IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 4/09
CRC 16/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	WARWICK BENSON Plaintiff
AND	AIR NELSON LIMITED Defendant

Hearing: 11, 12 and 13 May 2009
(Heard at Nelson)

Appearances: J A Wilton, Counsel for Plaintiff
K M Thompson, Counsel for Defendant

Judgment: 22 May 2009

JUDGMENT OF JUDGE A A COUCH

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[1] Mr Benson worked for Air Nelson Ltd and related companies for 33 years until July 2007. For much of this time, he was a customer services agent engaged in checking in passengers. For the last 11 years of his employment, he was one of three customer service supervisors at Nelson Airport.

[2] On 20 June 2007, it was discovered that Mr Benson had been recording false data relating to the weight of passengers' baggage. Following a detailed investigation, Mr Benson was summarily dismissed on 23 July 2007.

[3] Mr Benson pursued a personal grievance alleging that his dismissal was unjustifiable. That claim was investigated by the Employment Relations Authority which determined that his dismissal was justified (CA 42/08, 17 April 2008). Mr Benson challenged that determination and the matter proceeded before the Court by

way of a hearing de novo. Throughout the personal grievance process, the primary remedy sought by Mr Benson was reinstatement to his former position.

[4] I was told by counsel that the evidence provided to the Court was essentially identical to that provided to the Authority. This comprised the evidence of seven witnesses for the plaintiff and four witnesses for the defendant. I was also provided with comprehensive documentation including verbatim transcripts of the several disciplinary meetings.

[5] Hearing this evidence took more than 2 days but, as a result of thorough cross-examination, there were few remaining issues of fact. With the assistance of thoughtful submissions from counsel, I was readily able to resolve those issues. There were no contentious issues of law. Reaching a decision was therefore a matter of applying established principles of law to the facts as agreed or as I found them to be.

[6] I was conscious that Mr Benson was still seriously seeking reinstatement and that both he and Air Nelson wished to have a decision as soon as possible. Following my normal practice of writing decisions in the order in which cases were heard, and having regard to my commitments to other hearings, it was likely that a fully detailed decision might not be available for several months. I therefore offered the parties the alternative of a prompt decision with only the essential reasons. Both parties opted for such an abbreviated decision.

[7] The background to the matter, how the issue which led to Mr Benson's dismissal arose and the nature of the disciplinary process are set out in some detail in the Authority's determination at paragraphs [5] to [34]. I need not repeat all of that here. Rather, I focus on the key facts and on the cases relied on by the plaintiff and the defendant.

Key facts

[8] Mr Benson was trained and experienced in the loading of aircraft. This included documenting the weight of all baggage and freight to be loaded on an

aircraft and performing calculations necessary to ensure that both the weight and balance of the loaded aircraft were within safe limits.

[9] Mr Benson was also trained and experienced in the procedures for checking in passengers. An aspect of this process was the weighing of baggage and recording that information in Air Nelson's computer system where it was later used for a variety of purposes including the weight and balance calculations. As a supervisor, Mr Benson was not only responsible for carrying out these procedures himself but also for ensuring that other staff did so.

[10] Air Nelson had established procedures for dealing with excess baggage. At the time in question, that was baggage exceeding 23 kg for any one passenger. The normal course was that the passenger would be charged a fee for the excess baggage. There were, however, a number of exceptions to this such as sports equipment, frequent flyers and seamen. Customer service agents also had a limited discretion to waive excess baggage fees in exceptional circumstances. On all occasions on which exceptions applied or that discretion was exercised, the reason for not collecting excess baggage charges had to be recorded. Until May 2007, this was done manually.

[11] In May 2007, the procedure for handling excess baggage was automated. This was done using a new component to the software used at check in. It was called X-Bag. When a passenger checked in, the weight and number of bags was still manually entered into the computer system as before. If the weight exceeded 23 kg, the X-Bag software would "pop up" and had to be completed. This required payment of the appropriate fee to be made or the reason for not charging it to be entered into the system. Only then would bag tags be issued and the check in process be completed.

[12] X-Bag did not change Air Nelson's policy regarding excess baggage. The threshold for payment of fees remained at 23kg, the same fee structure applied and the range of reasons for not collecting excess baggage fees was unchanged. All that changed was the method of recording information about excess baggage.

