IN THE EMPLOYMENT COURT
AUCKLAND

AC 51/06
ARC 96/05

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JUNIOR FUIAVA Plaintiff
AND	AIR NEW ZEALAND LIMITED Defendant

Hearing: 3 February 2006
(Heard at Auckland)

Appearances: Garry Pollak, Counsel for Plaintiff
Rachel Larmer, Counsel for Defendant

Judgment: 12 September 2006

JUDGMENT OF JUDGE B S TRAVIS

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[1] This is a most unfortunate case where an employee who was well regarded at work has been dismissed for serious misconduct. The plaintiff was employed as a storeman in Air New Zealand's Cargo Terminal at Auckland International Airport. He arranged for a parcel to be sent as air cargo to relatives in Samoa. Unbeknown to the plaintiff, his wife had added two aerosol containers of brake cleaner, a highly flammable fluid, to the parcel. These are dangerous goods which can imperil an aircraft. The plaintiff signed a declaration that the parcel lodged by him for carriage by air did not contain any dangerous goods, such as aerosols of any kind, and that there were no items that he did not pack himself and that no one could have placed something in his parcel without his knowledge. Fortuitously the dangerous items were discovered on a routine x-ray check and removed from the package.

[2] The Authority, in a determination issued on 20 October 2005, after considering the new test of justification inserted into the Employment Relations Act 2000 as s103A by an amendment in 2004, concluded that the plaintiff's dismissal was what a fair and reasonable employer would have done in all the circumstances and therefore the plaintiff did not have a personal grievance. The plaintiff has challenged that determination and sought a full hearing of the entire matter.

Facts

[3] The factual matters were not greatly in dispute. The plaintiff had worked for Air New Zealand for approximately three years. He enjoyed his work, had close friends in the workplace and was allowed to work extensive overtime when it was available. He had no disciplinary issues and, to the contrary, his employer thought well of him. Mr Sullivan, the Cargo Operations Manager, described him as a conscientious worker and accepted that he was a harmonious employee in the department. Mr Sullivan said he liked the plaintiff and regarded him as an exemplary worker, who was courteous, polite and happy.

[4] When the plaintiff started work he received training in dealing with the transportation of dangerous goods. The course he attended was one approved by the Civil Aviation Authority in New Zealand. It covered the classes of dangerous goods, their identification, the handling of cargo including dangerous goods, the loading of dangerous goods and the documentation, including the declaration which has to be signed by shippers. The plaintiff was given a book which covered the course topics and the plaintiff acknowledged that not only had he read the booklet but he understood the instructions on handling dangerous goods and was fully familiar with the airline's requirements. He was also trained in the x-ray processing of goods for air cargo, a function he frequently carried out in the course of his employment.

[5] In June 2004 there was an incident, described by the defendant as being serious, concerning the handling of dangerous goods on an aircraft. As a result of that incident, all Cargo handling staff, including the plaintiff, received a special dangerous goods update and were issued with a dangerous goods handling booklet on 4 June 2004, which the plaintiff signed that he had read and understood. On the covering memorandum it stated "*the company will regard any failure to comply with*

DG [dangerous goods] *handling procedures as a very serious matter*". Colour notices were put up around the workplace following the June 2004 incident. These were very obvious to everyone and they listed items which posed risks to health, safety or property when they are sent by air. The plaintiff also knew that aerosols were the most common sort of dangerous goods that were often packed in consignments and they would be pulled out at the x-ray stage, where the plaintiff worked most of the time. He knew that aerosols were dangerous because they can explode and can damage and impair an aircraft. If the aerosols contained flammable material this could add fire to the danger of explosion, posing catastrophic hazards for aircraft.

[6] Although the defendant's records of the dangerous goods revalidation training given to the plaintiff were not complete, the plaintiff acknowledged in cross-examination that in or about November 2004, he received such training as part of a security revalidation. He remembered being taken through dangerous goods training to ensure that he knew how to properly handle them. He accepted that he knew what he was meant to do at that time.

[7] The plaintiff, like all candidates for employment in the Cargo department, had been tested for literacy skills and accepted in evidence that he understood his obligations. He knew that the defendant regarded any failure to comply with dangerous goods handling procedures as a very serious matter which could cause Cargo department employees to be dismissed.

[8] He also accepted that as a staff member duly trained in the cargo handling area he was regarded as a "*known shipper*". This class of shippers included staff members who the defendant knew had been trained in handling dangerous goods and who had been through security checks. The defendant had no regulatory obligation to check or x-ray any luggage or parcels that a known shipper was consigning. He knew that safety was the overriding priority in the airline industry and the most important matter for the defendant, coming before profit and contractual obligations. If there was any doubt about the safety of an item it would be removed because the defendant required full compliance with safety issues and he knew that not prioritising safety could be catastrophic. He was also aware that staff could be dismissed for shipping dangerous goods that were not declared.

[9] The plaintiff gave evidence that he and his wife had previously sent parcels to Samoa and that about one year before the consignment in question he had told her that aerosols would be picked up by the x-ray and they were not allowed to send such items. In January 2005, the plaintiff and his wife had been filling a box in their bedroom with gifts for their family in Samoa. These included food items, clothes and knick knacks. Mrs Fuiava's brother asked her to send him some brake cleaner and told her what he wanted. She purchased the items and put the two aerosol cans in the package and then sealed it and then asked the plaintiff to take it to the airport and send it to Samoa. She had no recollection of telling him about the two aerosol cans she put in the parcel and stated in evidence that she was not aware that she could not send them.

