

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 302  
3024908

BETWEEN                      WAYNE REGINALD  
   THOMAS  
   Applicant

AND                              AIRWAYS CORPORATION  
   OF NEW ZEALAND LIMITED  
   Respondent

Member of Authority:      Jenni-Maree Trotman

Representatives:            Richard McCabe, Counsel for the Applicant  
   Penny Shaw, Counsel for the Respondent

Investigation Meeting:     31 August 2018

Additional documents      3 September 2018 from Applicant  
received:                      3 September 2018 from Respondent

Determination:              28 September 2018

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Airways Corporation of New Zealand Limited (Airways) employs Air Traffic Controllers and other staff to provide air navigation and associated services in New Zealand. Wayne Thomas has been employed by Airways for approximately 35 years as an Air Traffic Controller. He has been based in the Auckland Tower since 2008 and has been a Senior Controller since 2015.

[2] In October 2016 a complaint was made by another Air Traffic Controller that Mr Thomas was, inter alia, bullying that Air Traffic Controller. An independent investigation was undertaken by Airways that concluded that Mr Thomas had not bullied or acted inappropriately towards the Air Traffic Controller.

[3] Mr Thomas claims that he has suffered an unjustifiable disadvantage to his employment as a result of Airways' refusal to advise all of his colleagues in the

Auckland Tower of the outcome of the investigation. He claims compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and a recommendation under s 123(1)(ca) of the Act.

[4] Airways denies Mr Thomas has been unjustifiably disadvantaged. It maintains it has advised all of those involved in the investigation of the outcome. It says it is under no obligation to advise other employees about the investigation or its outcome.

[5] As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

### **The issues**

[6] The issues requiring investigation and determination were:

- a) Did Mr Thomas suffer an unjustified disadvantage to one or more conditions of his employment?
- b) If so, what remedies should be awarded?
- c) If any remedies are awarded, should they be reduced, under s 124 of the Act, for blameworthy conduct by Mr Thomas that contributed to the situation giving rise to his grievance?
- d) Should the Authority make a recommendation that Airways disclose the outcome of the investigation to Mr Thomas' colleagues in the Auckland Tower?
- e) Should a non-publication order be made?
- f) Should either party contribute to the costs of representation of the other party?

### **Background against which issues are to be determined**

[7] On 21 October 2016 an email was sent by an Air Traffic Controller (ATC) to three other ATCs and to the ATC's union representative. The ATC did not give evidence and therefore I shall refer to the ATC as Person X.

[8] Person X's email raised serious concerns about Mr Thomas including that he was a sexist and bully. It alleged Mr Thomas had breached the code of conduct for which "*one can be stood down and dismissed for*" and then went on to set out examples of Mr Thomas' behaviour. The email concluded with Person X advising that the complaint was going to be taken to Michael Turner, the Acting Business Manager of the International Towers, and to the General Manager of Air Traffic Control. Person X asked the recipients of the email to "*email me with any feedback*".

[9] Person X then forwarded the email to Mr Turner. Mr Turner contacted Mr Thomas to tell him of the email. In the meantime, the email was circulated and discussed widely amongst the Tower staff.

[10] On 8 November 2016 Mr Turner emailed Mr Thomas asking if there was anything he could offer him in terms of support regarding the allegations of bullying made by Person X. He also advised him he was able to access EAP and provided him with the contact details. Mr Thomas responded "*Thanks for the offer but am getting enough support from the staff thanks, it would be nice to know what's going on though*".

[11] On 18 November 2016 Airways received a detailed complaint letter from Person X's lawyers. A meeting then took place between Paul Fallow, Head of Service Delivery, Leanne Jones, the People and Capability Manager, Mr Thomas and his representative. The concerns raised by Person X were discussed and denied by Mr Thomas. He also raised concerns that Person X was bullying him and had breached Airways' policies relating to conduct and the use of its IT systems.

[12] The complaints made by Person X and Mr Thomas led to Airways proposing that Mr Thomas and Person X attend a facilitated meeting to address their issues. Mr Thomas did not agree to attend a meeting until feedback was obtained from their colleagues that would act as a "reality check" for them both.

[13] In a letter dated 13 January 2017, Mr Thomas made a formal complaint about Person X.

