Nature of training intervention and purpose of 11 December letter

[22] Intervention in training is intended to be educative or remedial in nature, rather than punitive or disciplinary. This is made clear from the Airways National Training Plan, at PRCT 10, which refers to intervention as action taken to, … *investigate and offer advice on repairing any breakdown in the training process.* Intervention is also referred to as, … *not an implied criticism of anyone involved,* and not concerned with, … *apportioning blame.* It is obvious from the content of the comprehensive intervention report of 8 December 2002 that the process was followed to achieve its proper purpose and was not misapplied. The report indicates that Airways took into account criticisms or concerns Ms Graham wished to raise about her training. The report also offered her constructive advice as to where improvement was needed in her controlling and how she was to achieve that. Detailed recommendations were made as to a training plan to take her up to the FPA. The report itself was an objective analysis produced as an aid to learning for the benefit of Ms Graham.

[23] Mr Hansen's letter of 11 December 2003 was written in the context of the intervention report which had stated that at the end of her training Ms Graham would either be, …*recommended for FPA, or her training will be terminated.* Mr Hansen's letter served to make clear the consequence to Ms Graham if her training was terminated, … *your employment with Airways will be terminated.*

I do not consider that this statement was peremptory or predetermined an outcome. The statement was consistent with the operation of clause 49.7.3 of the employment agreement, which provides that an employee who fails to qualify for a position on a second attempt, ……*shall lose the right to appointment.* The letter made it clear to Ms Graham that she was facing a make or break situation which she needed to approach accordingly with all due effort and concentration. The advice about termination flowed as a consequence of any failure to clear the hurdle of recommendation for the FPA, rather than from the fact that a training intervention had been necessary. However despite the final and conclusive tenor of the advice given by Mr Hansen in his letter, I find that Airways amply demonstrated by its conduct after 7 February 2003 that dismissal was not to be treated by it as an automatic consequence of either the failure by Ms Graham to obtain a recommendation or of the suspension of her training. I am satisfied that Mr Hansen kept an open mind after 7 February to the possibilities that the January-February training phase had not been properly carried out by Ms Markwick or for any other reason had not been a fair to Ms Graham. Mr Hansen carried out an enquiry into all the circumstances in which the training had been given and as part of that Ms Graham and her representative were given opportunities, which they took up, to consider the employers assessment of the situation and to respond with anything that could be put forward in her favour.

[24] I find that Ms Graham has no sustainable grounds for complaining about the training intervention or the content of Mr Hansens letter of 11 December 2002.

Whether a further training intervention required after suspension

[25] It was contended on behalf of Ms Graham that a further intervention was required under the Airways National Training Plan, as a consequence of her failure to be recommended for a FPA on 7 February 2003. It was contended that a further intervention was also required before Ms Graham's training could be terminated.

[26] It is clear that the training process of intervention was not repeated for Ms Graham on or after her suspension on 7 February 2002. Although in some respects the meeting of 14 February might have seemed like an intervention, Airways has not suggested the occasion was an intervention and the notes made at the time expressly refer to it as a disciplinary meeting unlike an intervention which is a no-blame and educative process.

[27] To uphold the contentions of Ms Graham in this regard would require certain parts of the intervention process as set out at clause 6.2 of the Training Plan to be read too narrowly and without regard to practicability in a training context. Parts of clause 6.2 provide that in the case of a trainee deemed not ready for recommendation for the FPA and also where there is a failure in training requiring termination of training, an intervention will be "mandatory". By contrast, other parts of the clause provide that intervention will merely be "discretionary".

[28] In my view the provisions of the Training Plan are not to be interpreted so strictly or narrowly as to require a round or succession of interventions, each one called without regard to earlier interventions or to what has gone on before during training. It seems to me permissible for an intervention report to recommend a termination of training as a future consequence of any continuing failure to attain a particular standard or goal after further training has been given in accordance with the intervention. The intervention report of 8 December 2002 made a recommendation that Ms Grahams training be terminated if she was not recommended for the FPA following an extensive course of further training to be provided as detailed in the report. I do not consider that recommendation was unreasonable or that it contravened clause 6.2. A construction of clause 6.2 requiring an intervention every time the FPA was not recommended where there were

multiple failures in this regard, would be pedantic and not consistent with clause 49.7.3 of the Air Traffic Controllers Collective Agreement.

