

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 95/09
5086992

BETWEEN NICOLAS JOHN
 Applicant

AND AIRWAYS CORPORATION
 OF NEW ZEALAND LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Richard McCabe, Counsel for Applicant
 Stuart Dalzell, Counsel for Respondent

Investigation Meeting: 6, 7 and 20 May 2009 at Nelson

Determination: 3 July 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr John), an experienced air traffic controller based most recently at Nelson Tower and employed in that capacity by the respondent (Airways), claims to have suffered disadvantage as a consequence of an unjustifiable action or actions of Airways and to have been unjustifiably dismissed by Airways.

[2] Airways resists those claims, contending that the dismissal was, in all the circumstances, justified based as it was on long term medical incapacity and that the dismissal was fairly carried out. Airways also denies any unjustifiable action and argues that the unjustifiable action grievance was not raised within 90 days of any disadvantage being suffered by Mr John.

[3] In November 2004, Mr John was appointed to a position as an air traffic controller at Nelson Tower. Airways was keen for that vacancy to be filled as soon as practicable, but Mr John sought a later date at which he would commence duties at

Nelson than Airways was proposing. In particular, Mr John and his wife were expecting their first child and, of necessity, Mr John and his wife would need to sell their family home in Wellington and relocate to Nelson while their new baby was settling in.

[4] Further, Mr John identified that he would need time to shift professionally from his then existing role in *a largely non-operational position* at Wellington Tower to a completely operational focus at Nelson Tower. Mr John also reflected his concern about leaving the Wellington Tower shorthanded by his imminent departure to Nelson.

[5] There were discussions between the parties and, in the result, a compromise date was arrived at and Mr John commenced his duties at Nelson Tower in June 2005. Airways says this start date was reached consensually; Mr John alleges that he had no choice but to accept it.

[6] On arrival at Nelson Tower, Mr John, of necessity, required training in the Nelson environment. In broad terms, Mr John had to acquire, through training, a rating for his work at Nelson Tower.

[7] Mr John says that this process was *stressful* and was *quite different to what I was used to*. Mr John's performance in training caused both himself and Airways concern.

[8] On 30 December, Mr John advised Mr Warwick Duke, the regional manager, and Mr Adam Arnold-Kelly, the senior controller training, that he was fatigued and on 5 January 2006, Mr John advised Mr Duke by email that he was experiencing stress.

[9] On 25 January 2006, a training review conducted by Airways concluded that Mr John was, or had been, fatigued but notwithstanding all of that, Mr John completed rating for Nelson Tower in March 2006 and commenced his duties.

[10] In May 2006, Mr John presented at his doctor in an unwell state and was diagnosed as suffering from an Anxiety Stress Disorder. The following month, Mr John suffered a family bereavement and on 19 July 2006, Mr John responded to a general staff survey initiated by another regional manager, Mr Rod Irwin, in which Mr John expressed dissatisfaction with the job due to stress caused by the Airways work environment.

[11] That same month, the Civil Aviation Authority disqualified Mr John from holding a medical certificate which meant that he could not work as an air traffic controller until his medical condition had been resolved.

[12] As a consequence of Mr John's response to the general staff survey initiated by Mr Irwin, Airways conducted inquiries at the Nelson Tower, talking to a number of staff and management involved there.

[13] Dissatisfied with progress in that latter regard and generally, Mr John made a complaint to the Department of Labour on 27 April 2007. The Department of Labour (Labour) commenced a health and safety investigation at Nelson Tower and, in September 2007, issued a report which found that Airways had failed to meet its health and safety obligations as a good employer.

[14] On 28 November 2007, Mr Duke, the responsible regional manager for Nelson Tower, issued a memorandum to staff at the Nelson Tower in which he took issue with the conclusions reached by Labour and indicated Airways' intention to conduct its own inquiries.

[15] Mr John raised an unjustifiable action personal grievance with Airways on 10 January 2008 alleging that Airways had failed to provide him with a safe workplace, and the following month Labour amended its conclusions after significant submissions from Airways.

[16] On 3 July 2008, Mr Grant Rawstorn, the regional services manager, dismissed Mr John from his employment on four weeks' notice on the basis that his medical condition made his return to the workplace *unlikely in the foreseeable future*.

Issues

[17] It will be helpful for the Authority to consider each of the chapters in the concluding part of Mr John's employment history with Airways. Each facet of the employment relationship that is considered here has bearing on either the alleged unjustifiable dismissal or the alleged disadvantage as a consequence of unjustified action.

[18] Accordingly, I propose to examine the following matters:

- (a) Mr John's transfer to Nelson;

- (b) Mr John's training at Nelson;
- (c) Mr John's health problems;
- (d) Airways' responses;
- (e) The Department of Labour report;
- (f) The Scrimshaw Report;
- (g) The dismissal.

Mr John's transfer to Nelson

[19] Mr John applied for a transfer from Wellington Tower to Nelson Tower in November 2004. Airways has a bidding system for staff wishing to transfer in such situations, and Mr John was part of that bidding process. Once he was successful with his bid for the position at Nelson Tower, Airways and Mr John then proceeded to engage about a start date.

