

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 85  
5401880

BETWEEN

MICHELE DUMBLE  
Applicant

A N D

AIRWAYS CORPORATION  
OF NEW ZEALAND LIMITED  
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Warwick Reid, advocate for Applicant  
Susan Hornsby-Geluk, counsel for Respondent

Investigation Meeting: 24 and 25 January 2013

Date of Determination: 12 March 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. The dismissal of Michele Dumble by Airways Corporation was unjustified. For that reason Ms Dumble has a personal grievance.**
- B. To remedy the grievance Ms Dumble is reinstated to the position of Manager-Towers. Reinstatement is suspended for 14 days while the behaviour of Mr Ray Dumble towards another Airways employee is addressed to the satisfaction of that employee.**
- C. No award is made to reimburse remuneration lost by Ms Dumble or to compensate her for humiliation and hurt feelings.**
- D. Costs are reserved.**

**Employment relationship problem**

[1] By letter of 31 October 2012 the respondent, Airways Corporation of New Zealand Ltd, notified the applicant, Ms Michele Dumble, of her immediate dismissal from employment with the SOE.

[2] Airways employs Air Traffic Controllers and other staff to provide air navigation and associated services in New Zealand. During some 25 years of service Ms Dumble rose to become Manager–Towers, a senior position in which she had charge of some 180 staff who work in control and flight services towers around New Zealand. The dismissal letter acknowledged her long service and good work record and referred to her position as being one of responsibility for employees working in a safety sensitive environment.

[3] After termination Ms Dumble raised a personal grievance, claiming her dismissal was unjustified.

[4] Despite attempts by the parties to settle the grievance including mediation assistance, no resolution was reached and the matter proceeded to an investigation by the Authority. Ms Dumble seeks a declaration that her dismissal was unjustifiable and asks to be reinstated to her former position. She also seeks reimbursement of lost remuneration and compensation for hurt feelings, humiliation and distress suffered as a result of the dismissal. Compensation for loss of superannuation entitlements is claimed by her as well.

[5] Evidence and submissions were presented on behalf of Ms Dumble and Airways by advocate Mr Reid and counsel Ms Hornsby-Geluk on 24 and 25 January 2013, leaving the Authority in a position to give this determination.

**Grounds for dismissal**

[6] These were set out under three heads in the 31 October 2012 letter:

- (i) Breach of Airways' Travel Policy and Domestic Travel Expenditure Policy;
- (ii) Bringing Airways into disrepute;
- (iii) Breach of Airways' Drug and Alcohol Policy.

[7] In each case the behaviour of Ms Dumble, which Airways concluded amounted to serious misconduct, occurred during the evening of 26 September 2012 or in the early hours of the following morning, while she was visiting Nelson in the course of her work. She had flown there with another Airways manager and after arriving at about 6.30pm and checking into their hotel the pair met a locally based Airways manager. During the remainder of the evening the three had drinks, at the hotel to begin with then at a restaurant where they also had a meal, at another bar and finally back at the hotel again in the room of one of them.

[8] Around midnight the three were involved in a disturbance. Noise coming from the room they were in was complained about by guests in adjacent rooms. The Police had to be called, although no arrests were made. Next day a manager of the hotel complained to Airways and the employer began an investigation into the conduct of Ms Dumble and her two colleagues. The investigation widened in scope to include the use of Purchasing Cards, which each of the three had been issued with for work purposes. Airways had found that the cards were used by each employee on the night of 26 September to buy food and drink. The investigation also covered the amount of alcohol Ms Dumble and her companions had consumed that night.

[9] At the end of its investigation Airways concluded that severally and collectively in relation to the three matters of conduct alleged against her, Ms Dumble had committed serious misconduct. Summary dismissal was determined to be the appropriate penalty.

[10] In relation to the other two employees, both of whom were in subordinate positions to Ms Dumble, one resigned during the investigation but the other, the local manager and most junior, kept his job. Although his behaviour was found by Airways to have amounted to serious misconduct in relation to all three of the same matters alleged against Ms Dumble, he was not dismissed but received a final written warning. Other disciplinary action has been taken against him but the nature and detail of that is recorded in a confidential mediation settlement reached by him with Airways under s 149 of the Employment Relations Act 2000. Because of a statutory prohibition the Authority has not seen the terms of settlement. Ms Dumble contends that an apparent disparity of treatment between her and that employee supports her personal grievance claim.