[13] For some time following the introduction of X-Bag, Air Nelson allowed staff to continue using the old system of manual recording of excess baggage information if they wished to.

[14] Mr Benson was trained in the use of X-Bag on 9 May 2007 and began using the software when it was first put into service on 18 May 2007. Mr Benson was able to use it successfully on a number of occasions, apparently with help from colleagues at times. He did not report having any problems in using the software or seek further training; neither did he revert to using the manual system.

[15] Some time late in May 2007, Mr Benson began using a different practice for dealing with excess baggage. When a passenger presented with more then 23 kg of baggage, Mr Benson would not record the actual weight. Rather, he would record it as 23 kg. This meant that X-Bag was not triggered and he was able to obtain bag tags without collecting any fees or recording any information. He would note on a scrap of paper, or mentally, the amount of weight the bags had actually been over the 23 kg recorded and then add this amount to the weight recorded for the bags of a subsequent passenger with less luggage. On occasions, Mr Benson altered records of weight entered earlier by him or by other staff.

[16] Mr Benson acknowledged that this practice involved deliberately recording false information about the weight of baggage to be loaded onto aircraft but said he believed it was acceptable. He gave two reasons for this. Firstly, he said that he made sure the "overs" and "unders" balanced. Secondly, if there was a problem he relied on this being picked up by the practice at Nelson Airport of weighing baggage trolleys on a weighbridge prior to loading the aircraft.

[17] Mr Benson's actions first came to the attention of his manager, Ms Lawry, on 20 June 2007. Later that day, she recorded in a memorandum what gave her cause for concern and her recollection of the conversation she then had with Mr Benson. The first part of that memorandum was:

> *At approximately 1140 a staff member brought to my attention a discrepancy with the bag weight for passenger [Ms S] on NZ8507 to CHC. Warwick had checked her in with a baggage of 3 pieces weighing 23 kgs. The staff*

member was concerned that there could be an error with the baggage weight and therefore weighed the bags and they weighed 30 kgs.

I check weighed them and confirmed they weighed 30 kgs.

I spoke to Warwick Benson, who checked the passenger in, asking if he is charging XS at all times.

He said that he is not always.

I asked why not, he replied because of what is going on with the industrial situation at the moment.

I asked if this was him making his own form of protest – he replied that he was

He said that a number of people were not doing things that they should be because of the current situation. I asked what but he said little things, like things not being tidied away.

He said he was not putting in the correct baggage weight against people checking in.

I said this was a serious breach of what we do, and that it had serious safety implications by not putting the correct weight in. He said that he made sure the weight was correct in the system somehow. I asked if he put the weight against someone else and he said that he did.

He said that I knew he wouldn't do anything to jeopardise safety, but I replied that I didn't know that.

I said that he was a leader in traffic and if everyone followed what he did there could be serious implications.

I said that I did not want him to do this, I asked him to assure me that he would not do this again. He said he would not.

[18] Ms Lawry gave evidence confirming that this was an accurate summary of what occurred and what was said. Mr Benson did not dispute the accuracy of the summary but sought to explain his confirmation that he had been recording false baggage weights as a form of protest. He said that Ms Lawry's initial question about excess baggage charges had irritated him and that, when she asked whether his actions were a form of protest, he thought she was trying to provoke him. According to Mr Benson, he was *"silly enough to take the bait"*, which he explained to mean that he had agreed with Ms Lawry's suggestion in order to annoy her rather than to inform her.

[19] During the investigation which followed, Mr Benson gave several other reasons for his actions. On 21 June 2007, Mr Benson said that *"sometimes it was compassionate, not always industrial"*. He also referred to *"dealing with long*

queues". At a later stage, Mr Benson said that he had not received sufficient training. In his evidence, Mr Benson emphasised the issue of training and said that he was under great pressure because there was industrial action being taken by other staff at the airport at the time.

[20] In the course of the investigation, Mr Benson was adamant that his conduct had no safety implications. In his evidence, he initially maintained that position but later accepted that what he had done potentially compromised the safety of aircraft. All other witnesses also accepted this was so and it was clearly established by the evidence.