[20] As I have already indicated earlier in this determination, there was a difference between Mr John and Airways as to when he should start, with Airways' proposing that he commence at Nelson in May 2005 and Mr John proposing that that not happen until September 2005.

[21] I am satisfied on the evidence I heard that Airways was always motivated to have the transfer effected quickly because the staffing level at Nelson Tower was critical. It was clear that the staffing level at Wellington Tower was also not up to complement, but the position at Nelson was more critical than the position at Wellington.

[22] For his part, Mr John made it clear to his employer that he and his wife were expecting their first child and at the point at which the appointment was made, Mr John's wife was *at a late stage in the pregnancy*. For Mr John, the reality was that his family circumstances would change dramatically with the arrival of the infant and, in the midst of the process of the family adjusting to the new arrival, he and his wife would have to uproot their home, sell their house property in Wellington and move to a new community. Mr John sought some latitude from Airways in that regard.

[23] In addition to those family circumstances, Mr John was also concerned about leaving his colleagues at the Wellington Tower to carry a vacancy caused by his departure, and he was very conscious of his own need to retrain, partly for a purely operational role at Nelson (he had a broadly non-operational supervisory role at Wellington), and partly because of his separate training need to be rated for Nelson Tower. The rating process, of course, trained controllers to understand and deal with the particular aspects of the airfield they were to operate in.

[24] In an email dated 8 February 2005 sent by Mr John to his then superior at Wellington Tower, Mr John carefully identifies the various factors which he sees as militating against an early departure by him to Nelson. Then, in a subsequent memorandum from Mr John to his Wellington Tower superior, and to Mr Duke, the regional manager for Nelson, and Mr Coumbe, the human resources manager for Nelson, Mr John notes the Airways position that he is to move in May 2005 but then goes on to make it abundantly clear that such a proposal would not be acceptable to him. Amongst other things, he says:

While I appreciate that my move to Nelson has been to some degree expedited due to the staffing situation at Nelson is both currently and forecast to encounter, unfortunately my personal circumstances would make this an incredibly difficult proposition and I do not believe that I am able to make the move within this timeframe.

[25] Then, in the balance of that memorandum, Mr John carefully argues for an alternative date of late July, demonstrating by a timeline why that particular date had its own logic.

[26] That memorandum is followed by another memorandum of 23 March 2005 addressed this time exclusively to Mr Duke in which Mr John appears to continue to take a helpful and collaborative approach. His second sentence in this memorandum is as follows: *I am confident that we can arrange a move and start date that suits both parties.* Later on in the memorandum, he says that he and his wife had considered Airways' request to get to Nelson sooner than the date proposed in Mr John's earlier communication of 3 March 2005 (late July 2005), and that *in order to try and help we will be attempting to do this.*

[27] Further on in the same memorandum, Mr John reveals for the first time that the baby *may be another couple of weeks away* and that there is a possibility of the infant being delivered by Caesarean section which of itself would pose further delay

in terms of getting Mr John's wife back to her pre-birth health status, Caesarean section being significant abdominal surgery. He then goes on to commit to putting his Wellington home on the market the second weekend following the delivery of his child and then move to Nelson as soon as practicable after the completion of the sale thereafter. Mr John concludes by making some requests of Airways to assist him in the marketing and transfer process.

[28] Mr Duke responded to Mr John by memorandum dated 29 March 2005 seeking a commitment from Mr John to be onsite at Nelson on 1 June and undertaking to look at Mr John's particular requests for individual assistance in respect of the transfer.

[29] Mr John alleges that he was effectively forced to move to Nelson at a time and date that suited Airways and that his concerns *were brushed aside and largely ignored*. I do not see the evidence as supporting either of those allegations at all. I accept Mr Duke's evidence that Airways proposed a 1 May date, Mr John came back with a 22 July date, and a compromise was reached, namely 1 June. The correspondence between the parties, which is before the Authority, suggests a collaborative and measured approach to the issue, particularly from Mr John. There is no evidence in the correspondence that he was irritated, stressed or being ignored. Indeed, quite the reverse appears to be the case. Mr John himself refers in two of his communications (one of which I cited specifically above) to working collaboratively with Airways, as for example when he says in his 23 March 2005 memorandum *I am confident that we can arrange a move and start date that suits both parties*. That reiterates the point that he made earlier on 8 February when he said in writing *I am sure that there is a solution that would be suitable to all parties*.

[30] Indeed, Mr Duke's evidence is that he and Mr John spoke by telephone about the proposed 1 June date and that Mr John agreed to it and that the memorandum in which Mr John says that he was effectively presented with a *fait accompli* of *1 June or else* simply reiterates an agreement that has already been entered into.

[31] Most fundamentally, Mr John himself clearly is making every effort to meet the employer halfway and that is best illustrated by his second memorandum of 23 March 2005 to Mr Duke wherein he makes the entirely unsolicited proposal that he and his wife would place their Wellington property on the market for sale *the second weekend following the delivery of our child*. What makes the argument even more

pointed is that Mr Duke's evidence is that that is precisely what happened, and that he received an email from Mr John on 4 May 2005 which confirmed that the sale of the Wellington property *went through* the previous night and Mr John and his wife were putting things in place to move to Nelson in time for 1 June. Mr Duke said that he replied expressing his congratulations. While those two emails are not before the Authority, the evidence was not challenged and I have no reason to doubt the veracity of the points made.