[10] On 19 January 2005, the plaintiff was on accident leave but went to the defendant's Cargo depot and filled out the necessary document to consign the package to Samoa. The document he signed, the "*Shippers Instructions for Despatch*" (known as the IFDAC), has two boxes on its front where the shipper certifies whether or not the consignment contains dangerous goods. He ticked the second box which stated:

> …
>
> *2.* □ *Certifies the contents of this consignment DO NOT CONTAIN ANY OF THE FOLLOWING DANGEROUS OR HAZARDOUS MATERIALS as defined in the IATA Dangerous Goods Regulations: Explosives: Gasses: compressed, liquified* [sic]*, dissolved under pressure or deeply refrigerated; Flammable liquids; Flammable solids: substances liable to spontaneous combustion, substances which, on contact with water, emit flammable gasses; Oxidising substances; Organic peroxides; Toxic (poisonous) and infections substances; Radioactive materials: Corrosives: Miscellaneous dangerous goods (including magnetized materials, articles liable to damage aircraft structures and articles possessing other inherent characteristics which make them unsuitable for air carriage unless properly prepared for shipment).*
>
> …

[11] He also certified that the particulars he had furnished were correct and that he accepted the conditions of carriage. On the rear of the IFDAC there is a contents declaration which gives a brief explanation of dangerous goods and a list of 20 common items which may fall under this classification. Beside each is a box that is to be ticked if that item is present. The first item is "***Aerosols (of any type)***". Unlike the other items this one is printed in bold font and clearly stands out. The plaintiff

did not tick any of the listed items. Under the heading "*Security*" the shipper must answer the following four questions, to which the plaintiff had replied "*No*":

> …
>
> *a.* *Are you carrying the property of another person?*
> *b.* *Are there any items in your bags/parcels that you did not pack yourself?*
> *c.* *Could anyone have placed something in your bags/parcels without your knowledge?*
> *d.* *Have you been given any gifts to carry by another person?*

[12] The form concluded, immediately above his signature:

> ***I declare that the bags/parcels lodged by me as cargo for carriage by air, do not contain any dangerous goods as defined in the IATA Dangerous Goods Regulations (examples are shown in 1 above) and to the best of my knowledge poses no security risk (as detailed in 2 above).***

[13] The plaintiff accepted in evidence that if he had known the parcel contained the aerosol cans he would not have certified that it contained no dangerous goods and that in ticking the declaration the way that he had, he had certified that the parcel did not contain any such dangerous goods. He also accepted that his answers were incorrect to questions (b) and (c) and therefore the information he had provided on the declaration was misleading.

[14] At the time he despatched the parcel he had recently had a knee operation and he suggested to the Court that his wife might have been a bit stressed and therefore forgotten to tell him that she had put the two cans into the parcel. He said that it was the year before that he had warned her not to pack aerosols and he had not repeated the warning on this occasion.

[15] In January 2005, Mr Sullivan was made aware that aerosols had been located in a routine x-ray of the parcel and removed. As the plaintiff was still off work recovering from his knee operation, Mr Sullivan decided not to conduct an investigation until the plaintiff returned. When he did return, Mr Sullivan advised him of the disciplinary investigation and instructed him not to send any more consignments until the investigation was completed.

[16] Mr Sullivan sent a letter to the plaintiff on 1 April 2005, requiring him to attend an interview to investigate the finding of undeclared dangerous goods in his consignment, warning him that the investigation included aircraft safety, that the

defendant regarded this as a very serious matter and that if the plaintiff was found to have failed to comply with any regulatory requirement or company policy, disciplinary action, including the termination of his employment, could be taken against him. He was told that he was entitled to be represented at the interview.

[17] There then followed five meetings. The plaintiff was represented throughout by his union, the New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc, which made strong submissions on his behalf to the effect that he had not acted wilfully, deliberately or dishonestly. It appears to have been accepted throughout that the plaintiff's actions were not wilful or deliberate and that he did not know of the inclusion of the aerosol cans. In submissions on his behalf, the union stressed his exemplary work performance, his personal circumstances, his openness and honesty, and his promise never to do this again. The union submitted that although he had dealt with dangerous goods and had some training, he had not had any training on the gravity of declarations and English was his second language. The union argued that the plaintiff's disclosure was intended to promote safety and was therefore in accordance with the defendant's "*Just Culture*" policy and he was thus not an employee who posed any ongoing threat to safety. The union pointed out the plaintiff had not been suspended while the incident was being investigated and that there had been delays in carrying out the investigation.

[18] As a result of issues raised during the investigation, Mr Sullivan carried out further enquiries and reported these back to the plaintiff and his union representatives. At the final meeting, which took place on 10 June 2005, Mr Sullivan advised the plaintiff and his representatives that the result of the investigation was that the plaintiff had shipped a consignment using staff concessions that had contained undeclared dangerous goods, contrary to the security declaration the plaintiff had completed.

