

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 59/09
5158820

BETWEEN PAMELA MARION ADAMS
Applicant
AND AIRWAYS CORPORATION
OF NEW ZEALAND LIMITED
Respondent

Member of Authority: Philip Cheyne
Representatives: Maxine Knowler, Counsel for the Applicant
Stuart Dalzell, Counsel for the Respondent
Investigation Meeting: 30 April 2009 at Queenstown
Determination: 4 May 2009

DETERMINATION OF THE AUTHORITY

[1] Pamela Adams worked for Airways Corporation of New Zealand as an Air Traffic Controller for 7 years based at Queenstown and elsewhere for many years before that both for Airways and its predecessors. By letter dated 1 April 2009 Mrs Adams was dismissed from her employment following a disciplinary investigation.

[2] Mrs Adams say that she has a personal grievance of unjustified dismissal and by this application seeks interim reinstatement pending the investigation and determination of her substantive grievance and her claim for permanent reinstatement. The parties were not able to resolve their employment relationship problem by mediation so this determination resolves the issue of interim reinstatement. As is usual this issue was investigated by consideration of affidavits supporting and opposing interim reinstatement and the parties' submissions. The following findings are solely for the purpose of this determination while final findings will have to await an opportunity to fully test all the relevant evidence.

The dismissal

[3] Mrs Adams is a very experienced controller and was the Senior Controller – Operations at Queenstown. She reported to Bruce Rosie who is Airways’ Operations Manger – Queenstown/Milford Sound. Airways employs a number of other Air Traffic Controllers in Queenstown, one of whom is Mike Bishop.

[4] On 2 March 2009 there occurred an incident between Mrs Adams and Mr Bishop while they were working together in the Queenstown control tower. Mrs Adams thought Mr Bishop had lost separation between two aircraft so she raised that with him. Mr Bishop objected to the manner in which Mrs Adams spoke to him. Mr Bishop verbally complained to his manager Mr Rosie and then put the complaint in writing. The gist of the complaint is that Mrs Adams challenged him in an angry and demanding manner that raised his stress levels and added confusion to the busy situation he was dealing with. In his complaint Mr Bishop said that it was not the first time that this had happened and he asked for some action to be taken to remove *this latent risk to safety and degradation of a positive working environment....*

[5] Mrs Adams completed an incident report and lodged it with the Civil Aviation Authority. That report says *I asked the controller “What separation do you have in place ...?” The controller became abusive and agitated and was adamant that the hold down ... was correct. ...The controller was relieved from position and left the tower.*

[6] Grant Rawstorn is the Regional Services Manager. Mr Bishop’s complaint came to him and on 5 March 2009 he wrote to Mrs Adams telling her of the complaint, advising her that he would investigate and of his intention to be in Queenstown on 9 and/or 10 March 2009. The letter says *...if the investigation finds that a breach of the Code of Conduct occurred, the breach could potentially be classified as Misconduct or even Serious Misconduct. As such, after you have had full and proper opportunity to respond and refute the allegations, it could lead to disciplinary action including a formal warning or up to and including dismissal.* Mrs Adams was told she could bring a representative or a support person to the meeting.

[7] Following receipt of this letter Mrs Adams asked Mr Rosie to be released from her sole duty shift prior to meeting with Mr Rawstorn. That state of affairs appears to have been continued by agreement during Airways’ investigation. Mrs Adams also sought EAP assistance. At the meeting on 10 March Mrs Adams was given a copy of Mr Bishop’s written complaint and she related her account of the 2 March incident.

Later Mr Rawstorn interviewed Mr Bishop and other employees, at least some on Mrs Adams' suggestion. On 11 March, having received advice about her own stress, Mrs Adams spoke to Airways' HR manager and told her that she wished to step down from her senior role. Mrs Adams followed up with an email to that effect on 12 March and Mr Rosie replied the next day saying *I will action your request effective today.*

[8] Meantime, Mr Rawstorn continued his investigation and then sent Mrs Adams a letter dated 16 March with a preliminary report. The report records the protagonists' differing accounts of the 2 March incident as well that of the sole witness. There are also comments attributed to other mostly unnamed employees about Mrs Adams' negative attitude towards Mr Bishop and to her other colleagues. The report concludes with Mr Rawstorn to initiate a performance management process with Mrs Adams under the code of conduct. The letter invites Mrs Adams to another meeting and cautions her in terms similar to the 5 March letter mentioned above.

[9] The further meeting took place on 24 March. In her affidavit Mrs Adams says *At that meeting I was given an opportunity to respond to the various allegations contained in the Preliminary Report.* Mrs Adams denied bullying or harassing Mr Bishop (or anyone else) but accepted that her style of communication was forthright and black and white. Mrs Adams also suggested that Mr Bishop did not like her not being a union member and was not as responsive to the female controllers as opposed to the male controllers.

