

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA148/08  
5116900

BETWEEN                      STEPHEN JOHN GRAY  
   Applicant  
  
AND                              AIRWAYS CORPORATION  
   OF NEW ZEALAND LIMITED  
   Respondent

Member of Authority:      Helen Doyle  
  
Representatives:            Richard McCabe, Counsel for Applicant  
   Stuart Dalzell, Counsel for Respondent  
  
Investigation Meeting:      20 August 2008 at Nelson  
  
Determination:              3 October 2008

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**DETERMINATION OF THE AUTHORITY**

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## **Employment relationship problem**

[1] Stephen Gray was employed as an Air Traffic Controller by Airways Corporation of New Zealand Limited (Airways) from 9 May 1994. He was a controller at the Nelson Tower from April 2003, until his resignation on 15 March 2007.

[2] On 21 August 2007, Mr McCabe from New Zealand Airline Pilots Association (NZALPA), wrote to Airways and advised that Mr Gray now wishes to pursue his employment relationship problems of unjustified actions causing disadvantage and unjustified constructive dismissal. Mr McCabe asked in his letter whether Airways would be willing to attend mediation in the first instance.

[3] Airways advised NZALPA that it did not consider a grievance had been raised as required under s.114 of the Employment Relations Act 2000 and that, if Mr Gray wished to raise a grievance, he ought to apply for leave to do so. Airways indicated

that it was only prepared to attend mediation on the issue whether a personal grievance should be allowed to proceed.

[4] The preliminary, and only, issue to be determined by the Authority in this determination is whether Mr Gray raised personal grievances with Airways within the period of 90 days from when the action alleged to amount to a personal grievance occurred or came to his notice.

**Did Mr Gray raise his personal grievances with Airways within the period of 90 days from when the action alleged to amount to a personal grievance occurred or came to the notice of the employee?**

[5] The alleged unjustifiable action grievances that Mr Gray says he raised require consideration of three main periods of interaction between Mr Gray and managers at Airways. Mr Gray says that he raised grievances about leave issues, his September 2005 annual proficiency assessment and management/workplace relationship issues. The events at the time of resignation and the exit interview have to also be considered to determine whether an alleged grievance of unjustified constructive dismissal was raised with Airways.

[6] Mr Gray failed an annual proficiency assessment on 20 September 2005 and was assessed *not-competent*. He challenged that assessment and said on the performance assessment document under assessee's comments that he disagreed with the majority of the assessor's findings and:

*I feel that I am being made an example of because the Assessor believes that A) unit standards are slipping and B) that I am a bad example to trainees (which I refute).*

[7] On 22 September 2005 Mr Gray emailed the assessor and, then senior controller at Airways Nelson, Adam Arnold-Kelly and copied in the Regional Manager, Warwick Duke expressing that he was very upset about the assessment of his controlling. Mr Arnold-Kelly responded to that email.

[8] A meeting then took place between Mr Duke and Mr Gray in October 2005 to discuss the matter. Following that meeting Mr Duke wrote to Mr Gray on 19 October 2005 in an attempt to reach formal agreement with him on the root cause that resulted in Mr Gray's unsuccessful annual assessment.

[9] Mr Gray responded to that letter by email on 20 October 2005 indicating that he felt unsupported and not listened to and in an attached document to his letter, said

that he did not agree with the root cause identified by Mr Duke as lack of operational currency.

[10] An action plan was subsequently signed by Mr Gray later in October 2005. When Mr Gray was assessed competent in a subsequent performance assessment dated 2 November 2005 he wrote under assessee's comments that he agreed to the action plan *under duress* in order to proceed toward this APS and that he disagreed with the root cause in the action plan.

[11] Mr Gray said in a memorandum forwarded to Mr Duke on 30 January 2006 which confirmed an amendment to a procedure (LUO Amendment), that he remained insulted at the injustice of being assessed incompetent as a coordinator at Nelson Tower because he did not follow the procedure. There was a further email sent to Mr Duke dated 31 January 2006.

[12] Mr Duke recognised in an email to Mr Gray dated 1 January 2006, as a result of both the memorandum and the 31 January 2006 email, that it appeared there were some important issues that needed addressing.

[13] There was a further meeting between Mr Duke and Mr Gray in early February 2006 where there was a discussion, amongst other matters, about the root cause of the performance assessment of not-competent.

[14] On 14 July 2006 Mr Gray responded to a staff survey that was sent out by the Manager of Regional/Military Air Navigation Services, Rob Irwin. He also forwarded his response to the Chief Executive Officer of Airways, Ashley Smout.