**Test of justification**

[11] By raising a grievance about her dismissal and in bringing it to the Authority for investigation and determination, Ms Dumble has required the Authority to apply the test for justification at s 103A of the Employment Relations Act. Under the test the question of whether the dismissal of Ms Dumble was justifiable must be determined, on an objective basis, by considering whether Airways' actions, and how Airways acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[12] In applying s 103A the Authority must also consider four particular factors set out at s 103A(3), as well as any others it thinks appropriate.

[13] The test is to be applied with the proviso that a dismissal must not be determined to be unjustifiable solely because of process defects if they were minor and did not result in the employee being treated unfairly.

[14] The Authority has had the benefit of extensive evidence on all matters material to the resolution of this grievance, and it has received comprehensive submissions from Mr Reid and Ms Hornsby-Geluk in relation to the law to be applied, particularly under s 103A of the Act.

[15] I turn to the conclusions reached by the employer in relation to each head of serious misconduct alleged and found against Ms Dumble.

**Breach of Travel Policy and Domestic Travel Expenditure Policy**

[16] I do not consider in reaching the conclusion that there had been a breach of this particular policy, Airways acted in a way that a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[17] After commencing its investigation Airways, through Mr Andy Boyd, acting Head of Service Delivery, wrote to Ms Dumble on 8 October 2012 advising that she appeared to have breached the requirements of Airways' Travel Policy. He advised, accurately, the Policy stated that when employees are travelling together, the most senior employee's purchase card is to be used. Mr Boyd also advised;

*It appears that this did not occur as both [the two subordinate employees] incurred expenditure on their purchase cards relating to the purchase of alcohol on the evening in question. All such*

*expenditure should have been on your card and it is reasonable to assume that you were aware that [the employees] were putting their purchases on their Airways purchase cards.*

[18] Mr Boyd advised that the Travel Policy stated the consumption of one beer or wine before and with dinner constituted a reasonable consumption of alcohol and that any additional alcohol was to be at the cost of the individual. He advised:

*The evidence suggests that there were five bottles and four glasses of wine and one glass of beer charged to Airways during the evening you [and the two subordinate employees] spent in Nelson. This is substantially more than the permitted two glasses per person. In addition, a further bottle was provided by [one of the employees] – not at Airways cost – at least part of which was also consumed. Whilst you did not make all of these purchases yourself, it is reasonable to assume that you were aware that both [the two employees] made their purchases on Airways' Purchase Cards or accounts.*

[19] I find that the assumptions Mr Boyd made about Ms Dumble's awareness of the use of purchase cards by her two colleagues were not reasonable. The basis on which he reached them has not been explained by Mr Boyd. Suspicion is not an adequate basis and I do not consider the fact that Ms Dumble was in the company of her two colleagues while all three were eating and drinking alcohol they had purchased provides, by itself, a basis for imputing to her knowledge of the way that her colleagues had paid for what they bought.

[20] Neither does Ms Dumble's knowledge that because of their positions of employment her two colleagues had been issued with Airways Purchasing Cards provide any basis for determining that she knew that those cards were being used by them on the night in question. It cannot reasonably be assumed that Ms Dumble concerned herself at all as to the method of payment used by either of her subordinate colleagues during a social occasion. If she did, it she is more likely to have thought her colleagues would comply with the conditions under which they had been issued their cards, one of which was that they would not use them when a more senior employee was paying for food or drink.

[21] Although Ms Dumble gave explanations as to her involvement when the drink was purchased, Mr Boyd unreasonably preferred or gave more weight to accounts given by one of the two other employees, the local manager, about the purchase of alcohol. I cannot find that his accounts of what happened could have led Mr Boyd to reasonably conclude Ms Dumble was aware at the time that he had paid for the liquor

with his Purchasing Card in the bar the trio visited at the end of their evening out together.

[22] The employee's written statement preferred by Mr Boyd included reference to Ms Dumble and the third employee as having "looked at each other" and having said "words that I didn't hear." According to the statement, and there is no dispute, immediately after that Ms Dumble had gone outside the bar to take a phone call. The other two employees remained inside and decided which of them would use his purchase card to pay for wine. There was no other discussion heard by the local manager about who would pay for wine.

[23] He stated;

*First of all, when Michele used her phone, there was no discussion. There was a context – the impression I had – I was invited for dinner and drinks by Michele to thank me – there was a work email inviting me out and saying that she would shout me.*

[A question] *When Michele and [the third employee] looked at each other what was your understanding of the interaction?*

[Employee's answer] *They were deciding between the two of them who was going to pay. Michele got distracted [by the phone call] and [third employee] said to me "you pay."*

[24] The employee's statements could not reasonably be taken as convincing or persuasive proof that Ms Dumble had agreed or had known that the most junior employee would be asked to use his card to pay for the wine. As recorded in the statement and as advised to the employee, Ms Dumble had previously explained that she was not part of any discussion about how wine was to be paid for. I do not consider that the employee's statement directly contradicts Ms Dumble's on the point, yet that appears to be the way Mr Boyd viewed it, unreasonably I find.