[32] It follows that I am not satisfied that Mr John has demonstrated any deficit by Airways in the process by which he was transferred from Wellington to Nelson. Indeed, I think that the whole process demonstrates a willingness by both parties to work with the other to achieve a mutually agreed solution. There is evidence in the correspondence before the Authority, both from Airways and Mr John, of concessions being made and accommodations reached, and I do not accept that the evidence supports the contention that Mr John now makes that he was in effect *put upon*. Moreover, Mr John's own evidence makes clear that he knew that there was a staffing shortage at Nelson which was serious and so the contention that he could, in effect, accept the transfer but not actually engage with the employer to effect it, is not made out.

Training at Nelson Tower

[33] The nature of the training regime required for air traffic controllers when posted to a new tower is in the nature of on-the-job training where the usual functions of an air traffic controller are performed by the trainee and closely monitored by a more senior air traffic controller who is rated for that airfield. At the end of the on-the-job training process, the trainee is subjected to oral and practical competency tests.

[34] Mr John, had of course, been trained before in the previous towers that he had worked at after completing basic training. Notwithstanding that earlier experience, Mr John found Nelson training more stressful. He said, for instance, in his evidence that *... there is a culture at Nelson tower that just accepts that employees should endure pressure and stress ... and later training at the Nelson tower was indeed stressful; ... and the training I was experiencing (at Nelson tower) was quite different to what I was used to.*

[35] Mr John's evidence was that he would have preferred more classroom-based learning rather than what he called experiential learning, which is what Airways calls on-the-job training. It is the position that, in larger towers, there is a measure of classroom-based learning simply because the number of staff is greater and the resources therefore greater to cope with those staff training needs. However, in small regional towers like Nelson, classroom-based learning for air traffic controllers is limited in scope and duration. The short point is that whether Mr John had a preference for classroom-based training or not, the training regime that applied at Nelson applied to all staff (not particularly Mr John) and was designed by Airways to meet the significant safety obligations that Airways had as a supplier of air traffic control services.

[36] Mr John and Airways also have a difference about the progress Mr John made through the training programme. Mr John said that his progress was essentially unsatisfactory and that that fact, of itself, ought to have contributed to Airways being aware that there were health and safety workplace issues which Airways needed to address. Airways says that Mr John's progress through the training process, while not perfect, was well within an acceptable range and that as a matter of fact he eventually successfully passed all of the tests required of him and became a fully rated controller for the Nelson Tower.

[37] It is true that there was a delay in Mr John becoming rated because he failed what is called his 100% check on 12 December 2005 and subsequently failed his final performance assessment on 23 January 2006. However, Airways says that those results are not aberrant or uncommon. In any event, Mr John subsequently re-sat his 100% check on 21 January 2006 and passed, and then passed the same 100% check again on 24 February 2006, and then passed his final performance assessment on 27 February 2006.

[38] The evidence supports Airways' contention that thereafter, for a short few months, Mr John worked successfully and happily at Nelson Tower. However, in May 2006, Mr John sought medical advice because he was *feeling mentally unwell*.

[39] What is important for the purposes of this section of the determination is a consideration of the messages that Airways received from Mr John while he was training, its responses to those messages, and the appropriateness of any action that Airways took in consequences of those messages.

[40] Because Mr John failed his first 100% check on 12 December 2005, Airways national training plan required a training review report to be prepared. The report was actually prepared while Mr John was on annual leave and presented to him when he returned, just prior to New Year at the end of 2005. The report is dated 23 December 2005 and is designed to assess progress towards the identified target of a 100% check.

[41] Mr John said in his evidence that he ... *had been unaware that this review was being conducted in [his] absence ...* and that he ... *became highly stressed about it and its contents*. Mr John says that the normal practice would have been for the trainee to be interviewed at a round table discussion arranged but that neither of those events happened. For Airways, Mr Duke conceded that ... *the training plan would typically be a consultative document but it wasn't on this occasion*. Given the particular time of year, and the fact that Mr John was at the relevant time on leave, the failure to deal with the document consultatively does not seem surprising.

[42] What is surprising is Mr John's reaction to the document. He says in his evidence that after receiving the training review plan (he was given it at work after returning from annual leave), *that evening I went home very upset*. This is a surprising response because the document itself is not negative about Mr John's abilities and indeed maintains a positive and constructive tone throughout. That Mr John should react so negatively to what amounts to a positive endorsement of his progress is, itself, of significance.

[43] Mr John underlined that significance by promptly emailing to Mr Duke and Mr Arnold-Kelly (the author of the training review report) a response dated 30 December 2005.

[44] In that response to the training review report, Mr John referred, amongst other things, to fatigue being an issue for him and contended that that was part of the explanation for his failure to complete training. Far from being blasé about the receipt of Mr John's 30 December document, Mr Duke, who was on annual leave, accessed his emails during his leave, found the electronic copy of Mr John's 30 December document, and attended the office on 1 and 2 January in the New Year to enable him to respond appropriately to Mr John's 30 December communication.