[19] Mr Sullivan read a statement to the plaintiff and his representatives which contained the following. In the aviation industry the first priority has to be the safety of aircraft and passengers and because the carriage of dangerous goods had a direct impact on aircraft safety, the consequences of a culture of non-compliance could be catastrophic. In the Cargo department the handling for carriage of dangerous goods was part of the usual daily work so that Cargo management would not be meeting

one of its fundamental responsibilities were it to accept non-compliance by its employees of dangerous goods requirements. Mr Sullivan accepted the matters that the plaintiff and his representatives had put forward in mitigation, specifically that the plaintiff believed at the time that his declaration had been correct and that he had taken reasonable steps to comply with the requirements. Mr Sullivan did not accept that the plaintiff had in fact taken sufficient reasonable steps by previously informing the plaintiff's wife of the importance of not placing dangerous goods in the consignment and specifically mentioning aerosols or by keeping the consignment in a secure location in their bedroom. As a shipper and an Air New Zealand employee the plaintiff was responsible for ensuring that the documentation and cargo was correctly presented. Because of the seriousness of a failure to fully comply with dangerous goods and security requirements when presenting cargo for carriage, Mr Sullivan had concluded that the plaintiff's employment should be terminated with four weeks pay in lieu of notice.

[20] In his evidence Mr Sullivan stressed that the primary concern of the defendant in this case was the very serious safety and security risks that arise from shipping undeclared dangerous goods. In the Cargo department all operations staff were trained in dangerous goods awareness and an ongoing emphasis was placed on the safe handling of such goods and the importance of correct documentation. Mr Sullivan said it was incompatible with the priority the defendant accords to safety matters for him to have imposed a sanction short of dismissal. Mr Sullivan also considered that the plaintiff's failure to ensure that dangerous goods were not shipped in the consignment and his incorrect completion of the documentation, fundamentally undermined Mr Sullivan's trust and confidence in the plaintiff's future ability to perform his job to the required standard and that the failures were unacceptable as they involved matters that were critical to aircraft safety.

[21] Mr Sullivan stated in evidence that he had dismissed the plaintiff because the plaintiff was fundamentally careless. The plaintiff had had the opportunity to check the consignment and to make enquiries of his wife to determine whether anything else had been added without his knowledge. The plaintiff was aware that his wife was also packing items in the consignment and should have questioned her about these and should have taken care to actually check what was in the consignment he

was presenting. Mr Sullivan also considered that the disciplinary concern was not just about the dangerous goods themselves but the incorrect security declaration which was another serious matter.

[22] Mr Sullivan had the authority from management to dismiss the plaintiff summarily, but, because of the plaintiff's good employment record, his cooperation with the investigation and his genuine remorse, he decided to dismiss him but provided him with four weeks' pay in lieu of notice.

[23] Mr Sullivan frankly conceded that this had been a very difficult matter for him and he had not wanted to dismiss the plaintiff. Indeed when Mr Sullivan gave his evidence to the Court, the reliving of the disciplinary action he had felt obliged to have taken, caused him evident distress. His evidence and the manner in which he presented it, confirmed the high regard in which he had held the plaintiff and his considerable regret at having had to carry out the action that he considered was appropriate. The appropriateness of that action became the core of this case.

[24] The only area of real conflict in the facts was an assertion by the plaintiff in evidence that when Mr Sullivan read out the dismissal letter and gave it to the plaintiff, the plaintiff's representatives had then asked Mr Sullivan to reconsider the decision as this was essentially a private matter and not work related in the usual sense. The plaintiff said that Mr Sullivan had replied that it was not his decision and that the "*boss upstairs*" had made the decision.

[25] Mr Sullivan denied having made this statement and said that the decision was his, although it is clear that he received assistance from human resources and had kept his senior managers fully informed. Mr Sullivan said that one of the senior managers had wanted the dismissal to be summary, but had accepted Mr Sullivan's decision to give the plaintiff four weeks' pay in lieu of notice.

[26] I prefer the evidence of Mr Sullivan to that of the plaintiff on this matter as it appeared that the plaintiff was very stressed and shocked at the decision to dismiss him and may not have fully appreciated what was being said. I find Mr Sullivan alone made the decision, which he reached with considerable regret but that he was satisfied it was the correct decision to make in the circumstances.

Disparity of Treatment

[27] Mr Sullivan was cross-examined by Mr Pollak, counsel for the plaintiff, on his responsibility for conducting an investigation into the conduct of Ms Barrett, an employee in the Cargo department, and as to his decision to dismiss her on 31 March 2005.

[28] Ms Barrett had been employed as a Cargo clerk for approximately 17 years and had worked for the defendant for a total of 25 years. There were two final warnings on her file, the latest of which was 6 May 2004 concerning her inappropriate tone and an abruptness towards other staff members. Ms Barrett had received training in dangerous goods and security and had received the same update that the plaintiff had received following the incident in June 2004. She was required to be able to recognise documents and, where necessary, report dangerous goods.

[29] On 9 February 2005, she presented a consignment of goods for shipment using her staff cargo concession, completed the necessary forms and answered "*No*" to all four security questions. When the consignment was x-rayed it was found to contain two aerosol cans of insect spray which came into the category of dangerous goods. The consignment also contained food stuffs and a bicycle which were not her property. Mr Sullivan gave evidence that although shipping another person's property using the staff only concession was of concern, this did not have the same potential to directly impact on aircraft safety and therefore was not a significant factor in the investigation.

