IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2013] NZEmpC 40
CRC 6/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	B Plaintiff
AND	VIRGIN AUSTRALIA (NZ) EMPLOYMENT AND CREWING LIMITED, PREVIOUSLY KNOWN AS PACIFIC BLUE EMPLOYMENT AND CREWING LIMITED Defendant

Hearing: 24-26 and 29-31 October and 1-2 and 29 November 2012
(Heard at Christchurch)

Counsel: Tim McGinn, counsel for plaintiff
John Rooney and Rebecca Rendle, counsel for defendant

Judgment: 20 March 2013

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] The plaintiff was a pilot with the defendant company for approximately 16 months. During that short time he came to the attention of management on a number of occasions. He was given a final written warning following what became known as the spa pool incident and was subsequently summarily dismissed.

[2] The plaintiff claimed that his dismissal was unjustified, that he had suffered unjustifiable disadvantage associated with a period of suspension, and that the defendant had breached its obligations of good faith. Those claims were dismissed

by the Employment Relations Authority.[1] The plaintiff pursued a de novo challenge in this Court.

[3] Criticisms about the way in which the company responded to concerns relating to the plaintiff traverse the period of his employment. It is therefore necessary to consider the plaintiff's short but eventful time with the company in some detail.

The facts

[4] The plaintiff was employed by the defendant as a first officer pilot from August 2008. In January 2009 he, along with about 15 other crew members, visited a hotel bar at Potts Point in Australia (the Potts Point incident). Hotel staff became concerned about the group's rowdy behaviour and alcohol consumption. The primary concern that was raised in relation to the plaintiff was that he had taken an open bottle of spirits into the bar. He denied this and that he had been involved in the alleged behaviour that took place. The company did not advance matters past this initial stage. While it is apparent that the company was not wholly satisfied with the plaintiff's responses it nevertheless concluded that there was insufficient evidence to make a conclusive finding against him. It did however make it clear to the plaintiff what its expectations were, and that it had concerns about whether he had been honest with them during the course of the investigative process. It advised the plaintiff in writing that:

> [B], we were disappointed that your responses to the allegations as put were not completely honest at our meeting. Integrity is paramount within the aviation industry and to employment relations.
>
> Pacific Blue does not condone, and will not tolerate, staff engaging in behaviour that may bring the Company into disrepute ... I wish to make it clear that such behaviour is not appropriate and does not belong in the Pacific Blue workplace.
>
> We have considered your response and the evidence obtained, and we have found that on this occasion, there is insufficient evidence for us to make a conclusive finding on these allegations. This letter will, however, be placed

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[1] [2012] NZERA Christchurch 6.

> on your file for future reference and may be referred to should there be any further instances of inappropriate behaviour.

[5] The plaintiff took no further steps in relation to the way in which the defendant had dealt with the Potts Point incident, or the stated intention to keep the letter on his file for "future reference."

[6] In early 2009 the plaintiff's fiancé died. Her family raised a number of concerns with the defendant relating to alleged alcohol and drug use by the plaintiff (the family complaints).

[7] Mr Lowe (Flight Operations Manager) was tasked with undertaking an investigation, which he commenced on 14 April 2009. The company's stated concerns related to alcohol consumption, illicit drug use, and the plaintiff's self management of fitness for duty. The plaintiff was provided with a copy of the emails which set out allegations relating to various issues, including alcohol and drug use and dealing, and was given an opportunity to respond to them.

[8] A meeting took place on 17 April 2009. The plaintiff advised that the allegations were false and said that he had two friends who would be prepared to give written statements in support. He indicated that he was happy to submit to a random drug and alcohol test. The plaintiff also said that he was happy to attend counselling, and subsequently attended one session. Mr Lowe wrote to the plaintiff on 17 April 2009 confirming what had been agreed at the meeting.

[9] The plaintiff's legal representative wrote to Mr Lowe on 21 April 2009 enclosing the plaintiff's response to the issues that had been raised and supportive witness statements. These statements contradicted the suggestion that the plaintiff had been taking or dealing in drugs, or consuming excessive alcohol.

[10] On 24 April 2009 Mr Lowe advised the plaintiff that the company had completed its investigation and had found insufficient evidence to make any finding against him. Mr Lowe concluded that:

> There is insufficient evidence for me to make a finding on these allegations. As there is not enough evidence to enable me to prefer either your or the

> complainant's version of events over the other, no further action will be taken in relation to these allegations.

