

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 42/10
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: 2 & 3 July 2009 at Queenstown
Determination: 1 March 2010

DETERMINATION OF THE AUTHORITY

[1] Pamela Adams worked for Airways Corporation of New Zealand (Airways) 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 when Airways decided that she had seriously misconducted herself.

[2] Mrs Adams says that she has a personal grievance of unjustified dismissal but Airways says that it justifiably dismissed Mrs Adams for serious misconduct. There are some disputes about what happened which must be resolved but the main task for the Authority is to assess justification for the dismissal in accordance with s.103A of the Employment Relations Act 2000.

[3] Mrs Adams sought interim reinstatement which was declined for the reasons given earlier. During the substantive investigation meeting Mrs Adams confirmed that permanent reinstatement was no longer sought. Unfortunately my commitment to other cases has meant that it has taken longer than I would have hoped to provide this determination and I apologise for any inconvenience.

The dismissal

[4] 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. Mr Bishop rated as an ATC in December 2008 so was relatively inexperienced at the time of the following incident.

[5] On 2 March 2009 Mrs Adams and Mr Bishop were working together in the Queenstown control tower. They had separate responsibilities but it is accepted that an operator should be alert to the work of another operator to help guard against unsafe flight operations. Mrs Adams was also the senior controller. She thought Mr Bishop had lost separation between two aircraft so she raised that with him. Mr Bishop considered that Mrs Adams was very aggressive and challenging him to justify his flight control instructions. He checked his actions and satisfied himself that he had given appropriate instructions. Mr Bishop became angry and upset as a result of Mrs Adams’ intervention. Once he had finished dealing with the immediate traffic requirements he arranged for another controller (Ben McMillan) to take over the rest of his shift.

[6] After handing over his shift, Mr Bishop verbally complained to his manager Mr Rosie and then put the complaint in writing. The complaint was about Mrs Adams’ *interaction and communication style*, specifically that she had an *angry and demanding demeanour that appeared to be challenging [Mr Bishop] to justify [his] actions*. He described the incident and listed his concerns. He also complained that Mrs Adams’ demeanour towards him over the course of his training was *at best passive-aggressive and at worst confrontational and bullying*. The complaint indicated that other employees shared these views. He asked for the matter to be investigated and for some form of corrective action to be taken *to ensure that this latent risk to safety and degradation of a positive working environment is removed*.

[7] After the incident Ms Adams attempted to talk to Mr Rosie about Mr Bishop leaving the tower but Mr Rosie was not prepared to engaged in a discussion with her in the control tower. Mrs Adams also sent an email to Airways’ HR advisor (Megan Campbell) with her own account of the incident and completed an Air Safety Incident report form to similar effect. Eventually an investigation established that Mr Bishop

had met all his control obligations. Mrs Adams disagrees with the conclusion and aspects of the process of that investigation but none of that is relevant for present purposes.

The investigation

[8] 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.

[9] 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 continued by agreement during Airways' investigation. Mrs Adams also sought EAP assistance. 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.*

[10] Mr Rawstorn met with Mrs Adams on 10 March. Mrs Adams gave her account of the incident which differed somewhat from Mr Bishop's. On Mrs Adams' account she asked Mr Bishop in a normal speaking voice what separation he had, she having become concerned about a loss of separation arising from his instructions to aircraft under his control. Mr Bishop responded by accusing Mrs Adams of bullying him, abusing her power and winding him up. It was Mr Bishop who raised his voice and became aggressive towards Mrs Adams. Mr Bishop phoned another controller and *ran out of the tower* once that person had assumed control. Mrs Adams further justified her conduct by reference to Mr Bishop's performance generally as well as on 2 March. Mrs Adams was critical of Mr Rosie for not engaging with her about Mr Bishop on 2 March and not checking on her well-being. There was some mention by Mrs Adams about an exchange between her and Mr Rosie about Airways' values on

25 February following an unidentified complaint, and some mention also about discussions about values during appraisals. I shall return to those matters later.