[30] During the course of the investigation Ms Barrett had said that the box had been kept at a relative's house and that once the packing was completed she had taped it shut. She said the spray cans and a few other miscellaneous items had been added without her prior knowledge or approval.

[31] After the dismissal Ms Barrett took personal grievance claims for unjustified dismissal and an unjustified disadvantage for the final warning, which went to the Authority. Mr Sullivan gave evidence that at the Authority's investigation Ms Barrett said she had told her relatives that no items were to be added to the consignment. Mr Sullivan said he did not believe that she had given such

instructions as during his investigation he had asked her direct questions about this and Ms Barrett had not told him that she had given such instructions. During the investigation Ms Barrett maintained that another Cargo clerk had filled in the answers to the security questions. Mr Sullivan had not accepted Ms Barrett's explanation in relation to this matter and found it was Ms Barrett who had the responsibility to ensure that the declaration was correct and that she had failed to do so. Her attempt to shift partial blame to the clerk was a matter of concern to him. Mr Sullivan had not taken into account the previous disciplinary matters as they were entirely unrelated and said that his decision was based solely on the safety concerns and that his trust and confidence in her had been destroyed by her actions and her incorrect and misleading declarations. In cross-examination, Mr Sullivan also accepted that he considered Ms Barrett had not been truthful during the course of the investigation.

[32] The Authority issued a determination on 4 November 2005 (AA435/05) dealing with Ms Barrett's personal grievance claims. The Authority found that the final warning was not justified and awarded her the sum of $3,000 as compensation for the injury to her feelings resulting from that grievance. As to the dismissal, the Authority found Ms Barrett had a patchy employment record and had continued to maintain throughout both the investigation by the employer and the Authority's investigation that her error was minor and therefore had sought constantly to minimise the safety risks. The Authority found that her taking that approach reinforced the defendant's concern that it could not have the necessary trust and confidence in her.

[33] The Authority's determination also addressed an allegation of disparity of treatment relating to the treatment of a call centre employee. The treatment of that employee was also addressed in the evidence before me. Mr Sullivan was not directly involved in the defendant's investigation into dangerous goods discovered in March 2005, in a consignment presented for shipment by the call centre employee. The dangerous goods discovered in her consignment consisted of two aerosol cans of shaving cream, some flammable paint and some prescription medicine. Without objection an affidavit was produced to the Court from Allison Margaret Swarbrick, Human Resources Manager for contact centres nationally, who had advised the

manager who was carrying out the investigation. Ms Swarbrick had also attended throughout that investigation. It was common ground that this affidavit by Ms Swarbrick was a copy of that which had been put before the Authority which had investigated Ms Barrett's personal grievance.

[34] In the determination of 4 November 2005, the Authority noted from Ms Swarbrick's affidavit that the relevant considerations had included the call centre employee's exemplary work history, the high regard in which she was held, the seriousness with which she took the matter and her remorse over it. She had received a formal written warning.

[35] The Authority found that there was a prima facie case of disparity of treatment in the way Ms Barrett and the call centre employee had been treated. It referred to the decision of the Court of Appeal in *Samu v Air New Zealand Ltd* [1995] 1 ERNZ 636 which stated that the onus was on the employer to explain the disparity. The explanation was that the call centre employee was not being held to as high a standard as the Cargo employees because detailed appreciation of and adherence to shipping requirements was not as fundamental to her position as it was to theirs. With some reservation the Authority accepted that explanation and concluded that any possible disparity was not sufficient to render Ms Barrett's dismissal unjustified.

[36] Mr Sullivan was cross-examined on his decision to dismiss Ms Barrett and the decision of another manager to issue a final warning to the call centre employee. He pointed out that he had had no input into the decision in the call centre employee's case and the staff in Cargo were trained and focussed in adhering to the responsibility that they have to protect the defendant's aircraft to the best of their ability. He also did not accept that the plaintiff had taken every reasonable precaution to keep the parcel secure and prevent it being interfered with and stressed that, like the other Cargo staff, the plaintiff had to do everything necessary to comply with the regulations that made aircraft as safe as possible. He did not find the plaintiff's case to be a borderline one.

The submissions

[37] Counsel addressed the new s103A which reads as follows:

> ***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.*

[38] At the time the parties made their submissions the decision of Judge Shaw in *Air New Zealand v Hudson* (2006) 3 NZELR 155 had not been issued.

[39] Mr Pollak submitted that the section appeared to have been introduced at least in part in response to the decision of the Court of Appeal in *W & H Newspapers v Oram* [2000] 2 ERNZ 448; [2001] 3 NZLR 29. He contended that the statutory test requires justification to be determined on an objective basis and to take into account all of the circumstances, including the employer's actions, how the employer acted, the circumstances that relate to the employee and the circumstances that have led up to the dismissal. He submitted the new test places limits on the possible retaliatory actions of an employer once misconduct has been established. He submitted that the harshness or otherwise of a dismissal could now be reviewed, and the Authority or the Court may now determine whether or not, in the particular circumstances, the retaliatory action in its totality was unjustifiable, taking into account what a fair and reasonable employer would do in such circumstances.