#### *The appointment of an independent investigator*

[14] On 1 April 2017 Airways appointed an independent investigator to investigate the complaints received from Person X and Mr Thomas. As part of this process a

number of witnesses were spoken to. They were advised that the content of their discussions with the Investigator were to be kept confidential. There is no suggestion that any of the witnesses breached this requirement. However, it was common knowledge amongst the Tower staff that the witnesses were being spoken to about the allegations made by Person X against Mr Thomas.

*Events following the completion of the Investigator's Report*

[15] The Investigator's report was finalised by the Investigator on 23 June 2017 after receipt of submissions from Counsel representing Mr Thomas and Person X. In summary, the investigator's findings were that:

“Wayne has not bullied or acted inappropriately towards [Person X]. Wayne's avoidance of [Person X] was in all the circumstances a blunt but reasonable strategy to insulate himself from the potential conflict, from conversations that did not interest him, and to manage [Person X's] impact on him during shift.”

Person X's email dated 21 October 2016 was objectionable and offensive....”

[16] Following the outcome of the report Airways engaged with both Mr Thomas and Person X about its intention to adopt the findings of the report. It gave each party an opportunity to comment.

[17] On 3 August 2017 Mr Thomas emailed Airways advising:

Currently a considerable number of, if not all, staff at the Auckland Tower workplace have been aware of the nature of [Person X's] accusations, and that those accusations have resulted in an investigation. Despite having the Final Report for 6 weeks Airways has taken no steps whatsoever to acknowledge to Wayne and his workmates that the investigation is now complete and that the Investigator found that the allegations made against Wayne were neither accurate no justified. That is unreasonable and unfair. It cannot continue.

Wayne now proposes to respond to interested parties with the following statement...

[18] Airways responded on 4 August 2017 advising “*it isn't appropriate to issue a statement or discuss the situation with anyone not involved in the investigation*”.

[19] By email dated 14 August 2017, Person X challenged the outcome of the investigation report. The email also raised concern that the content of the investigation report be kept confidential.

[20] On 15 August 2017 Mr Thomas raised a personal grievance alleging (verbatim):

5. Airways' refusal to advise Mr Thomas' colleagues that he has exonerated from [Person X] bullying allegations that leaves Mr Thomas' reputation under a cloud and represents an unjustifiable action causing disadvantage to him.

[21] On 19 September 2017 Airways advised Mr Thomas of its decision to adopt the Investigator's findings and adopt the report in its entirety "*which found that you had not bullied or acted inappropriately towards [Person X].*" Airways went on to advise that the report had also found

that you "*avoided [Person X] to the extent that he (you) rarely interacted with [Person X] outside essential work communications, and rarely used [Person X's] name*".

Whilst this was accepted as a reaction to [Person X] being difficult to work with, in my view, as a senior member of the team, there were better ways for you to deal with this and the avoidance strategies you adopted have caused upset for [Person X].

In the circumstances, I believe that it is appropriate that I direct that you attend facilitation in the hope that the issues between you and [Person X] are resolved.

...

I intend to communicate **with staff involved in the investigation** in the following way;

*"Thank you for participating in the independent investigation that occurred in June this year. I realise it is not an easy position to be put in to discuss your colleagues in circumstances where complaints have been made. I can report that the investigator determined that no bullying or harassment had occurred. However, there were findings that indicated that interactions between staff had genuinely caused distress. This obviously presents health and safety implications for us and we need to ensure that our behaviours towards each other are respectful and inclusive at all times.*

*If you feel personally affected by the process of the investigation I would like to offer you the opportunity to take part in a one on one session with an independent facilitator. The aim of the session would be to support you to work through any challenges you may be experiencing and to help to improve/rebuild relationships in the general work environment. If recommended by the facilitator with your agreement this could lead to a facilitated group session which may involve other members of the team with the aim of improving relationships in the wider team. I also remind you of your ability to access EAP..."*

(emphasis added)

[22] On 22 September 2017 Person X raised a personal grievance. It is unnecessary for the purposes of this determination to set out the grievances raised save for an allegation that Person X had been disadvantaged by Airways' failure to ensure the confidentiality of the complaint made by Person X and the investigation process.

[23] On 26 September 2017 Mr Thomas responded to Airways' proposal. He advised he was willing to attend facilitation if Person X, inter alia, unreservedly accepted the findings of the investigation and provided him with a written apology. His letter did not respond to the proposal to only communicate the outcome of the investigation to those staff involved in the investigation.