[15] Mr Gray referred in his response to his anger and resentment at management of the Nelson unit and set out bullet point concerns under four headings, *Big Picture Issues, Recognition, Communication and Culture and Purpose*.

[16] Mr Smout responded by email dated 18 July 2006 to Mr Gray and expressed concerns that Mr Gray felt that way about conditions at the unit. Mr Smout said in his email that he was pleased that Mr Gray had put it in writing rather than *stewing on it*.

[17] Mr Gray was on leave from about mid July 2006 for seven weeks. On 9 October 2006 Mr Gray met with Mr Irwin and Tara Longley, the Senior Human Resources Adviser at Airways to discuss the concerns that Mr Gray had raised in his

feedback in the staff survey and matters of concern in the Nelson Tower. The interview with Mr Gray was documented.

[18] The memorandum from that interview records that Mr Gray referred during the meeting to issues relating to his assessment in September 2005. He is recorded as saying that he did not see the failure as justified, that he raised the issue with Mr Duke and that he had found Mr Duke unsupportive. Mr Gray said that he wanted things improved and to feel part of the team and be consulted.

[19] Mr Gray also referred at the 9 October 2006 meeting to a complaint he had made about a leave issue in or about May/June 2005. Mr Gray had raised a concern with Mr Duke that Mr Arnold-Kelly had falsified leave at that time. Mr Duke accepted in his evidence to the Authority that this issue had been raised with him at or about that time in 2005 and that as a result he had talked to Mr Arnold-Kelly who, he said, was *horrified at the allegations*. Mr Duke said that there were some changes to the system to improve transparency with respect to leave. Mr Gray said in his evidence that Mr Duke did not get back to him about the matter but it was not raised again by Mr Gray after May/June 2005 until 9 October 2006.

[20] Airways proposed as part of the solution following 9 October 2006 that Mr Gray meet with Mr Arnold-Kelly and Mr Duke with Wayne Coumbe from Airways human resources facilitating the meeting. Although Mr Gray was initially agreeable to this, he then declined but did meet with Mr Coumbe alone in late October 2006.

[21] At about this time Mr Gray was also contacted by Sarah Fifield of the Training Centre to progress his OGTI refresher and Mr Coumbe also arranged for Mr Gray to meet a counsellor from Synergy Health Limited, Brad Norris. One meeting took place between Mr Gray and Mr Norris in late December 2006. On 5 December 2006 Mr Gray met with Mr Duke about his Performance Review.

[22] On or about 22 January 2007 Mr Gray was advised that he had not passed his OGTI refresher. On 31 January 2007 Mr Duke completed a performance review of Mr Gray. The performance review was not signed by Mr Gray and there are some disputed matters about it that do not require resolution at this time. However, within the Manager's summary of Mr Gray's performance there is reference to the cause and consequence of the September 2005 performance assessment being the subject of

prolonged discussion and debate. Mr Duke also recorded that the subsequent actions and communications by him were considered unsatisfactory and that Mr Gray recorded his concerns about this in July 2006 (the staff survey). Mr Duke recorded that the stresses of this situation over the intervening time have had an impact on Mr Gray's relationship with the management team and at times, the controlling staff.

## **Events leading up to resignation**

[23] Mr Gray said in his evidence to the Authority that he wanted to see if Mr Duke approached him about the OGTI refresher because Mr Duke knew how important that was to him. Mr Duke did not discuss the OGTI refresher with Mr Gray.

[24] On 14 February 2007, Mr Gray tendered his resignation effective from 15 March 2007 in writing. The letter of resignation was written to Mr Duke and provided:

*After substantial consideration over many months it is with deep regret that I tender my resignation as an Air Traffic Controller. I wish to terminate my employment with Airways effective 15th March 2007.*

[25] At the Authority investigation meeting, Mr Gray could not recall what he said to Mr Duke about his resignation when he gave him the resignation letter. Mr Duke said in his evidence that he thought Mr Gray told him when he gave him the resignation letter that he (Mr Duke) had not supported him about his OGTI refresher. On 15 February 2007, Mr Duke accepted Mr Gray's resignation in writing. Mr Gray then went on scheduled annual leave for two weeks.

[26] Mr Duke met with Mr Gray on 8 March 2007 to talk to him about a number of administrative issues which are recorded in a file note dated 8 March 2007. Mr Gray accepted that that file note recorded what was discussed accurately except he did not accept that there was a protocol around single leave days. It was not argued that any of these matters in the file note amounted to the raising of a grievance.