[11] The plaintiff was not happy with Mr Lowe leaving matters on this basis, and his lawyer wrote to him on 21 April 2009 advising that this was so and asking for a response on two issues. Firstly, to explain why he was unable to draw a conclusion on the balance of probabilities that the complaints were unlikely to be true. Secondly, for confirmation as to whether Mr Lowe had any credibility concerns about the plaintiff's response, or in relation to the witness statements that had been provided on the plaintiff's behalf. The letter concluded with the following comment:

> My client wants his name cleared and currently feels disadvantaged by the way matters have been left. What comfort are you able to offer?

[12] Mr Lowe did not offer the comfort sought on the plaintiff's behalf. He did not respond to the letter, essentially because he did not consider that it would be productive to do so. The plaintiff did not take any further steps in relation to this issue.

[13] In the early hours of the morning on 10 June 2009 the plaintiff and four other crew members (who will be referred to as the party-goers) returned from a flight and went to the plaintiff's house. They were, by this time, off duty. They converged on the spa pool. Some alcohol was consumed, to varying degrees, by each.

[14] At around 3 am the plaintiff offered each of his guests a pill. He was asked whether they were legal and he confirmed that they were. They each took one. One of the party-goers (N) slept at the plaintiff's house, woke in the morning, and went to go home. While out on the street, and in partial company uniform, she collapsed and was taken to hospital. Her parents complained to the Police about events leading up to her hospitalisation. Concerns were raised about the nature of the pill that the plaintiff had given her.

[15] An employment investigation was commenced. Mr Lowe was responsible for undertaking the investigation and was assisted in this task by Mr Scott (the company's Human Resources Manager). Ms Dons, a manager within the Crew area,

interviewed those involved in the spa pool incident and provided written statements to Mr Lowe and Mr Scott.

[16] Ms Dons did not give evidence but it is apparent that she took a number of statements from N. The first is dated 12 June 2009. The first statement records that N had been at the plaintiff's house the previous evening:

> … where he had given her a pill that he told her was a vitamin tablet. [N] stated that she felt stupid as it was obviously not a vitamin.

[17] The statement goes on to refer to N taking the pill and waking up at approximately 11.45 am, having no recollection of intervening events. According to her statement, she woke to find the plaintiff sitting in a chair and thought he looked "wasted – munted", "his eyes rolling back in his head....on heavy drugs." While at the hospital N discovered that she had the plaintiff's phone in the pocket of the jeans she was wearing. According to her statement a text message was received on the phone which said "sold my car f**k. I'm f**ked up. How good was that pill. Where are you. We need Missy," and a voicemail message from a male saying "hey […] – I'm coming to get my wallet and some more of those "s'es" or "E'q's." N texted one of the other female party-goers to find out how she was and when she had got home, and was told that she had got home at about 3 am and that the pill was a vitamin tablet, like Berocca.

[18] It appears that while N was at the hospital her parents arrived and were in an agitated state. Police also arrived and took a statement.

[19] It is apparent from N's first statement that she texted Ms Dons later that day with the test results that she had received. These indicated that N had a very high blood alcohol reading, nearly twice the legal limit for driving. It seems that N was tested some 12 hours after she had got out of the spa pool, and after she had taken the pill (given that she arrived at hospital around midday).

[20] On 11 June 2009 Mr Lowe contacted the Police, after learning that they had attended the hospital the previous evening in response to N's admission and concerns about what she had consumed. Detective Collins advised Mr Lowe that the Police

investigation was at a very early stage and that they were waiting on test results. Mr Lowe indicated that the company would co-operate with the Police investigation. He expressed the view that a formal notification to the Civil Aviation Authority (CAA) was likely and that the plaintiff would probably be suspended pending a full investigation into the allegations. Detective Collins said that the Police would keep Mr Lowe informed as to the progress with the inquiry.

[21] There were further iterations of Ms Don's notes. Handwritten notes (which appear to have been made on 16 June), include reference to N being "100% sure" that the pill she had been given was dark brown/purple and a conversation with another female party-goer on the night in question during which N asked how she had felt after the pill, and that she (N) did not think it was vitamins. N signed this version of the notes as being a true and accurate record of events on 10 June, confirming that they could be used in evidence. These notes, with the handwritten amendments, were typed up into a further version (prepared on 18 June 2009). Neither Mr Lowe, nor the plaintiff, received a copy of the earlier notes.

[22] Mr Lowe wrote to the plaintiff on 12 June 2009 advising that an investigation had been commenced into events of 10 June 2009 and that pending the outcome of the investigation the company was considering suspending the plaintiff from his employment. He was asked to attend a meeting to discuss this proposal and placed on administrative duties in the interim to allow him to prepare for the meeting. The plaintiff did not take issue with his placement on administrative duties or assert that, contrary to the company's offer, he did not need time to prepare for the meeting.