[21] Mr Benson's actions deprived Air Nelson of excess baggage fees to which it was entitled.

[22] The records of baggage weight formed part of the information Air Nelson was required to keep in its role as an Airline Air Operator under the Civil Aviation legislation. By making false records, Mr Benson placed Air Nelson in breach of its regulatory obligations. He was also in breach of Air Nelson's operational instructions which he was bound by his conditions of employment to observe.

[23] Air Nelson had comprehensive personnel policies, two aspects of which were relied on in this case.

[24] The first was the disciplinary procedure for dealing with suspected misconduct which provided that *"Where the company has received notice of alleged misconduct on the part of an employee which could give rise to some form of disciplinary action"*, the matter should be referred to the employee's department manager who would first conduct a *"preliminary investigation"*. The policy then went on to provide that *"On completion of this preliminary investigation, the employee must be interviewed if it has been established that the employee's conduct raises grounds for concern"* and *"The employee must be informed of their right to be accompanied at the interview by a personal representative."*

[25] The second aspect of Air Nelson policy relied on was the process known as *"Just Culture and Open Reporting"*, the purpose of which was described as being *"to provide a fair, open and more blame-free reporting culture."* The process was described in the policy manual in three algorithms, each of which comprised a logical sequence of questions with the answers leading to various outcomes. Some of the outcomes provided for in the algorithms involved disciplinary action, others did not.

[26] The decision to dismiss Mr Benson was made by John Hambleton, the general manager of Air Nelson. In his evidence, Mr Hambleton recorded his conclusion that Mr Benson had recorded false weight information as a form of protest against his employer and that he found Mr Benson's explanation that he had been motivated by compassion for passengers not credible.

Test of justification

[27] Whether Mr Benson's dismissal was justifiable must be decided by applying the test in s103A of the Employment Relations Act 2000:

> ***103A Test of justification***
> *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action 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 would have done in all the circumstances at the time the dismissal or action occurred*

Case for the plaintiff

[28] The case for Mr Benson was summarised by Mr Wilton in the first paragraph of his submissions:

> *1. The plaintiff says his dismissal was unjustified because*
>
> *(a) The initial interview with him by Ms Lawry was unfair and unreasonable, and did not conform with Air Nelson's own policies and procedures;*
>
> *(b) It was unfair and unreasonable for Air Nelson to rely on the response of Mr Benson obtained in those circumstances, and its reliance poisoned the investigation from the outset;*
>
> *(c) Mr Benson's explanation of his actions was plausible in the circumstances, and would have been accepted by a fair and*

reasonable employer but for the reliance placed on Mr Benson's response to Ms Lawry; and

(d) To the extent that Mr Benson's actions were open to criticism, a fair and reasonable employer would have dealt with them under the Just Culture process.

Case for the defendant

[29] The case for the defendant was that Mr Benson had deliberately engaged in a sustained practice of falsifying important company records and, in doing so, he:

a) deprived Air Nelson of revenue to which it was entitled;

b) created a potential risk to aircraft safety;

c) was in breach of explicit operational instructions and of a condition of his employment which required him to observe those instructions; and

d) placed Air Nelson in breach of its regulatory obligations as an air transport operator and, as a result, adversely affected Air Nelson's reputation.

[30] Air Nelson also relied on the manner in which Mr Benson explained his actions during the disciplinary investigation. Particular emphasis was placed on the variety of reasons given by Mr Benson for his actions and the manner in which his explanation changed as the investigation progressed.

[31] A further point made by witnesses for the defendant and by Mr Thompson in his submissions was that Mr Benson's actions were "invisible". He kept no records of the incorrect entries he made in the system and, because most of those incorrect entries were primary records, there was no means of tracing them. Even Mr Benson did not know which weight records were accurate and which were not.

Discussion

[32] On the evidence, the case relied on by Air Nelson was amply made out. I therefore turn to the case for Mr Benson and the application of s103A to the facts.