[27] After that meeting on 8 March 2007, Mr Gray produced a medical certificate to Airways that supported his sick leave until the end of his notice period and he did not return to work after 8 March 2007.

## The exit interview

[28] On 22 February 2007, Ms Longley emailed Mr Gray and asked him if he wanted to undertake an exit interview with her. Mr Gray indicated at that time that he was interested in doing an exit interview but not one with Ms Longley. When Ms Longley indicated that she was the person in Human Resources who conducted all exit interviews, Mr Gray said that he would not be doing one.

[29] On 16 March 2007, Ms Longley emailed Mr Gray and advised that he could fill out the exit interview form via email and send it back to her. Mr Gray completed the exit interview and returned it as an attachment to his email dated 25 March 2007 in which he said:

*After a little procrastination, here it is. It's a great document, which allowed me to cover many issues. I don't know how I could have possibly completed it over the phone.*

[30] The exit interview asked Mr Gray to advise what prompted him to make his decision to leave. Mr Gray listed his reasons for leaving as:

- *Due to poor management practices I ran out of choices.*
- *I was not valued by my manager.*
- *Lack of staff prohibited my future development as a Project Manager.*
- *There was an element of "Work Place Bullying" which involved both my Manager and his Senior Controller at the Unit. Without any support from my colleagues or the Regional/Military Manager, I was left with only one course of action in order to maintain my health and wellbeing.*

[31] In terms of additional comments at the end of the questionnaire/exit interview document, Mr Gray said:

*I wish to make it clear that I didn't wish to leave Airways. I feel that if I'd been allowed to, I could have added a lot more value to the organisation. However due to poor management practices I found that I was left with no choice but to resign in order to maintain my health and wellbeing.*

[32] Mr Duke was forwarded a copy of the exit interview document by Ms Longley after Mr Gray had completed it. It is clear from Mr Duke's responses to

Ms Longley in March 2007 that he felt that the matter was at an end and that Mr Gray had *had his say*.

[33] When he gave his evidence at the Authority investigation meeting, I asked Mr Gray what he expected to happen after the exit interview document had been sent. Mr Gray said:

*Expectation was that changes were going to be made around how Adam treated trainees and assessed controllers. Had a belief that someone would be willing to look at the issues and make some changes.*

[34] The next communication with Airways from or about Mr Gray was the letter from NZALPA on 21 August 2007.

## **Conclusions**

### ***Unjustified actions causing disadvantage***

[35] Airways' position, succinctly put by Mr Dalzell, is that whilst Mr Gray complained from time to time about matters in the workplace as set out above, these complaints could not, and did not, constitute raising of personal grievances for the purposes of s.114(1) of the Employment Relations Act 2000. Mr Dalzell submitted that which is needed is a positive statement of a personal grievance and that the employer is left in no doubt that a legal claim is in the *offing*.

[36] The Employment Court judgments of *Creedy v. Commissioner of Police* [2006] 1 ERNZ 517, which was appealed on another point, and *Coy v. Commissioner of Police* (unreported), 23/07, 19 November 2007, support that what is important in raising a grievance is that the employer is made sufficiently aware of the substance of the grievance alleged so as to be able to respond to it and attempt to resolve it informally and soon after it is raised as contemplated by the Employment Relations Act 2000.

[37] It is not required that an employee raising a personal grievance with an employer leave the employer in no doubt that there is or could be a legal claim.

[38] What is required is that Mr Gray raise a personal grievance within the meaning of s.103 of the Employment Relations Act 2000 in a way that enables Airways to be sufficiently aware of the substance of the complaint so that it could attempt to resolve

it – *Miriam Clark v. Nelson Marlborough Institute of Technology* (unreported), CC12/08, Couch J.

[39] Mr Dalzell submits that the leave and the performance assessment issues could not be personal grievances and further that the concerns raised in the staff survey were general, expressions of dissatisfaction and essentially related back to the earlier assessment failure and the leave matters which were not raised in time and the survey could not of itself be the raising of those personal grievances.

[40] The leave and performance assessment issues were not categorised by Mr Gray when he raised them with his employer as personal grievances. It was clear, however, when they were raised that Mr Gray was concerned about how he felt he had been treated and the conduct of his employer in both instances. He was not raising matters in the nature of a dispute.

[41] The 14 July 2006 response to the staff survey and the subsequent meeting that Mr Gray had in October 2006 with Ms Longley and Mr Irwin did not comprise a complete overlap in terms of the concerns about leave and performance assessment already raised. The memorandum following the October 2006 meeting reflects additional/other concerns about a failure to consult and issues with communication as well as the concerns of Mr Gray that the leave and performance assessment issues had not been dealt with or not been dealt with properly. The staff survey does contain some general expressions of dissatisfaction but the concerns raised in a broader way were clarified at the October 2006 meeting by Mr Gray with Ms Longley and Mr Irwin.

