

**IN THE EMPLOYMENT COURT  
CHRISTCHURCH**

**[2010] NZEMPC 112  
CRC 35/10**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

BETWEEN PACIFIC BLUE EMPLOYMENT &  
CREWING LTD  
Plaintiff

AND B  
Defendant

Hearing: 20 August 2010  
(Heard at Christchurch)

Appearances: John Rooney, counsel for plaintiff  
Tim McGinn, counsel for defendant

Judgment: 20 August 2010

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**ORAL JUDGMENT OF JUDGE A A COUCH**

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[1] The defendant is a commercial pilot. In August 2008 he was employed to fly passenger aircraft operated by Pacific Blue. On 25 May 2010 he was summarily dismissed for misconduct.

[2] The defendant is pursuing a personal grievance that his dismissal was unjustifiable and is seeking permanent reinstatement. That claim is now before the Employment Relations Authority. The defendant also sought interim reinstatement which the Authority granted in a determination dated 26 July 2010.<sup>1</sup> Interim reinstatement was granted in the form of “garden leave” meaning that the plaintiff

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<sup>1</sup> CA 148/10

was obliged to employ and pay the defendant but was not obliged to offer him work. The plaintiff challenges that determination and the matter has proceeded before me today by way of a hearing de novo.

[3] Before turning to the merits of the matter it is important to clarify the relationships between those involved. Aircraft flown in New Zealand under the Pacific Blue brand are operated by Pacific Blue Airlines NZ Ltd. Aircrew on those aircraft are employed by Pacific Blue Employment and Crewing Ltd, the plaintiff in this proceeding. The plaintiff is a wholly owned subsidiary of Pacific Blue Airlines NZ Ltd. The evidence suggests that the business of the two companies is intermingled with day to day operation of the plaintiff being carried out by staff of Pacific Blue Airlines NZ Ltd. In particular it appears that the defendant was dismissed by a manager of Pacific Blue Airlines NZ Ltd.

[4] The parties have filed comprehensive affidavits accompanied by voluminous exhibits. I have considered all of that material but it is unnecessary to make detailed reference to it in the course of this decision.

[5] The principles by which applications for interim reinstatement are to be decided are settled and well known, they may be summarised in four questions:

- a) Is there an arguable case?
- b) Is there an adequate alternative remedy available?
- c) Where does the balance of convenience lie?
- d) What does the overall justice of the case require?

### **Arguable case**

[6] The large majority of evidence in the affidavits relates to events leading up to and culminating in the defendant's dismissal. Not unexpectedly, those involved have differing perceptions of many of the events and the parties draw differing conclusions about the meaning and significance of documents. As none of the

evidence has been tested by cross-examination, I cannot resolve those differences and do not attempt to do so.

[7] What is clear is that since January 2009 there have been a series of events involving the defendant which the plaintiff says have given cause for concern about the defendant's conduct and his fitness to work as a pilot for Pacific Blue. The plaintiff has investigated each of these events to a greater or lesser extent and responded in various ways. In February 2009 the plaintiff took no action. In April 2009 the plaintiff accepted an offer by the defendant to undergo random drug and alcohol testing. In October 2009, the plaintiff issued the defendant with a final warning. The defendant was also suspended continuously from 19 June 2009 until he was dismissed on 25 May 2010.

[8] In respect of each of these events, the plaintiff says that its actions were what a fair and reasonable employer would have done and were therefore justifiable. The defendant challenges the propriety of the plaintiff's actions, both in relation to process and outcome of particular investigations and also the totality of the plaintiff's conduct. Having considered all of the material in the affidavits and having regard to the submission of counsel, I am satisfied that the defendant has an arguable case of unjustifiable dismissal.

[9] For the defendant, Mr McGinn invites me to go further and conclude that the defendant has a strongly arguable case which is very likely to succeed in a substantive hearing. That submission is based very largely on the proposition that, in deciding to dismiss the defendant in May 2010, the plaintiff relied on previous events which had already been dealt with, either by condoning them or by the final warning issued in October 2009. Mr McGinn relies on the decision in *Ashton v Shoreline Hotel*<sup>2</sup> and in particular, what Chief Judge Goddard said at p429 of the report:

It is well established that an employer who discovers misconduct committed by its employee, yet overlooks that conduct and continues the employee's employment, must be taken to have affirmed the employment and cannot subsequently dismiss the employee in reliance on that conduct:

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<sup>2</sup> [1994] 1 ERNZ 421.