[10] Mr Rawstorn raised these last two issues with Mr Bishop who refuted them. There was another meeting between Airways and Mrs Adams on 26 March. Mr Rawstorn reported Mr Bishop's denials and indicated that he was proposing to dismiss Mrs Adams for serious misconduct. Mrs Adams told Mr Rawstorn that her health professional had identified her as suffering from workplace stress and possibly burnout. Mrs Adams' solicitor said that it was not accepted that the relevant conduct could constitute serious misconduct so arrangements were made for the solicitor to put a written proposal to Mr Rawstorn. That was done by letter dated 30 March. The letter proposes that Mrs Adams be given a formal warning, take a period of sick leave, return to work as a controller and undertake any courses or counselling.

[11] By letter dated 1 April 2009 Mr Rawstorn advised that he considered that Mrs Adams' behaviour amounted to harassment as defined in the relevant code of conduct

and was serious misconduct. The letter goes on to say controllers needed to have trust, confidence and open communication with one another when working to ensure safe operations for aviators and because that did not exist in the present case, Mr Rawstorn did not accept Mrs Adams' proposal and he had decided to dismiss her.

Arguable personal grievance?

[12] Counsel accepted that it is for Airways to justify its decision to dismiss Mrs Adams so that an arguable case of personal grievance probably arises but not to a strongly arguable standard.

[13] The starting point will be to reach conclusions about what happened between Mrs Adams and Mr Bishop on 2 March. I note that the only witness to the incident supported Mr Bishop's account but it remains weakly arguable that Mrs Adams' account will be preferred eventually. Whichever way that conflict is resolved, there are three serious contests in this case as presently described that could result in Mrs Adams' reinstatement. First, was Mrs Adams' conduct on 2 March misconduct under the relevant code of conduct so as to require formal warnings before dismissal? It is common ground that Mrs Adams has never been warned under the code of conduct. Secondly, even if Mrs Adams' behaviour was harassment and therefore serious misconduct under the code of conduct, was it such that she should have been warned rather than dismissed as allowed for under the provisions dealing with serious misconduct? Finally, Airways knew about Mrs Adams' blunt communication style as it had been discussed with her in her two previous performance appraisals. It may be that some or all of the comments by other employees relate to communication issues which Airways elected to deal with in these appraisals or otherwise so as to prevent Airways fairly invoking them now to support the conclusion of serious misconduct. Indeed, on 25 February 2009 Mr Rosie had spoken to Mrs Adams about a concern expressed by an unnamed controller over communication style but Mrs Adams was specifically told that it was not *a formal warning or anything of the kind*.

[14] These are all substantial points which lead me to conclude that Mrs Adams has an arguable case of unjustified dismissal.

Balance of convenience

[15] It is common ground that a full investigation may require up to two days and can be scheduled in the second part of May or in June this year. As counsel put it, the present question is what is the better holding position until then in light of the circumstances of the parties?

[16] This is not a case where an applicant employee will suffer debilitating financial difficulties if deprived of income from employment pending the substantive decision. Airways is clearly able to pay compensation to cover lost income or other losses should Mrs Adams establish a grievance.

[17] Interim reinstatement is advanced on the basis that Mrs Adams' employment skills and experience are solely within the air traffic control industry, Airways is the only employer of controllers in New Zealand and Mrs Adams has been a long serving and loyal employee. No doubt if Mrs Adams establishes a grievance these are very powerful factors pointing towards reinstatement as an appropriate remedy. However, I do not see this as a case where the opportunity for permanent reinstatement would be lost or materially compromised but for interim reinstatement.

[18] Against that, Airways says that it has concerns for the safe operation of air traffic control in Queenstown and beyond since staff must trust and watch out for one another and it has no confidence that Mrs Adams could interact in that way with others or them with her. That of course touches on the reasons for the dismissal in the first place. It is possible but by no means certain that there may be validity in the point. Even at a low level of possibility, the very serious consequences that might ensue, means that the potential harm to Airways of interim reinstatement for Mrs Adams outweighs the harm to Mrs Adams of not being reinstated now.

[19] For the foregoing reason, the balance of convenience favours Airways.

Overall justice

[20] There is nothing about the respective cases overall at present that would cause a different conclusion from that just expressed.

Conclusion

[21] The application for interim reinstatement is declined.

[22] Costs are reserved.

[23] The Authority will arrange a further phone conference shortly.

Philip Cheyne
Member of the Employment Relations Authority