IN THE COURT OF APPEAL OF NEW ZEALAND

CA19/2011
[2011] NZCA 299

BETWEEN	AIR NEW ZEALAND LIMITED Applicant
AND	RANDALL WULFF Respondent

Hearing: 14 June 2011

Court: Chambers, Ellen France and Stevens JJ

Counsel: A H Waalkens QC and K M Thompson for Applicant
P F Wicks and L Keys for Respondent

Judgment: 28 June 2011 at 3pm

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs for a standard application for leave on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Ellen France J)

Introduction

[1] This is an application under s 214(1) of the Employment Relations Act 2000 for leave to appeal against a judgment of Judge Couch in the Employment Court, in

which the Judge upheld the respondent's claim of unjustifiable dismissal and ordered reinstatement and compensation for lost earnings and emotional distress.[1]

Background

[2] The respondent, Randall Wulff, was employed by Air New Zealand as an international flight attendant. His conduct on two flights in early 2008 gave rise to concern on the part of Air New Zealand about his compliance with various airline safety standards. After a lengthy investigation, Mr Wulff was dismissed in November 2008.

[3] The dispute that arose between the parties has its genesis in a notice Air New Zealand issued in December 2007 to international cabin crew. The notice set out revised rules for rostering staff, including the handling of requests by staff for particular work or for particular days off. These rules introduced what were termed "productivity requests" which gave an advantage to staff with few absences for illness or injury, regardless of the cause.

[4] The Flight Attendants and Related Services Association (FARSA), the union to which many flight attendants belong, took issue with this notice. On 8 January 2008, a letter was sent to Air New Zealand setting out various concerns and seeking a meeting to discuss them. The letter was written in the first person and was signed by Mr Wulff as vice president of the union. One of the propositions in the letter was that the new policy penalised those staff who suffered work related accidents. To illustrate the point, the letter referred to "turbulence injury". The letter suggested that the new policy would encourage cabin crew to respond by, for example, remaining seated whilst in flight on all occasions where the seatbelt sign was illuminated. The letter acknowledged that this approach was not in the best interests of the airline, crew or customers.

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[1] *Air New Zealand Limited v Wulff* [2010] NZEmpC 158. The matter came before the Employment Court by way of a hearing de novo after Air New Zealand challenged the decision of the Employment Relations Authority which also found Mr Wulff's dismissal unjustifiable and ordered reinstatement: *Wulff v Air New Zealand Limited* ERA Auckland AA433/09, 4 December 2009.

[5] Air New Zealand responded by modifying its earlier notice to an extent by allowing for exemptions from the productivity request policy in exceptional circumstances. Various meetings between FARSA representatives and Air New Zealand management then followed.

[6] On 11 March 2008, FARSA issued a notice to its members, headed "ALERT". Mr Wulff was involved in the preparation of the notice. The notice included the following:

> The safety of our members is of paramount concern and for that reason FARSA is **recommending** that on all occasions that the seatbelt sign is illuminated, to refrain from all activities unless assisting in a life threatening situation and secure your harness immediately to minimise the chances of injury to yourself and others.

[7] Air New Zealand responded two days later, on 13 March 2008, with a letter stating that its notice purported to alter the established turbulence management policy. Safety and regulatory issues were identified and the union was required to withdraw its recommendation. The letter was addressed to the secretary of FARSA but a copy was also sent to Mr Wulff, then the acting president of the union.

[8] The next day FARSA issued a further notice to its members which stated:

> FARSA wishes to notify all members that the Alert Update relating to the recommendation around turbulence and seating of cabin crew issued on the 11th March 2008 was issued without sufficient consideration of CAA regulations and compliance.
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> All members **must** continue to comply with the Standard Operating Procedures and CAA regulations as set out in SEP [safety and emergency procedures] manuals. These are all approved by CAA and must be complied with.

[9] The two flights these proceedings relate to then took place. The first of these was an Auckland - Melbourne return flight on 24 March 2008. Mr Wulff was a crew member on both legs of this trip. He had discussions over the course of the flights with the pilot-in-command, Captain Pattie, about how Mr Wulff would behave during turbulence. The conversations led Captain Pattie to question whether Mr Wulff could be relied on to follow safety procedures, and, as a result, whether he could fly with Mr Wulff again. There were also issues about statements Mr Wulff

had made in a pre-flight briefing. A similar issue arose in relation to a briefing prior to the second flight from Auckland to Vancouver on 4 April 2008. Again, Mr Wulff was a crew member on that flight. Other in-flight issues of concern to Air New Zealand included Mr Wulff and two other cabin crew being seated with their harnesses fastened when other cabin crew were continuing to provide the meal service.