[42] I do not accept Mr Dalzell's submissions that the concerns raised by Mr Gray about leave, his performance assessment and management/ workplace relationships were something other than personal grievances under s.103 of the Employment Relations Act 2000. The concerns raised by Mr Gray were about his employment or conditions of employment which he alleged were affected to his disadvantage by actions of Airways that he found were unjustified.

[43] I am satisfied that the alleged leave and performance assessment grievances were raised with Airways within 90 days of the actions that Mr Gary alleges amounted to personal grievances occurred.

[44] The management/workplace relationship issues which are additional to those of leave and the performance assessment issues, raised in the 14 July 2006 memorandum and discussed at a meeting in October 2006 in the nature of ongoing issues that Mr Gray said he had with his managers and how issues had been dealt with or not dealt with. I am satisfied that these matters were also raised within the requirement of s.114(1) of the Employment Relations Act 2000.

[45] I find Mr Gray took reasonable steps to make his employer aware of the nature of his disadvantage grievances in terms of s.114(2) of the Employment Relations Act 2000. I am strengthened in this view as to the reasonableness of the steps because Airways responded at the time the concerns were raised recognising that there were issues that required addressing for Mr Gray and taking steps to attempt to resolve them.

[46] Mr Gray raised his personal grievances of unjustified actions causing disadvantage for the purposes of s.114(1) of the Employment Relations Act 2000.

***The alleged unjustified constructive dismissal***

[47] Mr McCabe submits that the exit interview document constitutes the raising of a grievance of unjustified constructive dismissal because it draws together the *building blocks* of the unjustified actions causing disadvantage to make the constructive dismissal *tower*. He placed reliance on the evidence from Ms Longley that she told Mr Gray that the exit interview document covered off the reasons for his leaving the organisation.

[48] Mr Dalzell described the exit interview as parting shots by a departing employee and says that there was no assertion of a personal grievance of unjustified constructive dismissal to enable it to be addressed.

[49] The purpose of the questionnaire/ exit interview document is set out at the start as to *gain an understanding of your thoughts about your terms of employment with the Airways*. There is a section to be filled in by departing employees about the reasons for leaving and what prompted that decision. Although there was an opportunity for confidentiality, Mr Gray ticked the box that he was happy for the document to be shown to his manager.

[50] Mr Gray's evidence about what he thought would happen after the exit interview is important. Mr Gray hoped that changes would be made and someone would be willing to look at the issues. Mr Gray did not say in his evidence that he expected to, or even thought that he would, get a response to the exit form that is now relied upon as raising an alleged unjustified constructive dismissal claim.

[51] I have also placed some weight on Mr McCabe's letter of 21 August 2007 to the extent that there was no criticism directed at Airways for not responding notwithstanding that the exit interview was sent to Airways as an attachment to an email on 25 May 2007 and the letter from NZALPA about five months later.

[52] I am not satisfied that the exit interview document pulls together the earlier alleged grievances of unjustified actions causing disadvantage so as to sufficiently convey the substance of a personal grievance of unjustified constructive dismissal in a way that enabled Airways to be aware of it so that it could attempt to resolve the matter.

[53] I do not find that a personal grievance of unjustified constructive dismissal has been raised in terms of s.114(1) of the Employment Relations Act 2000. If an alleged personal grievance of unjustified constructive dismissal is to be pursued by Mr Gray an application for leave to raise the personal grievance outside of 90 days will have to be made.

[54] Mr Dalzell raised during a directions conference with the Authority on 1 July 2008 before the preliminary investigation meeting that there should also be an application to raise the grievances outside of the 90 days so that a further investigation meeting with the Authority would not be necessary. Mr McCabe said that such an application was not necessary and that he did not intend to lodge an application for leave. The Authority indicated at that time that it was for the applicant as to how he proceeded although any additional requirements for investigation meetings could be reflected in costs.

[55] The Authority will want the parties to attend mediation on the alleged grievances of unjustified action causing disadvantage. Mr McCabe will have to give some thought to that along with whether an application for leave to raise the personal grievance outside of 90 days is made in terms of the alleged unjustified constructive

dismissal. He is to advise the Authority and Mr Dalzell of his intentions in both matters as soon as practicable.

**Costs**

[56] Costs are reserved on this preliminary matter.

Helen Doyle  
Member of the Employment Relations Authority