[45] In his evidence before the Authority, Mr Duke specifically referred to the flavour of the 30 December document as including *matters of an administrative*

nature. I agree with Mr Duke's characterisation of Mr John's memorandum. It is clear from Mr John's writing that he has a strong, philosophical interest in the process of air traffic control and much of the material before the Authority from him emphasises his enthusiasm for improving the way that Airways performs its core business.

[46] Mr Duke's point was that he was concerned that Mr John was concentrating on these administrative issues (and what might be done to improve training in an abstract sense), rather than concentrating on his own progress as a trainee. Mr Duke also quite properly referred to the reference to fatigue as another marker which encouraged him to return to work while on leave to address those issues with Mr John.

[47] Mr John wanted me to accept that the email of 30 December 2005 flagged fatigue as an area of concern. It is true that Mr John identifies fatigue as a reason for his training performance being less impressive than perhaps he would have wished, but there is nothing in this document which identifies specific deficits of Airways. To the contrary, the flavour of the paragraphs under the heading of *Fatigue* are very much to do with his personal circumstances, in particular the arrival of the new baby and the shift to Nelson. As Mr Duke correctly remarks in his annotation of the document, those were matters of choice for Mr John and certainly not matters about which he could legitimately complain to Airways.

[48] In any event, Mr Duke's evidence proceeds on the footing that he thought he had dealt with Mr John's 30 December complaints when he (Mr Duke) returned to the office on 1 and 2 January in response to Mr John's email. However, that was not the position because there was a further email from Mr John to Mr Duke dated 4 January 2006, sent the following day, in which Mr John objects to his perception that Mr Duke had required him to *re-sit* [his] *oral board*. Accompanying this document is an email dated 5 January 2006 in which Mr John makes the following observation:

Again I would like to make the point that I am feeling pretty stressed about this process, and that this is having both an impact at home and to my training. Fatigue has been identified as being an issue in my training but I don't feel a lot has been done to address this problem.

...

[49] Mr Duke responded by email dated 9 January 2006 in which he again tried to clarify a point which he says he had already made clear in earlier exchanges with

Mr John that a full oral board was not required in Mr John's case but that the organisation's training imperatives were to ensure that the exacting standards of a safe air traffic control system were met by staff and if there was a requirement of this sort, then it had to be met.

[50] Mr John then passed his 100% check again on 21 January 2006 but failed his subsequent final performance assessment on 23 January. As a consequence of that failure, Mr Duke called for an external review of Mr John's training and that document dated 25 January 2006 was prepared. Mr John's evidence is that he took the opportunity of discussing with the external reviewers *the problems I was having with Mr Arnold-Kelly and Mr Duke*. He says that the reviewers were disinclined to include that material in their report, but told him to deal with the matter at a local level. Mr John says that they included some relevant observations in the report itself, but I do not agree. In my opinion, the report does not in any way highlight the difficulties which Mr John says he was having. The most that can be extracted from the report is the following quotation:

Generally Nic [Mr John] feels he has a good working relationship with most on the unit ...

[51] There is no specific reference to either Mr Duke or Mr Arnold-Kelly, no reference to any interpersonal difficulties at all, and only a number of references to particular training problems which Mr John and the external reviewers had identified. Furthermore, the report refers specifically to fatigue, but in these terms:

He [Mr John] also felt rather fatigued as a result of the activities of the year, however he feels that fatigue is not currently a problem, and that since his Christmas break he is able to think more clearly.

[52] Mr Duke's evidence is that he sat down with Mr John and another senior trainer to discuss the external review report and went through each of the recommendations in detail. He made a specific point in his evidence of stating that Mr John did not raise fatigue as an issue during that meeting and so he (Mr Duke) thought that it had been addressed by his previous intervention. By the end of that month, Mr John had successfully completed his rating for Nelson Tower.

Mr John's health problems

[53] After 2½ months of active duty at Nelson Tower, having completed the training regime, Mr John reported to his doctor that he was feeling *mentally unwell*.

This was in May of 2006. On 16 May 2006, Mr John commenced a period of special leave to care for his father who had been diagnosed with a terminal illness. Following on the death of his father shortly thereafter, Mr John took the appropriate bereavement leave and then a period of leave without pay.

[54] On 22 June, Mr John informed Mr Duke that the Civil Aviation Authority had suspended his medical from 19 June, initially for a period of 10 days. In accordance with Airways' usual protocol, Airways' medical adviser, Dr Griffiths, was advised in order that he could act to facilitate Mr John's return to work by liaising between Mr John's doctor, Airways itself and the Civil Aviation Authority.

[55] There is dispute between the parties as to the precipitating cause of Mr John effectively declaring himself unwell in May 2006. Mr John told me in oral evidence *my father's death was not a contributing factor in my going to see my doctor and tell him I was feeling unwell*. Conversely, Mr Duke told me in his oral evidence:

My view is that the precipitating event for his [Mr John's] reporting to the doctor was his father's ill health.