[33] The first two aspects of the case for Mr Benson concerned the initial conversation he had with Ms Lawry on 20 June 2007. The primary submission made by Mr Wilton was that, once Mr Benson said he did not always charge for excess baggage and referred to *"the industrial situation"*, Ms Lawry ought to have concluded the discussion with him, conducted a preliminary investigation and advised Mr Benson of his right to representation before talking to him again. This submission was based principally on the personnel policy, the relevant parts of which have been summarised above.

[34] I do not accept this submission. When Ms Lawry went to talk to Mr Benson, all she knew was that the weight of one passenger's bags had been incorrectly recorded in the system, apparently by Mr Benson. Her initial concern was the excess baggage charge which might have been payable but was avoided because the weight was recorded as only 23 kg. This required explanation but was not an allegation of misconduct. There were many possible reasons why these events may have occurred, including some which did not involve misconduct. Equally, Mr Benson's reply that he did not always charge for excess baggage was not necessarily an admission of misconduct. Much evidence was given about the various circumstances in which passengers were entitled to check in excess baggage without charge. In this situation, it was entirely reasonable for Ms Lawry to ask Mr Benson to explain what he meant. The reply from Mr Benson referring to *"the industrial situation at the moment"* was vague and warranted further clarification before Ms Lawry could decide whether to invoke the disciplinary process. The first clear indication of possible misconduct during that conversation was when Mr Benson said that he was not correctly recording baggage weights. It was at that point Ms Lawry stopped asking Mr Benson questions which might disclose misconduct. Rather her concern moved to issues of safety.

[35] I reject this first aspect of Mr Benson's case for other reasons also. The part of the policy manual dealing with disciplinary process relating to misconduct begins by saying *"The following guidelines are suggested approaches to dealing with cases of misconduct. Situations will vary in individual cases."* Any error in recording the weight of items to be loaded onto an aircraft inevitably had safety implications. Ms Lawry had a duty to ensure any possible safety issues were identified and eliminated

without delay. That required an immediate investigation to clarify the critical facts. In such a case, departure from the guidelines set out in the policy manual was appropriate.

[36] Mr Wilton's second submission was that it was unfair and unreasonable for Air Nelson to rely on what Mr Benson said in reply when Ms Lawry asked him whether his actions were a form of personal protest and that this reliance poisoned the investigation from the outset.

[37] This submission was based on Mr Benson's evidence that what he said to Ms Lawry on that occasion was incorrect and was said as an angry response to an attempt by Ms Lawry to provoke him. Having regard to the evidence as a whole, I do not accept this part of Mr Benson's evidence. In the course of the disciplinary investigation which followed the discussion on 20 June 2007, Mr Benson was repeatedly asked why he adopted the practice he did. Repeated reference was made to Mr Benson's initial explanation that it was a form of protest and to what he said the following day that he acted as he did partly for *"industrial"* reasons. Mr Benson steadfastly refused to say what he meant by such terms. Eventually, he purported to withdraw this as an explanation but I conclude that he did so to avoid further questioning about it and to avoid explaining what he meant. In the course of that detailed and direct discussion about the issue, Mr Benson had ample opportunity to explain that what he said on 20 June 2007 was incorrect if that was the case. He never did so in the course of the investigation. In these circumstances, it was not unreasonable for Air Nelson to rely on what Mr Benson said.

[38] As to the proposition that reliance on what Mr Benson said on 20 June 2007 *"poisoned"* the investigation, this merges into the third submission made by Mr Wilton which was that Mr Benson's alternative explanations were plausible and would have been accepted by a fair and reasonable employer but for the reliance placed on what Mr Benson initially said.

[39] I find that this proposition is simply not supported by the evidence. As I have already noted, there was a great deal of discussion throughout the investigation process about the reasons for Mr Benson's actions. In the course of that discussion,

Mr Benson put forward several other reasons for his conduct. Mr Hambleton said that he considered those other explanations and rejected them for particular reasons. I accept that evidence.

[40] I reach that conclusion largely because there was good reason to reject Mr Benson's other explanations. The explanation that Mr Benson was motivated by compassion was illogical. A feature of the evidence given by Mr Benson and two other witnesses was that supervisors in Mr Benson's position had considerable discretion to waive excess baggage fees. If that was what Mr Benson believed, he would have recorded the correct weights and waived the fees then payable. He did not have to falsify the weight records to be compassionate.