[29] Under clause 49.7.3 of the collective agreement an employee may lose the right to appointment to a vacancy where he or she 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. There is no dispute that the provision was applicable to Ms Grahams appointment to her position at Whenuapai. The limitations with regard to qualifying are in the alternative; two failures to qualify, or the expiry of six months. It seems quite possible for more than two interventions to occur and be worked through within a period of 6 months. A failure to pass the FPA is a failure to qualify and a trainee may have only two attempts to qualify, but if each intervention had to result in a recommendation for a further attempt at the FPA more than two attempts could be made in six months. In that case the provision would simply have said that a trainee must qualify within six months, regardless of the number of attempts.

[30] It seems reasonable for those conducting an intervention to have regard to earlier training, the particular training deficiencies and the progress made by the trainee towards overcoming those, and recommend termination of training if standards or goals still remain unmet after further training. I note that the intervention report of 8 July 2002 (when Ms Graham was at Ohakea) recommended termination of her training if she was unable to stop certain behaviours identified as a barrier to her training for the FPA. Her earlier training record was referred to. I also note the earlier intervention report of 20 June 2002 which followed training difficulties experienced by Ms Graham at Ohakea. This report recommended that she proceed on to a point at which, …..*a recommendation for FPA shall be issued or an intervention entered into.* Unlike the 8 July and 8 December 2002 reports there was no recommendation for termination to follow if the problems continued. However I note that a Ms Sarah Fifield, who is a Training Development Specialist, was a co-author of both the 20 June and 8 December 2002 reports and presumably she was aware of the intervention process requirements. If she thought that a further intervention always had to follow a failure to be recommended for the FPA it might reasonably be assumed she would have made the same recommendation on 8 December as she had made on 20 June.

[31] I accept that curtailment of further training is a recommendation that can be made in an intervention report without the need for any number of multiple or successive interventions until 6 months has elapsed and the right to the position is lost. I find that Ms Graham's training was terminated at the completion of the December 2002 process, in accordance and not in conflict with clause 6.2 of the National Plan.

Adequacy of training plan

[32] 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 air traffic controller is to receive a folder containing an individual training plan ("ITP"). According to the notes taken by Airways of the meeting held on 14 February 2003, Mr Roberts acknowledged in response to a question that Ms Graham had not been provided with a documented training plan.

[33] I find that relevant information about her training was given to Ms Graham when she commenced at Whenuapai. It was given to her in the form of a training folder in which was collected a number of other documents. I find that in content the information was sufficient to inform Ms Graham of nearly everything she needed to know to allow her to fairly undertake the required training. While the plan ought to have been presented in a more personalised format as contemplated by the National Training Plan, the content of the plan must be regarded as more important than the way it was published to the trainee, provided it was readily accessible.

[34] The information that was on Ms Graham's training file included I find, a record of recognised prior learning, a record of preferred learning style and a regularly updated training roster. Information that was not on file included a training checklist from the course syllabus and a learning priorities graph. I accept that as a result of recently having validated at Ohakea, Ms Graham could be expected to be familiar with standard control procedures applying to all aerodromes. There was also a Whenuapai unit training plan available at her place of work for Ms Graham to consult if she wished and inevitably there must have been discussion with her instructors about local requirements and procedures.

[35] The thrust of Ms Graham's complaint about her training was not directed at any lack of information given as to what was expected of her or deadlines she had to meet. Both the training intervention report of 8 December 2002 and Mr Hansen's letter of 11 December to Ms Graham, set out the steps she had to take to progress her training and the timetable for doing that. Her real complaint was that Ms Markwick's experience as an instructor had been insufficient to enable her to fairly assess Ms Graham as having reached and maintained the required standard for the FPA. It was Ms Graham's belief that her training had been sufficient for that purpose, as she proposed on 7 February to Mr Roberts that she should be allowed simply to proceed with the FPA. During the meeting of 14 February, through her representative Ms Graham advised that she thought further training was not needed and proposed that after three more days of supervised practice she should be permitted to undergo the FPA. Airways rejected that proposal and in my view properly so, as the National Training Plan at clause 4.3 clearly stipulates that obtaining a recommendation for a FPA is a prerequisite for undertaking the validation test. No such recommendation had been given and the issue for Airways in enquiring into Ms Graham's training was whether at the stage reached by her in training she had not been given a proper standard of training, or had not been judged fairly in her performance of it.

[36] Both the training intervention report and Mr Hansens letter of 11 December 2002 had expressly advised Ms Graham, with emphasis on "consistently", that she;

> *……will need to demonstrate adequate controlling in sufficient traffic levels consistently before being recommended for her FPA.*

Consistency of performance can only be measured over a period of time whose length is relative to the degree of skill and judgement to be exercised in the particular activity being performed under supervision. For safety reasons, air traffic controlling will obviously require a longer period over which a trainee is to demonstrate proficiency. It was I find right of Airways not to countenance the proposal that the training programme for Ms Graham simply be abandoned and that she be permitted to move straight on to take the FPA. Any problem with being able to adequately control consistently might have gone unnoticed if the training had been curtailed or abbreviated as proposed by Ms Graham.