[56] That dispute about whether Mr John's illness was activated by personal or work issues continues to be seen in the diagnosis and treatment phase. Mr John was diagnosed as having an Anxiety Stress Disorder. Airways continued to believe that the reason for that illness was primarily not work-related whereas Mr John equally strongly believed that the illness was work-related and was primarily a function of his unsatisfactory relationships, particularly with Mr Duke and Mr Arnold-Kelly.

[57] By email dated 27 June 2006, Dr Griffiths, the Airways' medical adviser, reported to Mr Duke that, after discussing matters with Mr John, Mr John had told Dr Griffiths ... *that he had some situational stress related to non work factors* That email was copied to Mr John and the evidence is quite clear that Mr John took no issue with it at the time. Mr John did tell me in his oral evidence that he could not remember the conversation with Dr Griffiths but he did not ... *believe that I had significant personal issues that would have led him [Dr Griffiths] to conclude that non work issues were important*. Whatever Mr John may have thought, Airways' first hard piece of evidence about the cause of Mr John's illness makes clear that Airways is not responsible. Furthermore, that view of matters was reinforced some months later when Dr Griffiths again reported by email to Mr Duke on 6 October 2006, this time after receiving a report from a psychiatrist, Dr Doris. Dr Griffiths states

unequivocally “....his work is not the cause of his ill health”. Again, this email was provided to Mr John

[58] Mr John was encouraged to consult the psychiatrist, Dr Doris, and although those psychiatric consultations were funded by Airways, Dr Doris’ reports on Mr John were not promptly provided to Airways, although as the preceding paragraph makes clear, some of Dr Doris’ conclusions eventually found their way to Airways.

[59] Even if they had been, it is doubtful that Airways would have derived meaningful information from them. When the second report from Dr Doris was eventually made available to Airways, Mr Coumbe, a human resources manager with Airways, told me that he considered the Doris report *unhelpful* in assisting the company in the management of Mr John’s health.

[60] In essence, Dr Doris’ conclusions were that Mr John was suffering from a generalised anxiety state, that there were a number of causes of that but that those causes were not primarily work-related and that Mr John was working his way through a self-assessment process, the effect of which seemed to be a gathering conviction of his wish to disengage from air traffic control as a career.

[61] Mr Coumbe considered the position after reading the second Doris report:

Our [Airways] obligation is to give time and to support a return to work programme for Mr John in a structured way. I cannot see anything in the Doris report that would help us in that regard.

[62] It is clear from the evidence that Airways was frustrated by the lack of information being provided to it about Mr John’s medical condition and the lack of progress that seemed to be made in addressing a return to work programme. Medical information was not provided to Airways in a timely fashion, but even if it had been, for reasons I enunciated above, it is doubtful it would have assisted Airways greatly in its attempt to manage Mr John’s ill health.

[63] What is clear though is that from June 2006 onwards, Airways was aware that Mr John was not well although the cause of that unwellness was in dispute. In the next section of the determination, I consider Airways’ non-medical responses to Mr John’s continuing ill health.

Airways' responses

[64] On 19 July 2006, Mr John responded to a general staff survey circulated by an Airways senior manager, Mr Rob Irwin. Mr John's response to the staff survey is a reasonably lengthy document of a little over four A4 pages typed, which could best be described as philosophical in tone. The only reference to Mr John's personal circumstances is a single statement in the second paragraph where he says: *I currently find myself in the unfortunate position of not being medically fit to perform my duties as an air traffic control [sic] due to stress* and a paragraph in which he draws a distinction between the work culture in regional towers like Nelson and the work culture in other parts of the organisation.

[65] Contemporaneously with that response, and on 14 July 2006, Mr Stephen Gray, then an air traffic controller at Nelson Tower, also responded to Mr Irwin's staff survey and made similar but much more focused observations about his perception of the inadequacy of the Nelson Tower environment. Mr Gray's language is direct and to the point. For example, he says at one point: *... now because my manager refuses to deal with the abuse his senior controller dishes out I hate coming to work.*

[66] As a consequence of those two items of feedback, Airways conducted interviews with staff at Nelson Tower. Ms Tara Longley, an Airways Human Resources Adviser, gave evidence at the investigation meeting about those interviews. The essence of Ms Longley's evidence was that while Airways was concerned about Mr Gray's *working relationship with Adam Arnold-Kelly*, there was nothing that gave Airways any cause for concern in relation to Mr John's situation. With respect to Mr John, Ms Longley opined that Airways' focus was on developing a return to work plan for Mr John. Ms Longley did not consider that the material that she gathered from the interviews with other staff at Nelson Tower were in any way relevant to Mr John's situation.

[67] Ms Longley saw Mr John twice in two separate interviews on 9 October 2006. The notes of those two interviews have been provided to the Authority. The first of those meetings involved Mr John, Ms Longley and Mr Duke and really focused on the prospect of a return to work plan based on the intelligence gathered from Dr Doris' conclusions.