[10] That case was decided in 1994, and while it may have accurately reflected the state of the law then, it may not do so now. Section 103A of the Employment Relations Act 2000 requires the Authority and the Court to assess an employer's conduct "in all the circumstances". The width of that requirement was emphasised by the full Court decision in *Air New Zealand v V*.<sup>3</sup> I note also the decisions of Judge Travis in *Butcher v OCS Ltd*<sup>4</sup> and Judge Shaw in *Arthur D Riley & Co v Wood*.<sup>5</sup> In both cases the Court had regard to the decision of the United Kingdom Court of Appeal in *Airbus UK Ltd v Webb*<sup>6</sup> which was to the effect that all past conduct, even that which had been the subject of expired warnings, might properly be taken into account by an employer in making a decision to dismiss. Taking these more recent developments in the law into account, it seems to me that the decision in the *Ashton* case can no longer be relied upon as definitive. Overall, I conclude that the defendant has a arguable case, but I go no further than that.

### **Adequacy of damages**

[11] It is common ground that, on 27 April 2010, the Director of Civil Aviation suspended the defendant's passenger transport licence as a result of concerns that the defendant may no longer meet the statutory requirement for a fit and proper person to hold such a licence. The parties have differing views about the propriety of that action and how it came about but, for the purposes of this hearing, I assume it was proper. The defendant's licence remains suspended pending the outcome of an investigation by the Director and I am informed by counsel for the defendant that the suspension appears likely to continue until at least 6 October 2010. One result of the defendant's suspension is that his type certification to fly the Boeing 737 aircraft operated by Pacific Blue has lapsed and that, if and when the suspension is lifted by the Director of Civil Aviation, the defendant will have to complete a recertification simulator test. This will take time to arrange and complete and will be at a cost which the defendant estimates to be \$12,000.

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<sup>3</sup> [2009] ERNZ 185.

<sup>4</sup> [2008] ERNZ 367.

<sup>5</sup> [2008] ERNZ 462

<sup>6</sup> [2008] ICR 561; [2008] IRLR 309; (2008) 105(7) LSG 30 (CA).

[12] I am also informed from the bar that the Employment Relations Authority has scheduled its investigation meeting of the substantive claim to take place on 18-20 October 2010.

[13] The result of these factors is that there is no realistic prospect that the defendant will be lawfully able to fly again before the Authority's investigation meeting in October, and very little prospect that he will be able to do so prior to the Authority's substantive determination being given. What this means is that the sole consequence for the defendant if he does not have interim reinstatement is that he will not receive his salary. Equally, the sole effect on the plaintiff of interim reinstatement continuing is that it will have to pay the defendant more money. Mr Rooney initially advanced an argument that there would be safety issues but properly conceded that, if the defendant is not flying, no such issues can arise. Mr Rooney also made submissions about the possible effect on Pacific Blue's "brand" of interim reinstatement. Given that any responsible report would have to include the fact that the defendant would not be flying and that a substantive hearing is to be held in two months time, I find little or no substance in this concern.

[14] On this basis it seems to me that payment of money would fully remedy any damage either party might suffer as a result of the decision I make.

[15] Another aspect of this consideration must be the ability of the parties to pay damages should they be ordered to do so. The defendant says in his affidavit that he has \$50,000 equity in his home and relies on this to underpin his undertaking to pay damages. At the same time, the defendant gives evidence that he has significant debts and needs continuing income to avoid having to sell his home to meet living expenses. I return to this issue when I discuss the balance of convenience.

[16] Curiously, no evidence has been provided of the plaintiff's ability to pay damages. Ultimately I regard this as an oversight, rather than a reflection of the plaintiff's actual inability to pay the damages were they awarded. It is implicit in the evidence of all the witnesses that the plaintiff employs the flight crew who fly Pacific Blue aircraft. In recent public announcements regarding Pacific Blue's intention to cease domestic operations in October in favour of increased international

operations, a statement was made that all existing staff would be retained. I have no reason to believe that this statement was made irresponsibly. It follows that Pacific Blue will continue to employ some hundreds of staff through into the foreseeable future and must be presumed to have the means to do so.

[17] I conclude that damages would be an adequate remedy for both parties. Contrary to Mr Rooney's submission, however, I do not regard this as decisive of the matter. Rather it is a significant factor to be taken account in the overall justice of the matter.

### **The balance of convenience**

[18] The only substantial factor advanced on behalf of the defendant in relation to the balance of convenience is his financial position. He says that he cannot continue to meet his outgoings without the ongoing payment of his salary. In support of this assertion he produces a statement setting out aspects of his financial situation. I am told that this was prepared as at 4 June 2010 when he swore his affidavit in the proceedings before the Authority. It shows that the defendant was then in overdraft in his current account, that he had personal loans outstanding and significant credit card debts. That was in addition to a substantial housing loan. The inevitable inference to be drawn from this information is that, while he was employed by the plaintiff and receiving a salary of \$93,000 per annum, the defendant was living beyond his means. Any financial difficulties he had at that stage were due to his own financial imprudence, not the actions of the plaintiff.