[23] Another female party-goer was interviewed on 15 June and asked various questions about the spa pool incident. She expressed some surprise as to why N needed to go to hospital, said that N had been upset about a matter involving time off work and the loss of a friend, that the pills were loose in the palm of the plaintiff's hand, were red, and all looked the same. She said that they all took one and they all asked to make sure they were not drugs. She said that she had tasted N's drink (bourbon and cola) during the course of the night and that it was strong, and that N appeared hung-over when she woke up. She described the pill as a caffeine pill that she had seen before. She said that she got out of the spa pool at 4 am - 4.30 am.

[24] A further meeting with N took place on 16 June. Notes of the meeting record that she was "90% sure that she had had two Jim Beam and colas and 1 red wine." She described the pill as "oblong – brown crap colour. Purply/brown." She confirmed that she did not feel tipsy at the time she took the pill but that following the pill she was trying to stay awake and that she felt unwell when she got up. She said that "it affected me for more than two days." These notes were not given to the plaintiff as part of the investigation.

[25] Mr Ackland, Manager Aircraft Operations, decided to refer the plaintiff for a medical assessment under the terms of his individual employment agreement, "out of concern for his health (personal well-being) and his ability to safely fulfil his duties as a pilot." This was a proposal that the plaintiff agreed to. It was made clear to the plaintiff that the request was based not only on the most recent incident, but also on the:

> two previous incidents which we have spoken to you about earlier this year. Each of these issues has been drug and/or alcohol related, and in light of this Pacific Blue is of the view that a medical examination is necessary.

[26] The plaintiff did not raise any issues about this. The two previous incidents were also specifically referred to by Mr Ackland in his letter to Dr Souter (dated 19 June 2009). Dr Souter was conducting the medical examination, acting independently of the company.

[27] Mr Lowe met with the plaintiff on 19 June to discuss the company's concerns for his health and well-being and a proposal to suspend him. The concerns which were being investigated by the company were referred to in a subsequent letter, being:

- What substances were taken at the plaintiff's home;
- When these were taken;
- An allegation that he had given a colleague a pill which led them to being admitted to hospital;
- Being in a state of intoxication (either drug or alcohol related) in the hours immediately prior to his reserve duty on the afternoon of 10 June;

- The potential for his actions to bring Pacific Blue into disrepute.

[28] At the meeting the plaintiff's representative submitted that suspension was unnecessary. Mr Lowe considered these submissions but formed the view that suspension was warranted. He advised the plaintiff by way of letter that:

> We considered this feedback, but given both the nature of the investigation and the fact that we have needed to address drug/alcohol issues with you in the past, we have determined that suspension was appropriate while the investigation continues....the suspension will continue in force pending the outcome of the investigation.

[29] No objection was taken to the suspension at the time.

[30] Dr Souter advised the plaintiff at the outset of her interview with him that if she considered there were reasonable grounds to believe he may be unable to safely exercise the privileges of his medical certificate under s 27I(1)(a) of the Civil Aviation Act 1990 she would be obliged to suspend his medical certificate, and that this would be until CAA was satisfied that there was no condition of aeromedical significance. His certificate could be reinstated once CAA was satisfied with the outcome of "this investigation". It is clear that her assessment involved a detailed consideration of the concerns set out in the referral letter, the plaintiff's medical history, personal background, and work history. Following the consultation Dr Souter formed the view that suspension of the plaintiff's medical certificate was appropriate. His medical certificate was accordingly suspended.

[31] The plaintiff was later assessed by Dr Souter and two other independent medical assessors (both recognised experts in the field of substance dependency). The plaintiff was diagnosed as having a "low likelihood of substance dependency. Therefore he has no current diagnosis of alcohol or other drug dependency." He was assessed as being a:

> ... risky drinker. His use of alcohol increased in the months following his fiancé's death, presumably as part of a way of coping with his grief. This is consistent with the background history of concern around this time, and with his mildly elevated isolated Liver Function Test (GGT) in my opinion. CDT was not elevated. A urine drug screen conducted at that time was negative for drugs screened....There is no evidence from history or testing to date of

> illicit drug use. [B] admits to use of herbal supplements at times outside flying to increase his energy levels. He has been advised against ongoing use of these by Prof McCormick and myself, which [B] reports he has adhered to...[B] has clearly had a period of significant loss in his life earlier this year, and most problems seem to have been subsequent to this. In my view and of the other two assessors, he has unresolved grief issues.