[10] An investigation by the Acting Cabin Crew Manager, Philip Callaghan, followed. After interviewing a number of persons, including Mr Wulff and following various exchanges with Mr Wulff and his counsel, Mr Callaghan concluded that Mr Wulff's conduct amounted to misconduct, some of which was serious. Mr Wulff was then dismissed.

The decision of the Employment Court

[11] Judge Couch in the Employment Court said that whether Mr Wulff's dismissal was justifiable had to be decided in accordance with the test in s 103A of the Employment Relations Act.[2] Judge Couch considered the actions taken by Air New Zealand in the course of the investigation were not those of a fair and reasonable employer, and that such an employer would not have concluded that the actions of Mr Wulff amounted to serious misconduct.

[12] In reaching this conclusion, the Judge identified some problems with the investigation process, for example, staff members who could have corroborated Mr Wulff's account on particular matters were not interviewed. In addition, Judge Couch was critical of the failure to take into account later statements made by Captain Pattie (favourable to Mr Wulff) and various assurances given by Mr Wulff that he would follow the relevant safety policies and procedures. Further, the Judge considered that there was an insufficient basis to conclude that there was misconduct in relation to the Vancouver flight (apart from one minor incident). Finally, Judge Couch said that the investigation failed in not differentiating between the

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[2] That section provides that the question of whether a dismissal was justifiable must be determined on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time of dismissal.

union's actions and those of Mr Wulff in his personal capacity and in not taking into account other factors, such as Mr Wulff's unblemished record of over 13 years service with the airline.

[13] We come back to some of the detail of the reasoning shortly.

The proposed questions of law

[14] Air New Zealand submits that the decision of the Employment Court gives rise to two questions of law, namely:

(a) In justifying a dismissal or other disciplinary action under s 103A of the Employment Relations Act, is an employer precluded from taking into account, to the extent that they may be relevant, an employee's actions while the employee is acting or purporting to act in a capacity other than that of employee, such as in a capacity as a union representative? and

(b) Was it open to the Court to find that reinstatement was practicable, in view of Air New Zealand's statutory and regulatory responsibilities under the Civil Aviation Act 1990 and the Civil Aviation Rules?

[15] On the first proposed question, Mr Waalkens QC, on behalf of Air New Zealand, submits that the Employment Court should have proceeded on the basis that the union's views were shared by Mr Wulff personally. Accordingly, those views were a relevant consideration as to his suitability for continued employment in accordance with s 103A of the Act. It follows, Mr Waalkens says, that Judge Couch did not take into account all of the circumstances relevant under s 103A. In particular, the Court ignored behaviour that was arguably relevant to safety when considering whether Mr Wulff continued to possess the attributes essential for his job as a flight attendant.

[16] In terms of the second proposed question, Mr Waalkens submits that reinstatement is not practicable because it puts the airline in conflict with its

statutory and regulatory responsibilities, particularly those relating to safety. The submission is that clarification is required on the extent to which the general power to order reinstatement can override or usurp the specific responsibility of an employer, by law, to determine whether an individual is suitable for the role, for example, that of a flight attendant, pilot or engineer in the civil aviation environment.

[17] In opposing the application for leave, Mr Wicks on behalf of Mr Wulff submits that neither proposed question gives rise to any question of law. As to the first question, the submission is that the Employment Court did not preclude the possibility of taking into account Mr Wulff's actions in his capacity as a union representative in considering the question of justification. Rather, the Judge found as a matter of fact that Mr Wulff was not acting in his personal capacity when, for example, he wrote the letter of 8 January. In terms of the proposed second question, Mr Wicks submits that the issue raised simply reflects disagreement over the factual findings.

Discussion

[18] Leave to appeal from the decision of the Employment Court may be granted only if, in this Court's opinion, a question of law involved in the proposed appeal, by reason of its general or public importance or for any other reason, ought to be submitted to this Court.[3] The matters raised by Air New Zealand potentially raise questions of law. However, for the reasons we now discuss, we do not consider that they do so in the present case.