[11] Mr Rawstorn also interviewed Mr Bishop and a number of other staff including the one other person who was present in the tower during the incident (Lynda Millar) whose account I should mention. On Ms Millar's account Mrs Adams spoke in a *nasty, sharp, aggressive tone* telling Mr Bishop that he had lost separation. Ms Millar said that Mr Bishop remained *very controlled and assertive, altogether professional*. She said that she had witnessed Mrs Adams verbally attack Mr Bishop on two earlier occasions.

[12] Mr Rawstorn compiled a comprehensive report of his interviews. It summarised the investigation as follows:

Pam Adams' communication manner with, and treatment of, Mike and other employees appears to potentially be inappropriate and may be outside the Airways Values and Code of Conduct. As such Grant will initiate a Performance Management process as per the Code of Conduct with Pam. In the interim Pam will not complete any operational shifts in Queentstown Tower (as per her request).

[13] Mr Rawstorn sent the preliminary report to Mrs Adams on 16 March. Mrs Adams was invited to a further meeting to discuss the indication in the report that her conduct may be a breach of Airways' Values and Code of Conduct. The letter included the caution that any breach could be classified as misconduct or serious misconduct which could result in disciplinary action such as a formal warning or even dismissal. This further meeting was held on 24 March and Mrs Adams attended with her solicitor.

[14] Mrs Adams continued to dispute parts of Mr Bishop's account of the 2 March incident. She acknowledged that he may have felt affronted by her direct challenge that reflected her view of the urgency of the situation. Mrs Adams accepted that her communication style was blunt but she denied harassing or bullying Mr Bishop or anyone else. Mrs Adams also said that Mr Bishop did not like her not being a member of the union and questioned whether he was not responsive to her because of her gender. There was also some discussion about Mrs Adams' 2007 and 2008 performance reviews. The meeting ended with Mr Rawstorn to investigate further Mrs Adams' allegations about Mr Bishop.

[15] There was a further disciplinary meeting on 26 March which Mrs Adams attended with her solicitor. Mr Rawstorn reported on having spoken to Mr Bishop who had denied Mrs Adams' allegations. Mrs Adams told Mr Rawstorn that her health professional considered she had been suffering from workplace stress and possibly burnout. There was some discussion about Airways' Values and Code of Conduct. After a brief adjournment Mr Rawstorn indicated that he was leaning towards dismissing Mrs Adams for serious misconduct. Agreement was reached that Mrs Adams through her solicitor could make further submissions in writing before a final decision was made.

[16] In a letter dated 30 March Mrs Adams' solicitor accepted that Mrs Adams can be *blunt, direct confrontational and at time brutally honest* but denied that she bullied or harassed her colleagues. Mrs Adams' conduct was attributed to her own stress. The solicitor proposed that Mrs Adams receive a written warning, take a period of sick leave, return to work as a controller rather than a senior controller and undertake any courses or counselling as directed by Airways.

[17] Mr Rawstorn wrote to Mrs Adams through her solicitor on 1 April. He advised of his decision to dismiss Mrs Adams for serious misconduct based on his conclusion that Mrs Adams did behave as alleged and that her behaviour comprised harassment as defined by the Airways' Code of Conduct and Harassment policy in breach of Airways' Values. Mr Rawstorn rejected the 30 March proposal because he was not satisfied that controllers could have trust and confidence in and open communication with Mrs Adams. Mr Rawstorn did not accept that burn out excused Mrs Adams' behaviour nor did he accept that her conduct was only misconduct or a performance issue. The letter advised Mrs Adams about her final pay and arrangements for return of Airways' property and the collection of any personal possessions.

Justification for dismissal

[18] Whether Airways' decision to dismiss Mrs Adams Airways was justifiable must be determined objectively by considering whether Airways' actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time. As noted at the outset the challenge here is to Airways' actions rather than how it acted.