[25] If, as I find, Mr Boyd's assumptions about Ms Dumble's knowledge were not reasonable to begin with, it was not fair or reasonable to construct a case against her based on her perceived silence or prevarication or inconsistency in providing an explanation. Supposition and conjecture by Mr Boyd about Ms Dumble's state of knowledge provided no reasonable basis for rejecting Ms Dumble's denial of knowledge at the time it happened that either of the other two employees had used their Purchasing Cards.

[26] It seemed to be implied in the evidence and submissions given for Airways that Ms Dumble was inclined to be negligent or even dishonest in complying with the rules for the use by employees of Purchasing Cards. Mr Boyd's conclusion that it was likely she knew her two junior colleagues were using their cards against the rules, suggests Ms Dumble's attitude was that generally Airways employees will try to rot the system whenever they have a chance. There is no evidence that she thought that way about any of her colleagues.

[27] Neither is there evidence to support the submission that the purchase card useage would have gone undetected if Airways had not received a complaint from the hotel management about the disturbance on the night of 26 September. That submission implies that Ms Dumble would have later approved any claims for the expenditure, contrary to the rules. There is more force in Mr Reid's submission that approval required to be given for claims was a check built into the system to prevent misuse of the cards. In the way events unfolded, Ms Dumble was simply not asked to approve any claims and there is no basis for suggesting that she would have improperly signed them off.

[28] The allegations of over-consumption of alcohol and over-expenditure were tied to the allegations that Ms Dumble knew her junior colleagues were using their purchase cards to pay for some of the alcohol, contrary to Airways policy. If that was not reasonably able to be established then the basis for the consumption allegation does not exist, as I find is the case.

[29] I find that taking disciplinary action against Ms Dumble was not what a fair and reasonable employer could have done in the circumstances relating to this particular allegation of misconduct.

### **Bringing Airways into disrepute**

[30] In relation to this allegation I find that Airways' investigation left it with a reasonable and sufficient basis for concluding that Ms Dumble's actions had brought her employer into disrepute. As a matter of degree however, I do not consider that the damage to Airways, or the impact on its employment relationship with Ms Dumble, was serious enough to justify her summary dismissal for this conduct, viewed on its own from the other two matters investigated. At most some form of disciplinary action falling short of dismissal could have been justified.

[31] The information given to or gathered by Airways was that management of the hotel complained next morning after the disturbance that had occurred there on the night of 26 September. The Police who were called to the incident expressed surprise that employees of Airways had behaved in the way they had been seen to. It is significant that after the hotel had reimbursed the guests who had complained, or after some allowance had been made in their bill for their interrupted night's sleep, Airways paid back the hotel the cost incurred through its employees' conduct.

[32] Ms Dumble had not created any of the noise that disturbed guests in adjacent rooms, as she had fallen asleep after going to her colleague's room, but she was seen by the Police and a member of the hotel staff to give the latter 'the finger' when he had been apparently trying simply to get her quietly to go to her own room and go safely to bed. She was seen to be needing assistance to walk and was "lippy" in speech. It is little in her favour that Ms Dumble was not one of the noise makers, as she readily acknowledged that she should not have gone to the room with her two colleagues after drinking over the course of their evening out. She accepted that she should have exercised some leadership and told them to go off to bed and get proper rest before a meeting that was planned for the following morning.

[33] It was submitted by Mr Reid that Ms Dumble's behaviour as observed by the Police - unsteady on her feet, slurred speech, "lippy" with arrogant remarks, and giving the finger - was not properly investigated by Airways as to possible cause. During the investigation it was raised that a cause could have been the fact that Ms Dumble had been woken suddenly from her sleep to find she was being hastened by a colleague to leave the room she had been in and go to her own room under the instructions of the Police and night porter. It was submitted that in those circumstances Ms Dumble may have suffered from a medical condition or phenomenon known as Sleep Inertia, in which a person awoken suddenly may experience disorientation and confusion about where they are and what they are doing. In that condition sufferers may act without thinking about what they are doing, or without intending to act in a particular way.

[34] I find that Mr Boyd, in investigating the conduct, made allowance for the reasonably well known fact that people who are suddenly woken may for a short time experience some degree of disorientation and confusion, but I do not consider that he was required in the circumstances to investigate the possibility that the science of

Sleep Inertia was a cause. Mr Boyd could reasonably conclude from the Police eye witness account that Ms Dumble's conduct was explained by her being the worse for drink and by her waking suddenly in an unfamiliar place to find she had to leave it quickly and go to her own room. There was no failure of process in this regard.