[24] On 19 December 2017 Mr Healey met with Mr Thomas to advise that he intended to meet with employees involved in the investigation and to provide them with an overview of the outcome of the report, including the finding that Mr Thomas had not bullied or acted inappropriately towards Person X. This advice was repeated in emails dated 21 December 2017 and 9 January 2017. Mr Thomas raised no issue with this course of action.

[25] Mr Healey subsequently made contact with all individuals who were interviewed as part of the investigation and asked to meet with them individually to provide feedback. They were advised that Mr Thomas had not bullied or acted inappropriately towards Person X.

[26] Thereafter Person X returned to work and attempts were again made by Airways to organise facilitation between Person X and Mr Thomas to resolve their employment relationship issues. To date, this has not occurred.

### **Issue 1: Unjustified Disadvantage**

#### *The legal position*

[27] Under s 103(1)(b) an employee may commence a personal grievance claim if one or more of the conditions of the employee's employment has been affected to the employee's disadvantage by an unjustifiable action by the employer.

[28] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what

a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

[29] In *Bates v BP Oil New Zealand Ltd* the Employment Court held that an employer exercising a right to give or withhold consent to an employee's request cannot act or refuse to act in bad faith, for wrong motives, or capriciously. To do so, would be in breach of the employer's obligations of good faith.<sup>1</sup>

### *Analysis*

[30] Mr Thomas alleges that Airways' refusal to "advise all Auckland Tower staff that Mr Thomas has been exonerated from the allegations made against him by [Person X], despite those allegations being widely known" has left his reputation "under a cloud" and represents an unjustifiable action. I disagree.

[31] Mr Thomas has not suffered a disadvantage to his employment as a result of Airways' decision not to release the outcome of the investigation report to all of Mr Thomas' colleagues in the Auckland Tower. On balance, I am satisfied the source of any damage to Mr Thomas' reputation was the email sent by Person X on 21 October 2016. It was this email that led to Mr Thomas' colleagues becoming aware that Person X was alleging he was a bully and intended to make a complaint about him. It was not through any action taken by Airways in investigating the complaints and reaching its decision.

[32] Even if I am wrong on that point, I am satisfied that a fair and reasonable employer could have concluded, based on the circumstances known to it at the time, that it was inappropriate to circulate the outcome of the investigation to all of the Auckland Tower staff. These circumstances included:

- a) An awareness that Airways was required to provide a safe workplace to both Mr Thomas and Person X. Person X had strongly protested about wider communication of the findings and had raised an issue about the impact that disclosure had had, and would continue to have, on Person X's health and well-being.

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<sup>1</sup> 1 ERNZ 657 at p 668, line 17

- b) Airways wished to address the dysfunctional relationship between Person X and Mr Thomas and restore it. The communications I have viewed show Airways making multiple attempts to organise facilitation between the parties. Airways considered that communicating the outcome of the investigation any wider than it had done would undermine attempts to restore a functional working relationship between Mr Thomas and Person X.
- c) Airways understood from the witness statements it had read, and conversations that it had had with some of the witnesses, that staff already felt negative about Person X. It was concerned that disclosure of the outcome, without staff being aware of all of the facts, may cause further issues between staff.
- d) Airways was unaware that the lack of broader communication was negatively impacting on Mr Thomas. Airways understood from the witness statements taken during the investigation, and Mr Thomas' November 2016 email, that he was supported by his colleagues. This is consistent with Mr Thomas' evidence at the investigation meeting that he thought people thought "*there was not much truth in the matter as [Person X] was known for this*". He also pointed out that there were no differences or changes in attitude towards him that he was aware of.
- e) Airways was unaware that the details of the complaint and investigation, as opposed to the initial email circulated by Person X, had gone any wider than those involved in the investigation. The parties agreed that the investigation would be confidential to the investigator, the complainants, Airways and their respective representatives. In addition, all witnesses involved in the investigation had confirmed they would keep confidential everything said during the investigation and would not discuss the investigation with any other person.

[33] In reaching this finding I also considered the process that was followed by Airways in carrying out the initial investigation of the complaints, and the process that it followed thereafter in reaching its decisions regarding circulation of the outcome. I am satisfied that the process Airways followed was in accordance with the

requirements of s103A of the Act and Airways' Bullying and Harassment Policy.