[68] Ms Longley quotes Mr John as saying that Dr Doris *has done a fair assessment of where he is currently at. He agreed with Alan's [Dr Doris'] recommendation that developing a back to work plan is not an option at this point in time.*

[69] At the second meeting, which involved the same participants with the exception that Mr Duke was replaced by Mr Irwin, Ms Longley records Mr John's comments under a series of bullet points. In her oral evidence at the investigation meeting, she described Mr John's comments as *quite vague and generic*. Certainly, reading Ms Longley's notes, it is difficult to derive from them any nexus of complaint from Mr John that Airways could reasonably address.

[70] Mr John describes in his evidence how *nothing came of these meetings or of my email to Mr Irwin*. There was a further meeting between Mr John and Airways at which Airways' medical adviser, Dr Griffiths, and Mr Wayne Coumbe, a human resources manager, were present. Mr Coumbe had taken over from Ms Longley who had an extended period of leave.

[71] Mr Coumbe's evidence is that the meeting did not go well, at least in the sense of any development of Mr John's return to work plan. It was clear to Mr Coumbe from the meeting that Mr John was no nearer a return to work and was in fact still seriously unwell. It was, however, agreed that there would be a further meeting in the New Year and that meeting took place on 26 February 2007.

[72] At the February meeting, Mr John was present with his support person and Mr Coumbe represented Airways by himself. The meeting was held at a Nelson café to try to keep the atmosphere relaxed and informal. Again, although Mr Coumbe's evidence was clear that Mr John was better in himself, Mr John still said he was not yet ready for a return to work programme.

[73] Mr John's evidence was that he expected more from Mr Coumbe. He anticipated that Mr Coumbe would want to address the causes of Mr John's unwellness rather than simply give Mr John time to recover his health so that a return to work programme could be contemplated. In effect, Mr John was saying that he could not contemplate a return to work until the environment which he saw as contributing to his ill health was fixed; conversely, Mr Coumbe for Airways was

oblivious of anything particularly that Airways could fix, because nothing has been explicitly identified by Mr John that needed fixing

The Department of Labour report

[74] Concerned at what he saw as the lack of progress in addressing his issues, Mr John contacted the Department of Labour (Labour) on 27 April 2007, briefed it on what had happened and Labour, through its occupational safety and health unit, decided to conduct an investigation.

[75] A report issued dated 26 September 2007 signed by Sharon McDonald, a health and safety inspector at the Nelson office of Labour.

[76] The key findings of that investigation was that Mr John had suffered work-related stress because of psychological bullying from a senior trainer, Adam Arnold-Kelly, and that Mr Duke, the manager, had condoned this behaviour. As a consequence, Airways had, in Labour's view, failed to comply with ss.6 and 7 of the Health and Safety in Employment Act 1992 by failing to take all practicable steps to provide Mr John with a safe workplace.

[77] Mr Coumbe told me at my investigation meeting that he *nearly fell off his chair* when he learned that Mr John had complained to Labour about his allegations. Certainly the report is an important watershed in the employment relationship problem between these two parties. First, it represents Mr John's frustration at a feeling of not being heard by Airways and secondly, and equally importantly, it represents the first use of the actual language that Mr John relies upon in his statement of problem, namely an allegation of being bullied by Mr Arnold-Kelly and having that bullying, in effect, condoned by the regional manager, Mr Duke. Both of those claims were found to be made out by Labour's report, as I noted above. Furthermore, the very first date on which it appears that Airways was aware that bullying of Mr John by Mr Arnold-Kelly was alleged, appears to have been 29 August 2007 which was the date that Mr Coumbe was told by Ms McDonald that that was what Mr John had alleged to her.

[78] Airways was troubled by Labour's report and effectively took two different forms of action. First, it took issue with the report itself through its lawyers and, second, to inquire into the bullying allegation, it commissioned its own independent report. That independent report is the subject of the next section of this

determination, but it is appropriate to deal here with the engagement of Airways' lawyers with Labour.

[79] That engagement resulted in a formal response from Labour dated 13 February 2008 in which Labour conceded there was a ... *lack of material evidence to support the finding of workplace bullying* The letter goes on, however, to opine: *We do believe that work may be a contributing factor in the stress experienced by Nic John*

[80] It follows then that the central recommendation, for our purposes, from the original report of 26 September 2007, has been withdrawn by the effect of this letter.

[81] Despite that conclusion, Airways determined to continue with its own inquiry. Naturally, this response upset Mr John who had found it *very heartening to see* [his] *issues finally recognised*, and he was hopeful that the conclusion reached by Labour's original report *would serve as a catalyst for remedying the situation to enable me to return to work*.

The Scrimshaw report

[82] On 28 November 2007 (that is before the retraction of Labour's conclusion which did not come to hand until 13 February 2008), Mr Duke sent a memorandum to staff at Nelson Tower in which he indicated his view that the findings of the Labour investigation were *unsubstantiated* and the investigation *seriously flawed*. Of course, at the point at which Mr Duke wrote his memorandum, the concerns Airways had about the quality of Labour's report were still being addressed. Mr Duke made it clear that Airways had commissioned its own independent report from Mr John Scrimshaw. Mr Scrimshaw was a former senior manager at Airways and was also a member of the former Employment Tribunal. The evidence before the Authority discloses that Mr Scrimshaw's name had been discussed with NZALPA, Mr John's union, and was supported by NZALPA.