[40] Mr Pollak submitted that what the defendant had done was incredibly harsh and therefore unjustifiable and it was not open to the defendant to have dismissed the plaintiff. Mr Pollak also stressed what he described as the unusual and unique features of the plaintiff's lack of intent, his good employment record, his honest and open explanations and his remorse. He submitted this was not a situation where the defendant could reasonably assert that it had lost trust and confidence in the plaintiff as there was never likely to be any repeat of his conduct. He submitted it was more reasonable for the plaintiff to have responded by way of a warning, retraining or the like.

[41] Mr Pollak also submitted that the plaintiff's conduct was not a work related mater and that the defendant had failed to take this into account. He submitted that

when the conduct falls outside of the workplace it cannot justify dismissal except in relatively limited circumstances. These include bringing an employer into disrepute: *Swan and ors v ACI NZ Ltd and NZ Amalgamated Engineering Etc IUOW* ERNZ Sel Cas 909; [1990] 3 NZILR 262 or where the outside actions have shown the employee is unsuitable for the job because, for example, of previous convictions for dishonesty: *New Zealand Bank Officers IUOW v Databank Systems Ltd* [1984] ACJ 21.

[42] Mr Pollak submitted that the defendant had allowed the plaintiff to work normally for some considerable time and, by clear implication the defendant must have therefore have had trust and confidence in him and the incident was not one which had any reasonable prospect of having any effect on the workplace. He therefore submitted that the plaintiff's conduct could not have fundamentally undermined the employment relationship. The plaintiff had not been prosecuted, there was no question of any disharmony or effect on staff relations and there was a real issue of disparity of treatment. Mr Pollak submitted that the plaintiff ought to have been treated more leniently than Ms Barrett and should have been given a warning, like the call centre employee.

[43] Ms Larmer for the defendant, submitted that although the wording of s103A was new, its essential thrust was not, because the concept of a fair and reasonable employer was a well established and standard legal test. She referred to the explanatory note to the Employment Relations Law Reform Bill and the report of the Transport and Industrial Relations Committee. She also referred to the leading case prior to *Oram*; *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483, 487 which formulated the test for summary dismissal as whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances.

[44] Ms Larmer contended that s103A does not contemplate the Authority or the Court substituting itself in place of the employer as the decision maker and that was to be derived from the words "*an objective basis*" and "*what a fair and reasonable employer would have done*". She submitted that the judgment in the *Oram* case had been taken by some commentators as suggesting that what is considered justifiable may only be determined from the perspective of what the employer considered to be

fair and reasonable and that in any enquiry by the Employment Institutions, they may not substitute their own judgment for that of the employer. She referred to the explanatory note to the Employment Relations Law Reform Bill which stated that:

> *It is precisely the function of the Employment Institutions to examine whether a dismissal or other action was unjustifiable in light of all the facts. This inevitably involves some "substitution of judgment", but one based on an objective assessment of what a fair and reasonable employer would do in the circumstances. Deciding whether an action was justifiable solely on the basis of this objective judgment of the employer who undertook the action would be neither fair nor reasonable.*

[45] Ms Larmer submitted that this was not the effect of the *Oram* case which still required the Institutions to apply the well established principles of procedural and substantive fairness, but recognised there could be a range of permissible outcomes instead of only one appropriate sanction. She referred to the English Court of Appeal decision in *Post Office v Foley; HSBC Bank Plc (formerly Midland Bank Plc) v Madden* [2001] 1 All ER 550, which found there may be a band or range of reasonable responses and if there was room for reasonable disagreement among reasonable employers, as to whether dismissal for the particular misconduct was a reasonable or unreasonable response, the decision to dismiss was likely to be upheld. In light of that authority, she submitted that the Court was not required to assess whether the conclusion the employer reached was the same one that it would have reached, had it been in the employer's position at the time. To do this would run counter to the well established principle that the Court must not substitute itself for the employer, or act as if it were conducting a rehearing of, or an appeal against, the merits of the employer's decision to dismiss.

[46] Ms Larmer submitted that in assessing whether the action taken was what a reasonable employer would have done, the Court will not be required to determine what sanction it would have imposed, but instead must apply the well established principles relating to procedural and substantive fairness, including the principle the Court is not to substitute its own views for that of the employer. She submitted that the *Oram* test for serious misconduct was still good law which can be read consistently with the requirements of the new statutory test. She submitted also that the law prior to *Oram* recognised that a range of options was often available to an employer and the Court should not interfere with the decision if it was one within the reasonable range of responses available to it. She cited *Wellington Road Transport*

etc IUOW v Fletcher Construction Co Ltd ERNZ Sel Cas 59; [1983] ACJ 653 (the "*Hepi*" case) where Judge Williamson stated at p688:

> *We have said that we regard this particular dismissal as just but ungenerous, and that we see our power as being limited to ensuring justice rather than imposing generosity. Amongst the questions which can be asked in examining particular cases are "Should this employee have been dismissed?", "What would the fair and reasonable employer have done in these circumstances?" In the particular circumstances of this case, we think that this employer's action did come within the boundaries of fairness, reasonableness and generally accepted good industrial practice. Within those boundaries there may be options for alternative action. In such circumstances we think some weight has to be given to what Judge Jamieson described as a right of proper assessment in* Airline Stewards IUOW re Bell v Air New Zealand Limited *[1976] ICJ 187:*
>
> > *"In such a case the Court does not feel that it should weigh in a nice balance the question whether or not it would have been as severe as the employer was. Something must be left to the employer in assessing what is proper in such a case and to what extent leniency is justified, once adequate grounds for dismissal have been found."*
>
> *Put in other words, an employer has some right of choice between those options which are within what is fair and reasonable. The Court has a duty of inquiry and a right of judgment and is not much fettered by the decision under consideration. Where an employer chooses an option within allowable limits, we think the Court has to take some account of the fact that it is reviewing the decision of someone else and is not itself making a decision de novo. If the decision is found to be one properly open to the decision maker, the Court should hesitate to interfere with that decision. Holland J said that he could well understand the necessity for the employer usually to dismiss an employee under these circumstances. We respectfully agree.*

[47] Ms Larmer submitted that a fair and reasonable employer would have conducted an appropriate investigation, have fairly considered all the matters and made a fair and reasonable decision and she submitted that was precisely what the defendant had done in this case.