[32] Dr Souter recommended that the plaintiff receive appropriate psychological input, including education about safe use of alcohol. A referral was made to a psychologist, noting that he was likely to require two to three sessions before appropriate feedback could be obtained for CAA purposes.

[33] Email correspondence between Mr Lowe and Mr Ackland followed the release of Dr Souter's report. Mr Lowe pointed out that it appeared that the plaintiff's behaviour could be put down to a medical condition and that, in these circumstances, "it would be hard to push the allegations?" Mr Ackland replied: "To be honest I still have my doubts re use."

[34] Mr Lowe advised the plaintiff that he was proposing to defer the disciplinary process for a period of four weeks, in light of Dr Souter's advice that the plaintiff should undergo counselling sessions, and that his suspension would continue in the meantime. He was invited to contact Mr Lowe if he had any issues relating to the proposal. The plaintiff did not do so.

[35] Mr Lowe wrote to the plaintiff on 27 August 2009 inviting him to a disciplinary meeting in relation to the spa pool incident. He summarised the company's concerns as being under the influence of alcohol close to a shift; his honesty about what alcohol had been consumed; providing co-workers with one or more different types of pill potentially resulting in the hospitalisation of one; excessive drinking and mind altering substances (referring to "this most recent incident and our previous discussions this year about alleged drug taking and excessive drinking"); safety risks arising from three investigations in a short period; and impact on brand in relation to risky behaviour. Particularised concerns were also clearly set out. The plaintiff was advised that, if substantiated, the allegations could result in dismissal.

[36] A number of documents were provided to the plaintiff together with the letter of 27 August 2009. These included various statements from people who had been present at the 10 June incident, including the plaintiff's statement given during the meeting on 26 June 2009; meeting notes with N dated 12 June and 16 June 2009; and a written statement prepared by N on 16 June 2009.

[37] It is apparent that the Police contacted N on 10 September 2009 advising her that the toxicology result confirmed a presence of BZP in her system, and that they rang Mr Lowe on the same day and left a message for him to ring them back. The plaintiff submitted that it is a reasonable inference that Mr Lowe did ring the Police back and that the Police shared the toxicology result with him. Mr Lowe could not recall such a conversation. While he could not discount the possibility that he became aware of the result around 10 September 2009 (on an "anything is possible" basis) I am not prepared to draw the inference sought by the plaintiff in terms of timing. What is clear is that Mr Lowe had received advice of the toxicology result by 19 November 2009. I come to this evidence later. I am not satisfied that Mr Lowe was aware of the toxicology result before this date.

[38] In advance of the disciplinary meeting Mr McCabe (the plaintiff's then ALPA representative) wrote to Mr Lowe setting out a brief response to the interview notes with other staff. Mr McCabe pointed out that while N had said that she had two glasses of Jim Beam and cola and one glass of red wine (and that she "had probably had more based on test results"), the information provided to the plaintiff did not include what the likely volume of alcohol was that N had consumed based on the "test results." Mr McCabe noted that it did however appear that she had consumed significantly more than one glass of wine and two glasses of Jim Beam, that one of the other party-goers had said that N's drinks were very strong; that N was in a distressed emotional state; that she had been in the spa pool for at least two hours while consuming alcohol; and that she could have been suffering from dehydration and significant negative physical effects presenting as consistent with her symptoms on 10 June.

[39] Mr McCabe also noted that N's conduct might be the subject of a disciplinary investigation by the company and that if that was the case she would likely be trying

to provide exculpatory information to avoid disciplinary action. He said that information she had provided was inconsistent with information given by other parties who had been interviewed; that she was unlikely to be able to be fit to give any credible information as to the condition of other attendees; and that she had been the author of her own condition.

[40] Mr McCabe expressed the view that it would be unfair of the company to take into account the two previous incidents given that no disciplinary action had been taken in relation to the first; the plaintiff had been advised that no further action would be taken in relation to the second; and that "[the company] is not entitled to resurrect those investigations as justification for disciplinary action in the current matter." The letter concluded with an offer, as a gesture of good faith and to allay the company's concerns, that the plaintiff abstain from alcohol for six months and undertake any tests required by Pacific Blue.

[41] The plaintiff also prepared a set of notes on the witness statements, which he provided to Mr Lowe at the meeting. In those notes he pointed out that:

- N was the only person to say that the plaintiff had told her to take a pill;
- N's description of the pill was not consistent with the description provided by others. She said that she was "100% sure it was dark brown/purple." Everyone else said it was red. Red Alert pills were red;
- N said that the pill came out of a container. Everyone said that the pills were in the plaintiff's hand;
- N said that one of the other party-goers looked "wasted" and unhappy. The other party-goer had said that she felt fine;
- N said that the plaintiff was sitting in a chair looking "munted." Everyone else said that the plaintiff was in bed.