[41] The second alternative explanation Mr Benson relied on was that he had difficulty using the X-Bag software and put false weights in to the system to avoid having to use X-Bag. This overlapped with the other explanation Mr Benson gave which was that the strike action then being taken by other employees of Air Nelson placed a great deal of stress on him and other check in staff which exacerbated the difficulties he was having in using X-Bag.

[42] The proposition that Mr Benson had difficulty with X-Bag from the start was inconsistent with what he told Air Nelson in the course of the investigation that he had only been entering false weights for 2 weeks prior to 20 June 2007. X-Bag came into use on 18 May 2007, more than 4 weeks prior to 20 June 2007. There was also documentary evidence showing that Mr Benson had successfully used X-Bag on many occasions, including right up to 20 June 2007. These explanations were also inconsistent with other evidence. Mr Benson never told his manager he was having any trouble with X-Bag or sought any additional training. He never used the alternative and very familiar manual system which remained available throughout the period he said he was having trouble.

[43] I find that Air Nelson was entitled to take into account the explanation Mr Benson initially gave on 20 June 2007 and that the subsequent investigation was not improperly affected by doing so. I also find that the alternative explanations

subsequently given by Mr Benson were implausible and that it was fair and reasonable for Air Nelson, through Mr Hambleton, to reject them.

[44] The final submission made by Mr Wilton was that Mr Benson's conduct should have been dealt with through the Just Culture process and that, had this been done, the outcome may well have been different. He suggested that Mr Benson's actions disclosed *"systemic issues of the type which the Just Culture process – share, learn from and resolve, rather than shame and blame – was set up to deal with."*

[45] I do not accept this submission for two principal reasons. Firstly, it was based on the proposition that Mr Benson adequately explained why he adopted the practice he did. I have already found that was not so.

[46] Secondly, the personnel policy which provided for the Just Culture process explicitly said:

> *The presence of "Just Culture" will not prevent the disciplinary processes necessary to combat reckless or negligent behaviour causing, or leading to, harm or potential harm to the public, staff, customers or operations.*

[47] Mr Benson's conduct fell within the scope of that provision which makes it clear that, in such circumstances, Just Culture was not to be regarded as excluding a disciplinary process.

Application of s103A

[48] Other than the issues raised about the initial discussion between Ms Lawry and Mr Benson on 20 June 2007, there was no challenge to the process adopted by Air Nelson in its investigation of this matter. The final question I must decide is therefore whether a fair and reasonable employer would have dismissed Mr Benson in all the circumstances prevailing on 23 July 2007.

[49] I am in no doubt that what the investigation disclosed was a sustained course of conduct by Mr Benson which was deliberate, which he knew was wrong, which he knew deprived Air Nelson of revenue and which he knew or ought to have known had the potential to affect safety. That course of conduct was concealed and, had it

not been detected, Mr Benson would have continued with it. In the course of the investigation, Mr Benson gave no explanation for his actions which was credible and acceptable. This conduct went to the heart of the employment relationship and inevitably undermined the essential relationship of trust and confidence. In that sense, a fair and reasonable employer would have regarded Mr Benson's actions as serious misconduct.

[50] The other factor which must be taken into account is Mr Benson's long and unblemished record of employment by Air Nelson and related companies and his position as a supervisor. That cuts both ways. On one hand, it is a factor a fair and reasonable employer would take into account in mitigation of penalty. On the other hand, an employer would be entitled to expect that an employee with the experience, knowledge and position of responsibility which Mr Benson had had to know that falsifying weight records was fundamentally wrong and not to have done it.

[51] Overall, I find that, in all the circumstances of this case at the time in question, a fair and reasonable employer would have dismissed Mr Benson.

Conclusion

[52] I agree with the conclusion reached by the Authority in its determination and I do so for very similar reasons. The challenge is dismissed.

Costs

[53] Counsel both sought to have costs reserved for submissions following my substantive decision. Unless costs can be agreed, Mr Thompson is to file and serve a memorandum within 21 days after the date of this decision. Mr Wilton is then to have 14 days to file and serve a memorandum in reply.

A A Couch
Judge

Judgment signed at 12.30pm on 22 May 2009