[19] Airways rejected Mrs Adams' account of the exchange between herself and Mr Bishop. I have already noted that Mr Rawstorn did not accept Mrs Adams' allegation that Mr Bishop did not like her because she did not belong to the union and because of her gender. The allegations might have called into question Mr Bishop's motive for making the complaint and its veracity. However, for good reason, Mr Rawstorn accepted the complaint's veracity so it was a short step to reject any improper motive on Mr Bishop's part especially since there was nothing else to support Mrs Adams' allegations. Mr Rawstorn preferred Mr Bishop's account of the incident, supported as to its tone by Ms Millar. Ms Millar was regarded as a disinterested witness to the incident. Her account was that Mrs Adams said to Mr Bishop in an angry and aggressive tone *You've lost separation*. However, both Mr Bishop and Mrs Adams say that their exchange started with her asking *What separation do you have?* Mr Bishop says that Mrs Adams continued with *Don't tell me geographic – you've got none!* This was done with an angry and demanding demeanour challenging Mr Bishop to justify his actions. It raised his stress levels and added confusion to a busy situation. I accept that Mr Rawstorn's decision to prefer Mr Bishop's account was what a fair and reasonable employer would have done in these circumstances.

[20] Airways' decided that Mrs Adams' conduct amounted to serious misconduct as defined by its Code of Conduct. I should set out more of those details before assessing that action against the standard of a fair and reasonable employer.

[21] Mrs Adams was employed under an individual employment agreement that reflected the terms of the current Airways/ALPA collective agreement. I have been given a copy of Airways' Code of Conduct dated 28 June 2006 that was forwarded to Mrs Adams as part of the disciplinary process. It includes examples of *misconduct* which may, after a warning, result in dismissal; and examples of *serious misconduct* which may lead to instant dismissal without prior warning. An example of *misconduct* is: *The use of abusive, obscene or threatening language to another person whilst in the workplace, or any other behaviour which is likely to cause distress or offence;* and an example of *serious misconduct* is *Sexual, racial or other harassment of, or unwelcome behaviour towards, customers or Airways employees*. There is also Airways' *Harassment* policy. It says that Airways will not tolerate harassment and that *Harassment in any form is deemed to be misconduct or serious misconduct*. Under the policy *Harassment is behaviour that is unwelcome,...directed at or is*

offensive to someone and consists of objectionable conduct ...that demeans, belittles, intimidates, or humiliates another person. It may include the misuse of authority, intimidation, threats, coercion and blackmail. It can be intentional or unintentional. Examples of personal harassment (as opposed to sexual or racial harassment) include *constant unfounded criticism, constant threats and intimidation or humiliating a person.* The *Harassment* policy supports Airways' values which include *We Are Safe* and *We Value Each Other*. Mrs Adams has not disputed that she was aware of these policies, or that they applied to her.

[22] I need to say more about the work environment. Mrs Adams' evidence is that a control tower is an urgent, compelling and at times stressful work environment where decisions have to be made at a moment's notice and where others' lives could be placed at risk. Controllers have to be competent and self assured in their ability in order to discharge their duty and gain their colleagues' confidence. It is imperative that controllers have trust and confidence in one another. None of that is disputed by Airways and Mr Rawstron says that it is imperative that employees work effectively and supportively with one another. It is normal for one person to become extremely busy and for that person to rely on others present in the tower to watch their back in terms of not missing anything or making an error. Accordingly, staff have to trust one another implicitly. One thing not in doubt is that Mrs Adams enjoyed everyone's trust and confidence as to her technical judgement and focus on safety.

[23] Apart from the conclusions mentioned above concerning the 2 March incident, Airways also relied on information about Mrs Adams' conduct towards Mr Bishop on earlier occasions and in general towards staff. Other staff reported that Mrs Adams sniped at, badgered, belittled and seemed *out to get* Mr Bishop. From one employee's comment it seemed that Mrs Adams was aware of the effect she had on Mr Bishop. Several other employees were critical of the manner in which Mrs Adams communicated to them or others with one person describing it as *confrontational* and *bullying*. Several noted that Mrs Adams seemed to be that way with trainees in particular. The circumstance relevant to Airways' decision to dismiss Mrs Adams was that the 2 March incident with not just a one-off incident.