[48] She relied on Mr Sullivan's conclusions that the plaintiff had not taken appropriate steps to ensure that additional items were not placed into his consignment without his knowledge; he had received training in dangerous goods and was aware of his obligations; he had not taken all reasonable steps to ensure compliance with all dangerous goods and security requirements; he had incorrectly completed the dangerous goods and security declarations in the IFDAC; the plaintiff was the shipper and the person required to sign the IFDAC and had the responsibility to ensure that his declarations were correct. Ms Larmer also stressed the context in which this had taken place and the defendant's primary concern of avoiding serious safety risks that can arise from the shipping of undeclared dangerous goods. This,

she contended, was all within the knowledge of the plaintiff who had been fundamentally careless.

[49] Ms Larmer submitted that there was no unreasonable delay in resolving the disciplinary concerns because the plaintiff was recovering from surgery and on ACC. She submitted Mr Sullivan had had due regard to the plaintiff's personal circumstances and that his actions were one which a fair and reasonable employer would have taken in all the circumstances.

Conclusions

[50] The Court in *Hudson* found that the new s103A did not give the Employment Institutions the unbridled license to substitute their views for that of the employer. Their role was instead to ask if the actions of the employer amounted to what a fair and reasonable employer would have done and to evaluate this objectively. Shaw J found that the effect of s103A was to separate out the employer's actions for consideration and required the Institutions to consider those actions against what a fair and reasonable employer would have done. The Court concluded that although the amendment does not expressly prevent employers having recourse to a range of options from which they can chose, Parliament has legislated for the Institutions to evaluate the employers' choices against the specified objective standard of what a fair and reasonable employer would have done in the circumstances (paragraph [119]). This approach effectively restored to the Institutions what Williamson J in the *Hepi* case called the duty of enquiry and the right of judgment. The employer's subjective decision was to be examined against a universal objective test rather than an individualised one, in the light of all the relevant circumstances (paragraph [122]). This may mean that the Court can reach a different conclusion to that of the employer:

> *…but, provided this is done appropriately, that is objectively and with regard to all the circumstances at the time the dismissal occurred, a conclusion different from that of the employer may be a proper outcome.*
>
> (paragraph [120])

[51] Judge Shaw stated:

> …
> *[129] The objects of the Act already referred to may be taken as a guide to the standards which apply to a fair and reasonable employer. In the light of*

> *these, s103A can be read as giving the Authority and the Court the opportunity objectively to evaluate the subjective decision of an employer against the standard of a hypothetical fair and reasonable employer in order to ensure that the objectives of good faith behaviour and the need to address any inherent inequalities is achieved in all the circumstances of that case.*
>
> *[130] The* BP Oil *case established an approach of approaching first the question of what was open to a reasonable and fair employer to do in the all circumstances. If the employer's decision came within the range of those options then dismissal was likely to be justified.*
>
> …

[52] Judge Shaw also stated:

> …
>
> *[140] The reference to what a fair and reasonable employer would have done represents a statutory curb on the range of responses an employer may justifiably take. In* Oram*, the Court of Appeal specifically used the word "could" bearing in mind that there may be more than one correct response open to a fair and reasonable employer. This approach meant that an employer had only to show that the conduct complained of could reasonably justify dismissal in the view of that employer.*
>
> *[141] Section 103A does not mandate a decision to dismiss or not, based on the subjective views of what the Court would have done as an employer in the same circumstances, but requires a decision to be made by reference to the objective standards of a hypothetical fair and reasonable employer. Again, the test does not licence the wholesale substitution of the views of the Court for those of the employer but requires an objective evaluation of the actions of the employer against a statutorily imposed standard. The emphasis has shifted from the range of possible responses open to an individual fair and reasonable employer to an objective evaluation of the employer's response to misconduct against what a fair and reasonable employer would have done in all the circumstances.*
>
> *[142] All the circumstances of the case includes not just the employer's reaction to the misconduct which it honestly believes has occurred, but also the circumstances under which the misconduct occurred and the circumstances of both the employee and the employer. In other words, a return to the test as articulated by Williamson J.*
>
> …

[53] It is also helpful to note that in *Hepi*, without the benefit of any equivalent to s103A, the Court observed that the statute had left to the Courts the broad test for justification which applied to dismissals upon notice and summary dismissals and indicated that the Court should consider all of the circumstances. The Court in *Hepi* then went onto state:

> *In a list not meant to be exhaustive we note that, where appropriate, the Court considers: the conduct of the worker; the conduct of the employer; the history of the employment; the nature of the industry and its customs and practices; the terms of the contract (express, incorporated, and implied); the terms of any other relevant agreements; and the circumstances of the dismissal. The Court also has regard to good industrial practice which includes some consideration of the social and moral attitudes of the community. The Court considers ILO Recommendations and*

> *Conventions. The Court also has regard to its own earlier decisions and to the decisions of other Courts, both New Zealand and foreign.*
>
> (p666)

[54] Using those guidelines, I turn first to the conduct of the plaintiff. The investigation revealed that he had made a false declaration in a number of material respects and Mr Sullivan was entitled to conclude that the plaintiff had been fundamentally careless. Mr Sullivan was also entitled to conclude that the failure of the plaintiff to ensure that no dangerous goods were in the parcel and not to falsely declare that no one could have placed something in his parcel without his knowledge, demonstrated a failure to comply with the basic regulatory requirements imposed for dealing with the consignment of dangerous goods on aircraft. This was serious misconduct.

[55] I turn to the conduct of the employer. I accept Ms Larmer's submissions, which were not seriously challenged by the plaintiff, that the defendant had carried out a procedurally fair enquiry during which the plaintiff was advised of all the steps taken and given full opportunity to proffer any explanations he wished, and those explanations he did proffer were given due consideration. I have already addressed Mr Sullivan's reasoning and accept Ms Larmer's submission that he had acted reasonably and taken all relevant factors, including those advanced in mitigation, into account before reaching his decision.

[56] Turning to the history of employment, the defendant was entitled to conclude that although the plaintiff had been a good employee in all respects, he had received relevant training and recent reminders of the consequences of failing to provide proper declarations, was familiar with dangerous goods procedures, was a "*known shipper*" and yet had failed to properly ensure that his own consignment did not contain dangerous goods.

[57] As to the nature of the industry it is clear that safety is the overriding consideration for the defendant in all its various operations. The carriage on an aircraft of an aerosol can under pressure, containing a flammable substance can have catastrophic consequences. The defendant needed to be confident that a person such as the plaintiff employed in the very area which handled such dangerous goods would not be guilty of such a lapse and was reasonably entitled to form the view that

it could not condone such conduct. The defendant, through its training of the plaintiff and through its communications, had made it clear that any breaches by its staff in relation to dangerous goods could be visited with the consequence of dismissal.

[58] I find, contrary to Mr Pollak's submission, that the plaintiff's misconduct was related to his employment. It was not a private action which was irrelevant to the performance of his employment obligations. He was employed in the Cargo area and involved in the handling of dangerous goods. He had received adequate training and was familiar with the documentation. For all these reasons he was regarded as a "*known shipper*" and there was no obligation on the defendant to x-ray his consignment. It was only fortuitous that his consignment was x-rayed and the dangerous goods found and removed. As a minor consideration the plaintiff was using his staff concession when making the consignment.

[59] As to the allegation that the employer had demonstrated disparity of treatment, I have looked for guidance from the Court of Appeal's decision in the *Samu* case and have considered whether it has been altered by s103A. The Court of Appeal adopted what it said in *Airline Stewards and Hostesses of NZ IUOW v Air NZ Ltd* [1985] ACJ 952 at 954. Where there is a prima facie case of disparity, or enough to cause enquiry to be made into that issue, the employer may be found to have dismissed unjustifiably unless an adequate explanation is forthcoming. The Court of Appeal then went on to state in *Samu* at p639:

> *Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is for ever after bound by the mistaken or overgenerous treatment of a particular employee on a particular occasion.*
>
> *The issue for the Judge was whether on the facts before him the decision to dismiss was one which a reasonable and fair employer would have taken in the circumstances. That being a question of fact, the issue for this Court is whether there was material upon which the Judge could reasonably reach his conclusion that the dismissal was justified:* Northern Distribution Union v BP Oil NZ Limited *[1992] 3 ERNZ 483, 487.*

[60] It will be seen that this approach requires an adequate explanation for an apparent disparity, a consideration of all the circumstances, and a determination whether the final decision is one which a reasonable and fair employer would have taken in the circumstances. This formulation accords with the new test for

justification in s103A. It concentrates on whether the employer's actions were what a fair and reasonable employer would have done in all the circumstances, and requires an objective test by the Court. *Samu* was a case involving safety, an area where an employer may not be bound in the future by a previous too lenient decision.

[61] The most recent Court of Appeal decision dealing with disparity is *Chief Executive of the Department of Inland Revenue v Buchanan and anor* (2005) 2 NZELR 693 at paragraph [45], which found that the Court must consider three separate issues, namely:

> *(a) Is there disparity of treatment?*
>
> *(b) If so, is there an adequate explanation for the disparity?*
>
> *(c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?*

[62] I do not accept Mr Pollak's submissions that the dismissal of Ms Barrett in some way demonstrates disparate treatment of the plaintiff. His argument appeared to be that as Ms Barrett's conduct and employment record was much worse than that of the plaintiff, her dismissal may or may not have been justified but, because the plaintiff's conduct was not as bad, he should not have been dismissed. I cannot accept the logic of such a comparison merely because one other employee who was dismissed behaved worse than the grievant.

[63] The case of the call centre employee does however present a prima facie case of disparity. The events involving her had occurred in March 2005, and on 4 April she was advised that the outcome would be a formal written warning which was confirmed in writing on 7 April. These events therefore took place prior to the investigation and dismissal of the plaintiff. In his case the first interview was on 6 April and the dismissal occurred on 10 June 2005.