[35] In *Hallwright v Forsyth Barr Ltd* [2013] NZERA Auckland 79, the Authority recently found an employer had justifiably dismissed an employee for actions which amounted to conduct bringing the employer into disrepute. The actions of Ms Dumble can be strongly contrasted with those of that employee, which attracted a considerable degree of notoriety both through what was done very publicly, although outside of the workplace, and through the media attention given to the employee's subsequent trial and conviction for a serious criminal offence committed by his actions.

[36] The case of *C v. Air Nelson Ltd* [2011] NZEmpC 27 was referred to by Mr Reid in his submissions. On its facts, it illustrates the standard of conduct required to constitute serious misconduct justifying dismissal. By comparison, C's behaviour while off duty but with ongoing line responsibilities to staff he was staying with in a hotel, exceeded considerably the conduct of Ms Dumble in being seen to be apparently affected by drink and making to a member of the hotel staff a rude but common enough gesture.

[37] *Craigie v. Air New Zealand Ltd* [2006] ERNZ 147, also referred to by Mr Reid, is a further good illustration of the standard of conduct required in an off duty situation before a fair and reasonable employer may view it as serious misconduct, which in that case it was found to be by the airline employer. The circumstances were markedly different to those of this case.

[38] For a very brief time in a private place away from work, and before a very limited number of spectators, apparently the worse for drink Ms Dumble needed assistance with walking, was voluble and argumentative and made a rude gesture to a hotel staff member trying to help her. I do not consider that her employer's reputation even as an SOE in the forefront of aviation safety could reasonably be considered to have been so seriously damaged by the conduct that summary dismissal was open as a response by the employer. As a matter of degree, the impact of Ms Dumble's conduct could not fairly or reasonably have been viewed in that way.

[39] I take into account that Airways is entitled because of the safety sensitive and public nature of its business to value its reputation very highly. I must note though that Airways did not dismiss one of Ms Dumble's colleagues, recognised by the Police to be a local manager of Airways, who with the other male colleague had created the disturbance while Ms Dumble was apparently fast asleep.

[40] It is also curious that Airways seems not to have been concerned about its reputation when Ms Dumble's partner, who is in a senior management position in an organisation with which Airways must have a close business or professional relationship, took it upon himself to ring an Airways employee and abuse him and Airways in strong terms about his involvement in the disciplinary action then being taken against his wife. Airways seems not to have thought any the less of Mr Dumble's employer as a consequence of his actions.

[41] I find that dismissing Ms Dumble in reliance on this ground was not what a fair and reasonable employer could have done in the circumstances, although lesser disciplinary action may have been justifiable.

### **Breach of the Airways' Drug and Alcohol Policy**

[42] This particular policy expressly provides that Airways is a highly safety critical business and is committed to responsibly meeting its occupational health and safety obligations by providing a working environment free from the effects of alcohol and other drugs.

[43] The Policy document refers to the risk that "people at work" who are impaired by alcohol place themselves and others in danger. It also refers to the consumption of alcohol in such a way that will impair an employee for work duties. The policy has an extensive section relating to "Airways' functions and social occasions".

[44] I do not consider it was reasonably open to the employer to conclude that Ms Dumble, on the night of 26 September, was at an Airways' function or participating in a social occasion for Airways. She was simply meeting with work colleagues outside of work. The fact that they chose to discuss work matters of common interest did not make it a work occasion.

[45] In the dismissal letter Mr Boyd stated that he had had regard to the fact that Ms Dumble had gone to Nelson for an important customer meeting due to take place

at 10am on 27 September. He noted that because of his concern regarding Ms Dumble's fitness for work he had cancelled that meeting. He was entitled to take that precaution.

[46] I can find no basis on which the employer could reasonably have determined that Ms Dumble may have been unfit for work at 10am the next day, after eventually going to her own room and going to sleep at sometime after midnight. No testing was done to see what levels of alcohol she had in her system some 10 hours later.