[37] Although this matter of the ITP received attention during the meeting of 14 February and afterwards, it does not appear that the information that was given to Ms Graham about her training left her unsure and unprepared at any time during her training period. I find that there was substantial compliance with the requirements for an ITP. The content of the information provided to Ms Graham met the objectives of those requirements and any deficiencies in form or content did not cause Ms Graham any prejudice or disadvantage during her training. As a matter of degree any deficiency on the part of Airways was not so great that an otherwise justified dismissal should be found unjustified.

Whether suspension justified

[38] From the evidence, I find that on 7 February 2003 while Ms Graham was in the Whenuapai tower an attempt was made by Ms Markwick to discuss with Ms Graham her progress in training up to that point. Ms Markwick I find did not begin to tell Ms Graham that she would not be recommended for the FPA scheduled for 13 February, but began to say that she had reservations about making that recommendation. Before Ms Markwick had time to explain further Ms Graham got up to leave the room because she was upset and could not be persuaded to return and hear Ms Markwick out. I accept that Ms Markwick had intended immediately after her opening remarks to have a debriefing or discussion about particular issues she had with Ms Grahams performance in training, being issues which would need to be addressed by her in the week remaining before the FPA was due to take place. At the time Ms Graham decided to leave the tower it remained possible for her to continue training and be recommended for the FPA, provided the shortcomings Ms Markwick had found and wanted to pass on for her guidance were remedied by Ms Graham.

[39] After Ms Graham left the tower Mr Roberts was called and spent about two hours speaking to her nearby. Mr Roberts discussed with Ms Graham the training issues Ms Markwick had wanted to raise and, I find, he urged or encouraged her to go back and resume training with Ms Markwick but she declined to do so. Ms Graham said she had no faith or confidence in Ms Markwick and asked for another OJTI. Mr Graham explained why that was not practicable and explained that if she did not return to training she would be burning her bridges insofar as being able to validate at Whenuapai was concerned. I am satisfied that Mr Roberts did all he could to try and persuade Ms Graham to return to training and that he was given no good reason why Ms Markwick should not continue as the instructor. I am satisfied that in any event no other OJTI was reasonably available to substitute in that role and that Mr Roberts would have compromised his ability to conduct the FPA if he had stepped in as the OJTI, as Mr Graham requested him to do. Further I am satisfied that Ms Graham ought reasonably to have known the likely consequences to her training and her employment if she did not resume training. This had been clearly spelt out in Mr Hansens letter of 11 December 2002.

[40] Mr Roberts then conferred with other members of Airways management and Ms Markwick advised that at that point without any further training she could not recommend Ms Graham for a FPA. It was decided that Ms Graham would be suspended from training and from her employment and she was advised of this by Mr Roberts later on the afternoon of 7 February 2003. The suspension was on pay and she was advised that it would last at least until a meeting could be held on 14 February to consider the situation.

[41] I find that Ms Graham was not consulted about the suspension from employment before it was imposed on her. Usually a failure to give an employee proper notice of the possibility of suspension and to give the employee a reasonable opportunity to consider the implications of suspension and to object, will not be the conduct of a fair and reasonable employer and will accordingly amount to unjustifiable action. Where this results in some disadvantage to the employee in the employment, he or she will have grounds for a personal grievance claim.

[42] The circumstances of this case were far from usual however and I find that it was the conduct of Ms Graham herself in leaving her training with Ms Markwick and in deciding not to return when asked to, that for practical purposes brought the training to an end. In this respect the employer formally confirmed a situation of Ms Graham's own making. At the time, Ms Graham was employed to be trained and to become validated. Realistically there was no other employment for her to perform if she was not training. Nevertheless she should have been consulted while there may have still been time to put out the fires she had herself started on her bridges. Any disadvantage to Ms Graham caused by the unjustified failure to consult cannot be great if it existed

at all. By her own informed decision following a discussion with Mr Roberts, she brought about the curtailment of her training and at best she could have continued only in an empty position having little remaining purpose, until the employer could investigate the situation. I hold that there was some disadvantage however in the employment of Ms Graham. I am not persuaded from the evidence that any hurt feelings suffered by Ms Graham were significant. There was no loss of pay during the period of suspension. In any event in my view her contribution to the situation that gave rise to the grievance was so great that no award of compensation should be made. It is also relevant that dismissal itself following on from the suspension was justified, as I do find.