[64] Mr Sullivan had analysed the similarities and differences between the plaintiff's case and that of Ms Barrett before making his decision to dismiss the plaintiff. In his evidence he said he was not directly involved in the defendant's investigation of the actions of the call centre employee or in the decision about the disciplinary action that was taken. He does say that he was aware of the facts because he knew about the matter at the time and it became an issue in Ms Barrett's

personal grievance. The distinctions he drew were that the call centre employee did not work in the Cargo department and was not required to complete cargo documentation as part of her job, and had not received any training. The essential difference between the Cargo department and the call centre was that his department had the responsibility to load dangerous goods and its staff are trained and often have advanced training in these matters. He stressed that the Cargo department was the only department charged within the defendant with the responsibility of putting dangerous goods on an aircraft and ensuring that it is done in the correct way, complying with all the complex regulations.

[65] In the Barrett case before the Authority, Mr Sullivan is recorded as having referred to the need for "*zero tolerance*" in the cargo department of non-compliance with dangerous goods requirements. After applying the *Samu* case, the Authority saw that the detailed appreciation of an adherence to shipping requirements was fundamental to Cargo staff but not necessarily to call centre staff.

[66] I agree with these distinctions. In the present case the plaintiff was a "*known shipper*" whose consignments did not have to be x-rayed. He had received, as the other Cargo staff had, a recent reminder of the consequences of breaching the dangerous goods requirements. No such warnings were given to employees of the call centre. I therefore conclude that an adequate explanation for the disparity of treatment between the plaintiff and the call centre employee has been given and therefore it becomes irrelevant.

[67] Even if there was not an adequate explanation and the situation of the plaintiff and the call centre employees were on all fours, there is the consideration referred to in *Samu* that the employer cannot forever be bound by an over generous treatment of a particular employee on a particular occasion. This appears to answer the third question from the *Inland Revenue* case, assuming it has survived the passing of s103A.

[68] Finally I turn to the consideration of other cases to derive any relevant guidance. This Court and its predecessors have frequently noted the need to exercise caution in reaching a decision contrary to that of the employer where safety issues are involved. The decision of the Employment Court in the first instance in the

Samu litigation is such an example ([1994] 1 ERNZ 93 at 95). Issues of safety may therefore be critical, as they are in this case, in considering whether the actions taken by the employer are those that would have been taken by a fair and reasonable employer in all the circumstances.

[69] I accept Mr Pollak's submission that issues to the harshness of the action taken by the employer may now be considered under s103A. This is contrary to the *BP Oil* decision which stated that the Court should not consider mitigating factors which an employer might take into account in deciding whether, despite the employee's conduct being such as to justify summary dismissal, the employee should nonetheless be dismissed. The Court of Appeal went on to state (p488):

> *But for the Court to enter upon that territory was to usurp the responsibility and the prerogative of the employer. We cannot put the position better than Judge Castle did in* Read v Air NZ Ltd *[1991] 3 ERNZ 139, 146:*
>
> *The breach of trust was serious and of such a nature as to warrant a fair and reasonable employer deciding that she should be dismissed. That being so, it is not for the Court to substitute its judgment as to what penalty should or should not actually have been imposed.*

[70] Section 103A does not limit the test of justifiability to the determination of whether the misconduct in question was sufficiently serious to warrant a dismissal but also whether the action of the employer was what a fair and reasonable employer would have done in all the circumstances. The circumstances may include whether the hypothetical fair and reasonable employer would have been persuaded by mitigating factors to impose a penalty that was less than a dismissal. Thus if it could be determined on an objective basis that the mitigating factors were so strong that a fair and reasonable employer would not have dismissed, notwithstanding the finding of serious misconduct, the dismissal may well be held to be unjustifiable.

[71] Standing back from the detail of the case, I consider Mr Sullivan acted fairly and reasonably in reaching the conclusion that the plaintiff's actions were sufficiently serious to warrant his dismissal from his position where he was involved in the day to day handling of dangerous goods, notwithstanding his excellent work record to that point and the other mitigating factors.

[72] Mr Sullivan had the responsibility for supervising the operations of the Cargo department. The plaintiff in certifying that no one could have placed something in

his parcel without his knowledge and that there were no items that he had not packed himself, breached his duty to his employer and damaged the trust and confidence he had previously enjoyed. Mr Sullivan reached his decision after giving due consideration to the circumstances including the personal and family situation of the plaintiff. The safety considerations which the employees in the Cargo handling area had to apply were of such importance that the defendant was entitled to apply zero tolerance of non-compliance with the dangerous goods requirements. The defendant was entitled to conclude that it could not run the risk of any future lapses on the part of one of its key employees such as the plaintiff.

[73] I therefore find that the defendant has discharged the burden of showing the dismissal was justifiable because the actions taken by Mr Sullivan were what a fair and reasonable employer would have taken in all the circumstances at the time of the dismissal. I am fortified in this conclusion as it is the same as that reached by the Authority on what I understand to be the same evidence, in applying the s103A test. For these reasons the challenge is dismissed.

Costs

[74] Costs are reserved.

B S Travis
Judge

Judgment signed at 12.10pm on Tuesday, 12 September 2006

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