[19] In terms of the proposed first question, the initial point to note is that the Judge was not applying any rigid standard but rather dealing with the facts of the case as the Judge found them. To explain our view on this aspect, it is helpful to set out the Employment Court's discussion of this point in more detail. The context of the reasoning in this part of the decision was the conclusion drawn by Mr Callaghan that Mr Wulff was responsible as an employee for his actions as a union representative and that his conduct as an employee was more serious because he was

[3] Employment Relations Act 2000, s 214(3).

a union representative. In concluding that neither of these findings was appropriate or justifiable, Judge Couch said that, generally, when a union's representatives are acting on behalf of the union, their actions must be attributed to the union.[4] But the Judge then went on to consider the specifics of Mr Wulff's case. On this, the Judge concluded:[5]

> It is clear that, in his involvement with the letter of 8 January 2008 and the ALERT notices issued on 11 and 14 March 2008, Mr Wulff was acting as a representative of FARSA. That being so, responsibility for those actions lay with the union, not with Mr Wulff as an employee ... .

[20] The high point for Air New Zealand is to query the adequacy of the Judge's analysis of the factual basis for that conclusion. But we are satisfied it is certainly not a situation where there was no evidence on which the Judge could reach the finding he did.

[21] A further factor is that this aspect is not central to the decision. That is because the letter of 8 January was overtaken by other events. First, as the Judge noted, the union backtracked somewhat with the second ALERT notice. Secondly, there were the assurances from Mr Wulff that he would comply with the relevant safety procedures and policies. Accordingly, the Judge's conclusions on the first proposed question of law essentially turned on the factual findings.

[22] As to the second proposed question, the safety concerns were considered in the Employment Court. However, Judge Couch found that the factual conclusions reached by Mr Callaghan in the course of his investigation were ones not open to him. It was not possible to say that there was an outstanding safety issue. The Judge's reasoning is apparent in the following excerpt:

> [131] The second and third themes of [Air New Zealand's] submissions can be considered together. They were summarised in the following paragraph of [counsel's] synopsis:
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> > If the Court was to order reinstatement, it would, in effect, be overriding the specialist judgment of Air New Zealand that for the reasons given, Mr Wulff's presence in the business compromised Air New Zealand's ability to operate as safely as

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4 At [103].
5 At [104].

> it could and in discharge of its various responsibilities to a range of third parties.
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> [132] I do not accept that submission in the context of this case. It relies on the conclusions reached by Mr Callaghan. In particular, it relies on the proposition that Mr Wulff actually breached an SEP in the course of his duty. For the reasons I have given, that conclusion was inappropriate except as to the admission by Mr Wulff that he failed to check the toilets for passengers on one occasion. Such an omission cannot sensibly be said to undermine Air New Zealand's overall ability to meet its safety and regulatory obligations.

[23] In addition, it is significant that the Judge found that, even putting the evidence for Air New Zealand at its highest, "there was never any issue that Mr Wulff would not comply with [the safety procedures] generally".[6] The focus was narrow and confined to one aspect of the safety procedures, namely, crew behaviour during light turbulence. On this point, Judge Couch said:[7]

> On the evidence, I cannot accept that the issue of when a flight attendant should or should not sit during light turbulence is of sufficient significance to affect either flight safety or Air New Zealand's regulatory obligations. As to the latter, Captain Morgan [Air New Zealand's Chief Pilot] agreed that the issues involved in this case were not ones requiring any reporting under the Civil Aviation regulations. As to safety, both Captain Pattie and Captain Campbell-Cree [the pilot-in-command on the Vancouver flight] agreed that the only consequence of sitting down during light turbulence may be a delay in cabin service and that it did not compromise safety.

[24] As with the first question Air New Zealand wishes to advance, this issue turned on the factual findings. Neither proposed question gives rise to a question of law in terms of s 214(3) of the Act.

Disposition

[25] For these reasons, the application for leave to appeal is dismissed. The applicant, having been unsuccessful, must pay the respondent costs for a standard application for leave on a band A basis and usual disbursements.

Solicitors:
Air New Zealand Limited, Auckland for Applicant
Swarbrick Beck, Auckland for Respondent

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6 At [134].
7 At [135].