[47] I agree, however, that the employer was entitled to be concerned about the amount of alcohol drunk by Ms Dumble and the other two employees. For Airways it was submitted by counsel Ms Hornsby-Geluk that Ms Dumble had breached the Policy to a degree that amounted to serious misconduct. It was further submitted;

*Whilst the Applicant's behaviour occurred outside of work hours, she was with subordinates at the time and was reasonably expected to exercise a reasonable level of restraint and responsibility.*

[48] Mr Reid addressed submissions to the Employment Court decision in *C v Air Nelson*, noting that the result had not been disturbed by the Court of Appeal on appeal. 'To err is human,' the Employment Court accepted when considering the way the employer could view the particular behaviour of an airline pilot while staying at a hotel in the company of subordinates. That behaviour, details of which are in the decision and are well known to the parties in this case, was largely excused if not forgiven. It would be hard to reconcile the result C achieved ultimately with a finding that Ms Dumble had seriously misconducted herself to a degree that summary dismissal was open to the employer as a fair and reasonable disciplinary response. Also, another Airways' management employee involved was not dismissed but was excused his behaviour to a degree that seems more in line with the outcome for C.

[49] I find that summary dismissal of Ms Dumble was not what a fair and reasonable employer could have done in the circumstances. In my view, a warning issued to her and counselling, could have been justified on that basis.

### **Determination**

[50] Applying the test of s 103A of the Act, the Authority considers that while there was no failure by Airways in relation to any of the factors expressed at s 103A(3), summary dismissal of Ms Dumble in the overall circumstances known to

Airways at the time it made that decision, was not what a fair and reasonable employer could have done. Defective conclusions reached by Airways were not matters of process, they were not minor and they resulted in unfair treatment.

[51] The dismissal was therefore not justifiable and Ms Dumble has established her personal grievance in that regard.

[52] In the circumstances I find no basis for arguing that disparity of treatment made the dismissal unjustified. The employee who has kept his job agreed to the disciplinary action taken against him rather than having it imposed by Airways against his will. Ms Dumble had available to her the same opportunity to reach agreement over the nature and extent of action to be taken against her. In any event there is a reasonable explanation for any difference of treatment, in that the local manager was considerably junior to Ms Dumble.

### **Remedies**

[53] In considering the appropriate remedies to resolve the grievance, including reinstatement as strongly sought by Ms Dumble, the Authority must also examine the extent to which her actions or conduct contributed to the situation that gave rise to her unjustified dismissal. Mr Reid in submissions accepted, realistically, that a finding of some contribution against Ms Dumble was inevitable.

[54] I consider that there was significant contribution by Ms Dumble, particularly in relation to the amount of alcohol consumed and her behaviour at the hotel late in the evening while in the company of her two colleagues. Ms Dumble readily conceded during Airways' investigation that she was partly to blame for what happened at the hotel when she went to a room with the two other employees who caused the noise disturbance. She was at least half to blame for her grievance, I find.

[55] There is a compelling case for her reinstatement, given the unique nature of employment with Airways in New Zealand and the otherwise long and successful career Ms Dumble has had with the enterprise without any previous lapses of behaviour or performance, a career described by Mr Boyd as a "distinguished" one.

[56] I consider that reinstatement will be reasonable and practicable in all the circumstances provided the matter raised during the investigation about Mr Ray Dumble's abusive phone call to the identified Airways employee can be resolved with

that employee before Ms Dumble returns to her employment. Airways seems content to have let this matter go but in my view it should consult the employee and, given the business association between Mr Dumble's organisation and Airways, reach some appropriate resolution to preserve future relationships, including potentially those between the employee and Ms Dumble if she will be his manager. Mediation may assist.

[57] Subject to that condition, which I direct is to be met within 14 days of the date of this determination, I order the reinstatement of Ms Dumble as Manager-Towers, based in Tauranga, on a permanent basis.

[58] Reinstatement should also restore to Ms Dumble the former terms and conditions of employment that allowed her to participate in an Airways' superannuation scheme. They should be reinstated as if her employment had not terminated. It is likely she will have to put back into the fund whatever she was paid out from it. If reinstatement to the scheme is not possible under its deed, Ms Dumble is to be compensated for loss of the expected benefit from it. Leave is reserved to apply for further orders if required in this regard.

[59] I accept the submission of Ms Hornsby-Geluk that on the evidence provided Ms Dumble did not make any reasonable attempt to mitigate her loss of remuneration, and on that basis no award under this head is made.

[60] To take account of significant contributory fault or blame on the part of Ms Dumble, no award of compensation for hurt feelings or distress is made.

[61] It is open to Airways to issue Ms Dumble with a disciplinary warning about her conduct while staying in Nelson on 26 September last year. Airways may also require her to undertake assessment and counselling in relation to alcohol misuse and dependency.

**Costs**

[62] Costs are reserved. Given the mixed results of this investigation, it may be appropriate for the parties to bear their own costs. If they cannot agree on how this question is to be disposed of, application in writing may be made to the Authority by Ms Dumble within 21 days of the date of this determination. Any reply from Airways is to be filed within a further 21 days.

A Dumbleton  
**Member of the Employment Relations Authority**