[83] Mr John declined to participate in Mr Scrimshaw's investigation, believing that the Labour investigation had already dealt with the matter. Mr John also cast doubt on Mr Scrimshaw's ability to be impartial given his previous history with Airways.

[84] Mr Scrimshaw's conclusion was unequivocal. Mr Scrimshaw found Mr John to be *overly sensitive* and he concluded that: *the work related stresses were not abnormal for the work environment he [Mr John] was in*. Further, Mr Scrimshaw concluded that Mr John was not bullied by either Mr Duke or Mr Arnold-Kelly and in reaching that conclusion he relied, amongst other things, on the fact that at no stage had Mr John ever claimed directly to Airways that either of those men had bullied him, a conclusion which, on the facts before the Authority, I must say I absolutely agree with.

The dismissal

[85] On 10 January 2008, Mr John, through his union, NZALPA, had raised an employment relationship problem based on the Department of Labour finding that Airways had failed to provide Mr John with a safe workplace and thereby caused him serious harm. Mediation on that matter was attempted on 22 February 2008.

[86] The previous month, on 21 January 2008, Mr Scrimshaw's report had issued and on 13 February 2008 Labour had retracted the central conclusion of its earlier 26 September 2007 report. The mediation having not successfully resolved the employment relationship property and the parties seemingly no closer to a return to work plan, Mr Grant Rawstorn, the acting regional services manager for Airways, became involved. Mr Rawstorn wrote to Dr Doris and sought a report from him on Mr John's prognosis, specifically addressed at whether Mr John was fit to commence a return to work programme and if so how that might occur.

[87] Dr Doris' report dated 16 May 2008 concluded that Mr John was not fit to return to work as an air traffic controller in the foreseeable future. That information was shared with Mr John with an intimation that Airways proposed to dismiss Mr John on notice pursuant to clause 8.4 of the applicable collective employment agreement. Airways sought input from Mr John before any substantive deliberation on that provisional view was progressed by Airways.

[88] Clause 8.4 on which Airways relies provides that, where an employee's medical certificate has been cancelled or suspended (as was the case with Mr John), Airways may give notice of termination of employment when sick leave has been extinguished or two years have elapsed, whichever happens first. Furthermore, clause

8.6 of the applicable collective employment agreement gives Mr John the right to return to the employment if he regains his medical certificate within five years.

[89] Mr Rawstorn's evidence (which I accept) is that he considered the response he got from Mr John (which expressed disappointment at the provisional decision and sought access to Airways loss of competence policy which pays benefits in certain circumstances). Mr Rawstorn advised Mr John that, having considered his request for access to the benefits under that policy, he had reached the conclusion that the provisions of the policy were not applicable to *medical fitness situations*.

Determination

[90] I have given this matter serious and earnest consideration and have reached the conclusion that Mr John's application must be dismissed. Mr John claims that he was disadvantaged by a series of unjustifiable actions of his employer in that he suffered workplace stress and/or bullying which was causative of a generalised anxiety disorder which robbed him of the ability to practice his calling. However, the evidence does not disclose that Mr John ever adequately communicated to Airways that such was the position. Airways knew (eventually) that Mr John was unwell but the evidence simply does not establish that Airways ever knew that that unwellness was because of Airways alleged failures. There were, I find, a series of diffuse and generalised complaints made, first in respect of the transfer to Nelson Tower then, in respect of the training problems, all of which, on the evidence before the Authority, were adequately and appropriately dealt with by Airways at the relevant time.

[91] In relation to the transfer to Nelson Tower, there was an agreement, and as the analysis in the first substantive section of this determination makes clear, that agreement was reached after a proper exchange between the parties wherein both Airways and Mr John appeared concerned about the other's needs and the meeting of them.

[92] In relation to the training issue, I am not satisfied that Mr John had adequately demonstrated that his alleged training failures were somehow predictors of the stress that he claims they were. I prefer the evidence of Mr Duke who I hold gave straightforward and matter-of-fact evidence dealing with each and every one of Mr John's identified concerns. Of particular note was the evidence which disclosed that, immediately after receipt of Mr John's memorandum of 30 December 2005,

Mr Duke deliberately and consciously returned to the workplace on 1 and 2 January 2006 to address the concerns that Mr John raised, not just in respect of the suggestion that he was fatigued or stressed, but also to remedy misunderstandings which Mr John had about the nature of the process. Indeed, I am satisfied that in the period from 1 January 2006 down to about 10 January 2006, Mr Duke worked assiduously to remove the impediments which Mr John himself had placed in his way of getting rated for Nelson Tower.

[93] Furthermore, I am drawn to the conclusion that those efforts by Mr Duke were not ill-founded by the self-evident fact that Mr John got his rating for Nelson Tower at the end of February 2006 and then proceeded to work in that capacity, apparently happily and successfully, for some 2½ months. That behaviour set is, in my opinion, inconsistent with the stress and fatigue which Mr John seeks to rely upon and which he claims the employer not only caused but knew about.