This process included:

- a) Airways investigating the complaints by appointing an Investigator to undertake an independent investigation.
- b) The Investigator discussed the terms of reference with Person X and Mr Thomas' representatives, and obtained their consent to the matters to be investigated.
- c) The Investigator interviewed all relevant witnesses.
- d) Person X and Mr Thomas were provided with a draft of the Investigator's report before it was finalised and provided submissions. These submissions were considered and changes were made to the report to incorporate comments made by the parties.
- e) Airways offered support to Mr Thomas before, during and after the investigation was completed.
- f) After consideration of the investigator's report, Airways adopted the investigator's findings that Mr Thomas had not bullied or acted inappropriately towards Person X.
- g) Airways advised Mr Thomas of its intention to communicate the outcome of the investigation with only the staff involved in the investigation. This was done by way of letter, email and a meeting with Mr Thomas. This intention accorded with Mr Thomas' earlier request that he wanted the investigator's findings to be "*known to, at the least, the witnesses who were interviewed by the investigator*".
- h) When Mr Thomas later requested Airways to distribute the outcome to the wider tower, Airways considered Mr Thomas' views and those of Person X before reaching its decision not to communicate the outcome to the wider Auckland Tower. This decision was consistent with the practice followed by Airways on other investigations not to convey the outcome of investigations to parties not directly involved in the investigation.

*Finding on Issue 1*

[34] Mr Thomas has not suffered an unjustified disadvantage to his employment.

### **Issue 2: Recommendation**

[35] As I have found that Mr Thomas does not have a personal grievance, and in the absence of consent from Airways, I am unable to make a recommendation to the parties.<sup>2</sup>

### **Issue 3: Non Publication order**

[36] Airways applied for a non-publication order prohibiting the publication of the names of the parties, the names of the witnesses and all of the evidence in this matter.

[37] The Authority may, in any proceedings, make non-publication orders in accordance with Clause 10(1) of Schedule 2 of the Act. The scope of the discretionary powers has been traversed by a full Court in *H v A*<sup>3</sup> and recently addressed by Judge Inglis in *XYZ v ABC*<sup>4</sup> where she considered and applied the approach taken by the Supreme Court in *Erceg v Erceg*.<sup>5</sup>

[38] In *Erceg* the Supreme Court emphasised that the starting point is the principle of open justice, and that a high standard must be met before that principle can appropriately be departed from. The Supreme Court said:<sup>6</sup>

... the courts have declined to make non-publication or confidentiality orders simply because the publicity associated with particular legal proceedings may, from the perspective of one or other party, be embarrassing (because, for example, it reveals that a person is under financial pressure) or unwelcome (because, for example, it involves the public airing of what are seen as private family matters). This has been put on the basis that the party seeking to justify a confidentiality order will have to show specific adverse consequences that are exceptional, and effects such as those just mentioned do not meet this standard. We prefer to say that the party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule, but agree that the standard is a high one.

[39] After considering the parties' submissions, and balancing the respective considerations identified by each of the parties, I am satisfied that the requisite high standard has not been reached so as to grant a non-publication order. The public has a legitimate interest in knowing the content of my determination. I am not satisfied

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<sup>2</sup> Sections 123 and s 173A of the Act.

<sup>3</sup> *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [78].

<sup>4</sup> [2017] NZ EmpC 40, EMPC 69/2017.

<sup>5</sup> *Erceg v Erceg* [2016] NZSC 135.

that adverse consequences will flow from publication. I have addressed Airways' concerns regarding Person X by not identifying this person.

### *Finding on Issue 3*

[40] I confirm the preliminary indication of findings provided to the parties, namely that I decline to grant an order for non-publication.

### **Issue 3: Costs**

[41] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves especially in light of the fact that they have both been partially successful.

[42] If they are not able to do so, and an Authority determination on costs is needed, the parties may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. Any replies to those memoranda may be filed within a further 14 days. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

### **Direction to Mediation**

[43] I confirm the preliminary indication of findings provided to the parties, namely that the parties are directed to attend mediation within 28 days of the date of this determination to address the employment issues that have arisen between Mr Thomas and Person X. Person X is to be invited to attend this mediation.

### **Orders**

[44] The following orders are made:

- A. Mr Thomas has not suffered an unjustified disadvantage to his employment.
- B. As Mr Thomas does not have a personal grievance, and in the absence of consent from Airways, I am unable to make a recommendation to the parties.

C. No order for non-publication is made.

D. Costs are reserved.

Jenni-Maree Trotman  
Member of the Employment Relations Authority