Application of clause 49.7.3 of employment agreement

[43] I find that clause 49.7.3 of the Air traffic Controllers Collective Agreement was applicable to the circumstances where Ms Graham had trained to become validated at Whenuapai but ultimately, as a consequence of not being recommended for the FPA, had failed to qualify. It is not disputed that clause 49.7.3 was a term of employment and the meaning of the clause is not in dispute either. It clearly provides that where an employee has been appointed to a vacancy and fails to qualify for that position on a second attempt, the employee shall lose the right to the appointment. The question is whether Ms Graham had been allowed a second attempt before it was decided to dismiss her. In my view she had. The first attempt was the 100% check undertaken in November 2002 which ended with the intervention following the critical error made on 23 November. The second attempt was the training phase of January-February 2003 which was intended to conclude with the FPA on 13 February. This ended when Ms Graham withdrew from training and Ms Markwick consequently did not recommend her for the FPA. Both occasions, in 2002 and 2003, were clearly offered or presented by Airways as unfettered opportunities for Ms Graham to qualify, as Airways had originally expected her to do by the beginning of October 2002. It lay in her hands to qualify if she could, both times.

[44] It is not a reasonable view of the application of clause 49.7.3 that a trainee making an "attempt" to qualify must be allowed to proceed to a FPA. On that view there would be no purpose having the prior recommendatory stage for a FPA. Also training that might usually only take about one month might have to continue for up to six months before Airways could invoke clause 49.7.3. A serious safety concern would reasonably arise about a trainee who could not obtain a recommendation after several attempts over six months but was allowed a chance to fluke the FPA. An intervention is not required before any attempt at qualifying can be brought to an end. It could not have been intended that within the six month time limit on qualifying a trainee could be the subject of any number of multiple interventions either until the FPA was passed or six months was up. A succession of interventions would raise a serious question about safety and the suitability of a trainee.

[45] I hold that that Airways had grounds to dismiss Ms Graham. By operation of a provision of the employment agreement the second failure to qualify following on from her inability to be recommended for a FPA, lost Ms Graham the right to her appointment as an air traffic controller at Whenuapai. She had no former position at that aerodrome to return to. The presence of grounds for dismissal is however only part of the justification that must accompany a dismissal. There is still the question of whether in all the circumstances the dismissal was effected in a fair and reasonable manner.

Whether dismissal justified

[46] After considering all the circumstances surrounding the dismissal of Ms Graham and all that has been said by Mr Wallace on her behalf and by Mr Dalzell for Airways, the conclusion of the Authority is that the dismissal was justified. There was a fundamental failure in the performance of the employment and Airways acted fairly and reasonably towards Ms Graham in its handling of the situation and in reaching its decision to dismiss. Dismissal was an option available to the employer.

[47] As stated earlier, it is not the job of the Authority to determine whether Ms Markwick ought to have recommended Ms Graham for the FPA. That was the role of Airways management who in carrying it out conducted a complete and fair enquiry in which Ms Graham and her representative were involved. After her suspension on 7 February 2003, Ms Graham could have been in no doubt about the seriousness of her situation and she took the opportunity which was offered to explain and debate what had taken place during her training. Mr Hansen considered proposals made for training to be continued as an alternative to dismissal and in my view weighed up all the circumstances of Ms Grahams progress, including her preference for certain OJTI's and not others to work with her, before deciding to terminate the employment.

[48] The Authority was referred to *Trotter v Telecom Corporation of NZ Ltd* [1993] 2 ERNZ 659 and the general observations of the Employment Court in that decision about justification in relation to any dismissal for alleged unsatisfactory work performance. At page 679 of the decision the Court gave the following as the requirements of fairness and reasonableness;

> *……specific reasons for dissatisfaction are to be disclosed to the employee; a reasonably specific and measurable improvement demanded of him or her; and a reasonable period of time for it to be established whether the employee is able to achieve that improvement, and at the end of that time a dispassionate consideration given to the question whether enough progress has been made to avert dismissal. This consideration should also take into account the previous good record of the employee……Even if the employee is unable to come up to the mark, consideration should be given to possibilities of redeployment. …… there must be a fair trial of the employee's work. This involves providing the employee openly……with measurable or ……monitorable targets or goals which in turn implies that they must be articulated to the employee being monitored and that they must be such as can later be the subject of an objective decision on the question whether they have been attained or not.*