[94] Then, when Mr John seeks his doctor's advice about feeling *mentally unwell*, there is a long period of months where Airways is frankly not told anything useful about Mr John's medical condition. Airways meets with Mr John from time to time during this period and those meetings prove to Airways' satisfaction that Mr John was quite unwell, but there is no real basis on which Airways is given a proper suite of tools to assist Mr John in the management of his ill health and a return to the workplace.

[95] Indeed, when Airways finally starts to get the information from both its own medical adviser (Dr Griffiths) and subsequently the opinions from Dr Doris (only one of which was ever seen in full by Airways), the cause of Mr John's ill health is plainly identified as not Airways' responsibility. Dr Griffiths tells Airways that in June 2006, and he copies that to Mr John (who does not protest), and then subsequently, some months later, when the second of Dr Doris' substantive reports becomes available, there is clear evidence that far from Airways being responsible for Mr John's ill health, the reality is that Mr John is re-evaluating his engagement with his work and perhaps contemplating a future which does not include his continuing his calling as an air traffic controller.

[96] Then, when Mr John clearly becomes frustrated at the apparent inability of Airways to address his concerns (an inability which I find is based on it being unclear about what those concerns are and what part it (Airways) have to be responsible for),

Mr John then takes his complaint to Labour and Labour's report which issues in September 2007 is perhaps the high point of Mr John's claim against his employer. This is because the Labour report concludes that Mr John has been bullied by Mr Arnold-Kelly and that that bullying has been condoned by Mr Duke, the regional manager. But of course the Labour report does not stand and not only is it roundly criticised by Mr Scrimshaw's subsequent report, but even Labour itself agrees that the report is flawed and it withdraws the report and in particular removes the central finding that Mr John was bullied. A conclusion that Mr John may have suffered some workplace stress which contributes to his condition, remains however.

[97] When Mr Scrimshaw produces his report, he finds no evidence to support Mr John's conviction that he has been bullied and Mr Scrimshaw also finds that there is no evidence that Mr John ever complained directly to Airways that he was being bullied. I have already made clear that, on the evidence I heard, I agree with Mr Scrimshaw's conclusion.

[98] There is no doubt that as a general principle, the law imposes on employers a duty to keep their employees safe. That duty is informed by the qualification that the employer's obligation requires only *reasonable* steps be taken or, to use the language of the Health and Safety in Employment Act 1992 *practicable* steps. Indeed s.2A of the statute marries together the two terms by using the expression "reasonably practicable"

[99] Both the statute and the case law are clear that an employer's obligation is to take protective steps in respect of circumstances that the employer ...*knows or ought reasonably to know about* : s.2A (2) Health and Safety in Employment Act 1992.

[100] In *Attorney General v Gilbert* [2002] IERNZ 31, the Court of Appeal observed: *An employer does not guarantee to cocoon employees from stress and upset, nor is the employer guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgement on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer's obligations will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.*

[101] The law then imposes a broad duty on Airways to keep its staff, including Mr John, safe but the steps that Airways must take to achieve that goal are only those which are reasonably practicable and will depend on the particular circumstances of the role and the industry in which it is performed. Furthermore, and critically for our purposes, Airways are only required to take steps in respect to matters they know about or ought reasonably to know about.

[102] Airways has to balance its obligations to the travelling public to provide safe air space with its obligation to provide a safe system of work for its staff. Nothing I heard suggested to me that Mr John was being subjected to treatment different from that which applied to any other air traffic controller. The system of work is designed to adequately manage New Zealand's airspace to maintain the safety of aeroplanes and people who fly in them. That Mr John may have reacted badly to elements of that system of work is regrettable but not, in my view, actionable.

[103] Nothing before the Authority suggests the system of work adopted by Airways is flawed when balancing the safety conscious environment Airways strives for, against the needs of staff. Further, I found as a fact that Airways were simply not made aware of the particular hazards which Mr John claims to have been affected by.

[104] It follows that I am not satisfied that Mr John has made out his claim that he has suffered disadvantage as a consequence of unjustifiable actions of his employer, even setting aside Airways' pleading that that claim was not brought within 90 days of the events or actions complained of.

[105] That leaves us with the allegation of unjustified dismissal which I deal with now. Airways dismissed Mr John in reliance on clause 8.4 of the applicable collective employment agreement. That clause, in my considered view, gives Airways the right to do precisely what it did, that is, to dismiss Mr John from its service for having been medically incapacitated for a period of two years and thus unable to fulfil his professional obligations over that period. The clause presumably was negotiated by the parties for precisely this purpose and I accept the submission of Airways that it dealt with the matter as sensitively and as carefully as it could. Airways concluded that the only course of action available to it was to dismiss with the proviso that if Mr John recovers his health in the ensuing five years, then he has the option of returning to his calling should he wish to.

[106] Precisely because I am not persuaded that Mr John suffered unjustifiable actions of his employer that caused him disadvantage, it follows that the employer may properly rely on clause 8.4 of the applicable collective agreement. Were the position otherwise, Mr John could reasonably argue (as he sought to) that because he was damaged by Airways' neglect, their decision to dismiss in reliance on that clause, was unfair.

[107] It follows then that Mr John's claim fails in its entirety.

Costs

[108] Costs are reserved.

James Crichton
Member of the Employment Relations Authority