[19] Following his dismissal, the defendant was paid holiday pay and the equivalent of two months' salary which effectively maintained his income at its previous level until 11 August 2010. I was told from the bar that, yesterday, the defendant was paid a further month's salary pursuant to the order for reinstatement made by the Authority. Thus, since his dismissal, the defendant has received payment of money sufficient to maintain his previous level of income until the second week of September. He cannot say that he is financially disadvantaged to date and, if the cessation of salary now gives rise to financial hardship, that is due to

his own choices about spending. From the plaintiff's perspective, there is no suggestion that continued payment of salary would raise any significant problems.

[20] The only other factor advanced on behalf of the plaintiff in relation to the balance of convenience was that continued reinstatement may affect Pacific Blue's "brand". For the reasons I have given earlier, I do not regard this as a substantial factor.

### **Overall justice**

[21] The unusual and very significant feature of this case is the decision of the Director of Civil Aviation to suspend the defendant's air passenger transport licence. The effect of that suspension is that the defendant is unable to fly commercial aircraft and therefore totally unable to perform his side of the employment bargain. His inability to fly also means the defendant is unable to enjoy the non-monetary benefits which might otherwise flow from reinstatement such as accumulation of flying hours, increased experience and advancement in seniority. The effect of interim reinstatement, therefore, is solely to provide the defendant with money at the expense of the plaintiff. I must consider whether that alone is a proper purpose of reinstatement.

[22] I have regard to the recent decision of the Court of Appeal in *Lewis v Howick College Board of Trustees*,<sup>7</sup> where the Court restated the legal test of practicability of reinstatement enunciated in *NZEI v the Board of Trustees of Auckland Normal Intermediate School*,<sup>8</sup>. That test is framed in terms of the reimposition of the employment relationship being carried out successfully. To my mind, successful reimposition of the employment relationship requires the parties to be able to fully discharge their responsibilities in that relationship. In some cases one party may choose to forego the other party's performance where the reinstatement is only interim but where one party is entirely unable to perform its part of the bargain, it is difficult to say that the employment relationship can be successfully reimposed.

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<sup>7</sup> [2010] NZCA 320

<sup>8</sup> [1994] 2 ERNZ 414 (CA)

[23] The only significant factor favouring interim reinstatement is the plaintiff's financial situation. In terms of overall justice, I find the fact that he is very largely responsible for that situation counts against him.

[24] Standing back and having regard to all aspects of the matter, including the particular factors I have discussed in detail, I find that the overall justice of the matter does not favour interim reinstatement.

[25] The challenge is successful. The determination of the Authority is set aside and this decision stands in its place.

### **Publication**

[26] The Authority made an order prohibiting publication of any information which would identify either party. Both parties before the Court seek a similar order in relation to the proceedings before me.

[27] The starting point must be that proceedings in the Court ought to be conducted openly and be subject to report without restriction. An order prohibiting publication should only be made where the harm which may result from publication is out of proportion to the public good inherent in an open judicial system.

[28] My initial reaction in this case was not to make any order restricting publication. After hearing counsel and reflecting on the matter however, I have decided that a limited order should be made. My principal reason for doing so is that the substantive proceedings remain before the Authority. In the course of those proceedings, many highly prejudicial allegations are likely to be made about the defendant. It will be for the Authority to determine whether those allegations have substance. That being so, I think it would be wrong for me to pre-empt the Authority's powers to control publication of material which is unduly prejudicial by identifying the defendant now.

[29] As to the plaintiff, the principle reason for seeking suppression was that public knowledge that it was continuing to employ a pilot against whom serious



allegations have been made would damage Pacific Blue's public image. My decision not to grant the defendant further interim reinstatement must largely eliminate that possibility. As to any residual prejudice to the plaintiff of publication, I do not regard that as outweighing the public interest in open justice. In any event, the fact that Air New Zealand has recently made a public statement that it is not the airline involved, and there being only one possibility other than Pacific Blue, has largely let the cat out of the bag.

[30] There will be an order prohibiting publication of any information likely to identify the defendant in this matter. That order is to remain in effect until further order of the Court or of the Authority.

### **Costs**

[31] Costs in the Court are reserved for consideration after completion of the proceedings which remain before the Authority.

A A Couch  
Judge

Judgment delivered at 2.55pm on 20 August 2010