[24] It had been known to Mrs Adams for some while that her manner of communication could fall short of Airways' expectations. Mr Rosie prepared a performance review form in December 2007 which said that Mrs Adams'

communication style was perceived at times to be *implacable and uncompromising*. There is an evidential dispute about the 2007 review process but it is not necessary to resolve that – the present relevance of the form is the message just mentioned. There is a less trenchant message on the same theme in the 2008 performance review form. On 25 February 2009 Mr Rosie spoke to Mrs Adams about a non-staff complaint about Mrs Adams being sarcastic on the phone. He declined to name the complainant. Mrs Adams challenged Mr Rosie and Airways' HR advisor about her being *personally cautioned* without knowing who had complained or all the details. Ms Campbell replied *It was certainly not a formal warning or anything of the kind*. From this, the circumstance relevant to Airways' decision to dismiss Mrs Adams was that managers had known from various sources for some time that Mrs Adams did not always communicate in a manner consistent with Airways' expectations. This had several times been the topic of some exchanges between Mrs Adams and Airways' managers but Airways had never escalated it to a disciplinary matter prior to the 2 March incident.

[25] The main thrusts of Mrs Adams' challenge to her dismissal is that her conduct was not sufficiently serious to warrant dismissal without her first being warned and given an opportunity to remedy the complaints about her communication style; and that Airways knew of the communication style issue but elected not to take any disciplinary action. I am referred to the Airways' Code of Conduct which spells out the formal procedures *that provide the means to correct a problem that exists and inform the employee what is expected of them for their continued employment with Airways*.

[26] There is evidence from Mr Rosie that is relevant. He told the Authority that the incident on 2 March with Mr Bishop was *the straw that broke the camels back* and that previous concerns expressed by staff about Mrs Adams had been *noted*, that there had been a dozen or more incidents raised with him but no-one was prepared to make a formal statement and that Mr Bishop's complaint was *a catalyst to solve an ongoing problem*.

[27] Quite properly Airways' Code of Conduct recognises that conduct that falls within the definition of personal harassment might be regarded as either misconduct or serious misconduct depending on the circumstances. To justify dismissal for serious misconduct, the conduct must be such as would deeply impair or be

destructive of the basic confidence or trust that is essential to the employment relationship: see *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483. Considering the 2 March incident in isolation I do not accept that a fair and reasonable employer could have concluded that it constituted serious misconduct. It was a brief incident. Implicit in the words used, Mrs Adams had become genuinely concerned about a safety matter and challenged Mr Bishop on that point. Airways expects controllers to challenge one another in such circumstances. The problem was with the manner not the fact of the challenge. Even Mr Bishop did not expect that his complaint would result in Mrs Adams' dismissal. What it called for was corrective action so that Mrs Adams' style of communication in such situations would not cause further stress for or a defensive reaction from someone such Mr Bishop.

[28] To come even close to conduct amounting to serious misconduct Airways must call in aid Mrs Adams' history of communication as disclosed by its investigation. The essential unfairness in this is that the disclosures in the interviews were not new information to Airways. They were mostly the incidents Mr Rosie said had been *noted* by him. Mr Rosie's evidence was that he involved HR in addressing these matters and that he did so by way of the comments in the 2007 and 2008 performance appraisals mentioned above. Having eschewed the opportunity to treat these matters as disciplinary issues when they arose, it was not open to Airways to revisit them and include them as misconduct or serious misconduct so as to help justify its decision to dismiss Mrs Adams: see *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421.

[29] From this I conclude that a fair and reasonable employer would not have reached a conclusion that Mrs Adams had seriously misconducted herself by reason of the way in which she spoke to Mr Bishop on 2 March, nor would they have revisited the historical matters already dealt with as part of the performance appraisal process. It follows that Airways unjustifiably dismissed Mrs Adams.

Remedies

[30] Mrs Adams contributed to the circumstances giving rise to her grievance in a blameworthy manner. The manner in which she challenged Mr Bishop was contrary to Airways' values and could properly be categorised as misconduct for which she might receive a warning under Airways' disciplinary code. Relevant here also is Mrs Adams' knowledge courtesy of the performance review processes that she needed to

reflect on the effect of her manner of communication. Mrs Adams recognised these matters in effect by her solicitor's proposal that she be warned and undertake any course or counselling as directed.