[49] In considering the above general observations of the Court regard must be had to the particular circumstances in which Ms Grahams performance was being scrutinised by her employer. Inevitably there are significant differences between the circumstances of Ms Graham and those of the Telecom employee Mr Trotter. Ms Graham had been required to obtain a prescribed qualification and do so under close supervision from a trainer assigned to her. Ms Graham had a short time previously, although not without some problems, obtained the same qualification at a different aerodrome. She had had recent experience of the standards required of her performance and she received regular and detailed instruction and feedback from Ms Markwick about her performance. The time she was given in which to reach the standards and to qualify was expressly made known to her and was reasonable. In my view Mr Hansen objectively and dispassionately considered the performance against the required standards and progress towards achieving those. He was reasonably able to conclude that further training was unlikely to benefit Ms Graham and therefore that dismissal was a fair option. If training was not to be continued there was no possibility of meaningful redeployment.

[50] Ms Grahams refusal to continue training on 7 February 2003, which I am satisfied was decided upon and clearly communicated by her, was properly met by Airways with a disciplinary process as part of which Airways fully reviewed what had taken place in training, other options to enable training to continue, and the likelihood that Ms Graham would be able to meet the required standard for the FPA and validation. It was open to Airways to decide, as a fair and reasonable employer, that Ms Graham had twice been given a fair opportunity to repeat the validation process she had successfully been able to complete at Ohakea a few months earlier. Dismissal was justified on this basis.

Other points made

[51] To the extent there was discontinuity in the training commenced in accordance with the recommendations of the 8 December intervention report, this was inevitable at the time of year because of a drop off in flights. Training in those conditions becomes pointless and an extension of the programme is necessary. I am satisfied that the National Training Plan allowed for that and that Airways did not act unreasonably in its requirements. I am also satisfied that Airways had a discretion whether to subject a trainee to interim 35% or 70% checks and that this was properly exercised by Airways having regard to Ms Grahams ability demonstrated at Ohakea to be recommended for and pass the FPA.

[52] I accept the evidence of Mr Roberts that he had discussed with Ms Graham, on 31 January 2003, the contents of a memo he had prepared about the traffic levels required for the FPA. Although at least implicitly from the recommendations of the intervention report a copy of the memo should have been supplied to Ms Graham, I do not find any substantial unfairness through any failure in this regard. The information in the memo was brief and simple and a discussion about the required levels was adequate communication of the advice in the circumstances.

[53] Ms Graham exhaustively raised and challenged several other aspects of her training in putting forward her employment relationship problem. Some involved fine details of a technical nature, which is not surprising given the occupation of air traffic controller. By my observation Ms Graham does not lack confidence in herself and is not reticent by nature. She readily questioned with Mr Roberts at the time the ‘critical’ call made finally of her error on 23 November 2002. I consider that many of the aspects of training raised have only a superficial appearance as matters of unreasonable conduct or action by Airways in providing her training. Their significance has been somewhat blown out of proportion by hindsight for the purposes of the employment relationship problem brought to the Authority. It seems to me likely that Ms Graham was alert to the circumstances and requirements of her training at the time and enquired of anything she found unsatisfactory or unclear. She had the opportunity following the meeting of 14 February to challenge the way her training had been delivered and explain why she believed she had not been at fault, particularly by way of response to Ms Markwicks very detailed report on the training. I am satisfied that Airways properly weighed up all that was said by Ms Graham and Ms Markwick in particular, and properly measured what had happened in training against the standards required to be met by it as the employer and the standards reasonably expected of a trainee having the employment background of Ms Graham. I consider that the problem of dismissal undoubtedly suffered by Ms Graham, is not one that Airways is legally responsible to rectify.

Determination

[54] For the reasons given above I determine that the dismissal of Ms Graham was justified but that she has a personal grievance by virtue of being unjustifiably disadvantaged in her employment as a result of the suspension. However no orders against Airways are necessary to remedy the disadvantage employment relationship problem, as the contribution of Ms Graham to the circumstances was so great as to justly cancel any entitlement.

Costs

[55] Ms Graham had the benefit of skilled mediation but elected, I expect with knowledge of the risks, to seek a favourable resolution by investigation and determination. In this she has not been successful. There seems to be no good reason why usual principles in relation to costs should not apply in this case and allow Airways to recover a contribution to costs reasonably incurred through having to take part in the investigation. If Airways wishes to seek costs it should apply in writing within 21 days of the date of this determination and after attempting to resolve the question by discussion with Ms Graham. A copy of the costs memorandum is to be sent to Mr Wallace who may have a further 14 days to reply.

A Dumbleton
Member of Employment Relations Authority