[31] Mrs Adams did not contribute to Airways' decision to categorise her behaviour as serious misconduct or to, in effect, reopen the earlier matters. Balancing the respective contributions I find that Mrs Adams' contribution should be recognised by reducing remedies by a third.

[32] There is a submission for Airways that I should take account of the chance that a warning would not have corrected Mrs Adams' communication style so that she probably would have repeated the misconduct and likely been dismissed as a result. I do not accept that such a finding is available on the evidence. Indeed, Mrs Adams' position shifted significantly between the start and the end of the disciplinary process so that she acknowledged that there should be a warning. Mrs Adams also resigned from her position as the senior ATC in Queenstown. Her evidence, which I accept, is that she resigned because of stress and burnout rather than because of the disciplinary matter. The easing of the stress felt by Mrs Adams made it more rather than less likely that she would respond positively to a warning. I find that Mrs Adams probably would have responded positively to a formal warning by modifying her communication style so as to meet Airways' expectations and values.

[33] Mrs Adams is claiming lost remuneration from the date of her dismissal (1 April 2009) until the date of this determination but also compensation pursuant to s.128(3) of the Act of one year's salary. That reflects some confusion about the statutory provisions. The first task for the Authority is to determine whether there has been any loss of remuneration caused by the grievance. If there has, the Authority must order the employer to pay to the employee the lesser of the lost remuneration or 3 month's ordinary time remuneration (s.128(2)). However, the Authority may also order the employer to pay compensation for lost remuneration of a greater sum (s.128(3)). Often by the time a matter comes before the Authority a successful employee has suffered more than 3 month's lost remuneration for which they should justly be compensated. Sometimes justice also requires an award for future lost remuneration. The statutory provisions permit such awards. Overall however, the remedy of compensation for lost remuneration is also subject to proper reduction because the employee's blameworthy contribution under s.124.

[34] I accept that Mrs Adams has lost remuneration as a result of her grievance. When she was dismissed on 1 April Mrs Adams was paid 4 weeks salary in lieu of notice so her actual loss starts from the end of that period. Mrs Adams will not be able to gain further employment in this industry in New Zealand because Airways is essentially the only employer. The chances of Mrs Adams finding further employment at the same level of salary are not high so she is likely to face a continuing loss for at least some of the remainder of her working life. As a result I consider it is appropriate to make an award under s.128(3) rather than limiting the award under s.128(2). The submission for Airways is that an award of 6 months loss would be at the outer range of appropriate awards if a grievance was established. However, I find that covering Mrs Adams' lost remuneration for 9 months is appropriate. From that calculation must be deducted any other income from alternative employment during the period from May 2009 through to January 2010. Leave is reserved in case of difficulty with calculations.

[35] Mrs Adams' evidence is that she found the dismissal extremely traumatic and humiliating given her service of approximately 29 years with Airways and its predecessors. She was not able to tell family members until after the dismissal became public information as a result of the release of the earlier determination. It has been difficult for Mrs Adams to face people in the community knowing that they would be aware of the dismissal and that feeling of shame has caused her to withdraw from activities that she would otherwise participate in. An award of \$12,500.00 is sufficient to compensate Mrs Adams for these proven effects.

[36] As indicated above, both awards must be subject to reduction by a third to reflect Mrs Adams' contribution.

Orders

[37] Pursuant to s.128(3), Airways is to pay Mrs Adams compensation for lost remuneration of 9 months salary at the rate applicable immediately before the termination of her employment, less Mrs Adams' alternative income from employment during that period with the difference reduced by a third to reflect Mrs Adams' contribution.

[38] Pursuant to s.123(1)(c)(i), Airways is to pay Mrs Adams compensation of \$12,500.00 reduced by a third.

[39] Costs are reserved. Any claim for costs should be made by counsel lodging and serving a memorandum within 28 days and counsel for the other party may have a further 14 days to lodge and serve a memorandum in reply.

Philip Cheyne
Member of the Employment Relations Authority