[42] At the meeting on 23 September 2009 the plaintiff was given an opportunity to respond to the concerns set out in Mr Lowe's letter. He made it clear that he understood the safety issues that the company had and that he was prepared to voluntarily abstain from alcohol for six months. He said that he had stopped drinking eight hours prior to his next duty and that he had no doubt in his mind that

he would have been within the acceptable range, although he did accept that he had "pushed the limits" (conceding that he had had up to three to four bourbons). He said that he had resorted to alcohol following his fiancé's death and that he was working on these issues. The plaintiff also acknowledged that supplying an energy supplement may not have been perceived well, but maintained that what he had supplied was a Red Alert pill. Mr Lowe observed that it was difficult to understand how everyone had slept so well if what had been provided was such a pill, which the plaintiff accepted was designed to promote alertness.

[43] The plaintiff said that he understood the perceptions about pill taking and why Mr Lowe had formed the view that he had. He said that he knew that he had caused the company a "lot of grief" and understood its concerns. Mr Lowe concluded by saying:

> I must say that I still think there is more information than you are admitting to...

[44] Mr McCabe said that the plaintiff was happy to admit to being a risky drinker, that the Red Alert pill was not a good look, and to accept a warning on this basis.

[45] Mr Lowe met with the plaintiff again on 29 September and reiterated what he had said at the earlier meeting, namely that he was not convinced that the plaintiff had been completely honest throughout the investigation (particularly in relation to the consumption of alcohol and the nature and extent of his involvement in unknown pills and substances). He set out his findings in relation to each of the concerns.

[46] Mr Lowe advised the plaintiff that ordinarily his behaviour would have resulted in dismissal but that, having regard to the plaintiff's recognition that his behaviour was inappropriate, the recent death of his fiancé, and the steps being taken to address the concerns about his fitness to fly, he was prepared to stop short of that result. Rather the plaintiff was issued with a final written warning with conditions (which was the disciplinary outcome that the plaintiff had been seeking and which he agreed to).

[47] As part of the agreed conditions the plaintiff was to submit to regular and random drug and alcohol testing, ongoing counselling at the company's cost (directed at supporting the plaintiff's abstinence from alcohol); extend his voluntary abstinence from alcohol to 12 months; cease taking herbal energy or party pills and agree to the company making enquiries as necessary to ensure compliance with this commitment; and acknowledged that "any further safety related incidents or conduct which has the potential to bring the brand into disrepute, or any breach of any of the conditions above, may lead to summary dismissal." Finally the plaintiff was required to perform ground based duties as determined by the company for a minimum of one month following any clearance from CAA or until the company was satisfied that he was abiding by the conditions and was fit to fly.

[48] Mr Lowe's evidence (which I accept) was that he was influenced in his decision not to dismiss because he thought that the plaintiff was genuine in his desire to address the issues that had been identified. It became apparent in evidence that this assumption was misplaced.

[49] Ordinarily the final warning might have been the end of the matter. It was not.

[50] On 6 October 2009 Dr Elliott, of CAA, wrote to the plaintiff enclosing his medical certificate. The certificate was noted as being subject to a restriction (namely medical surveillance). In terms of the agreed conditions the plaintiff could not commence flying for a further month (until 7 November), or until the company was satisfied that he was abiding by the conditions and fit to fly.

[51] Mr Lowe was subsequently contacted by the Police and attended a meeting with Police and Customs on 19 October 2009. He became aware at the meeting of a number of text messages involving the plaintiff that were said (by the Police) to be of a concerning nature and reflective of possible drug dealing (the text messages).

[52] I accept Mr Lowe's evidence that he did not have anything other than general information relating to the Police inquiries and was not privy to the details of Police/Customs concerns at this stage. Nor was he given access to the material held

by these organisations. This is supported by the documentation which makes it clear that he took steps to obtain detailed information held by the Police, including by pursuing a complaint to the Ombudsmen in relation to the Police's refusal to provide the information sought. I accept too that these steps were motivated by a concern about the extent to which the nature and circumstances of the allegations giving rise to the Police investigation might place the defendant and the public safety at risk, and a concern to approach the issue in an appropriate manner.

[53] At the meeting the Police indicated that their inquiries were ongoing and asked Mr Lowe not to "tip the plaintiff off."

[54] On 4 November 2009 Mr Lowe requested confirmation from the Police that they were formally investigating the plaintiff.

[55] The plaintiff had simulator training scheduled for 6 November. Following consultation with senior management, Mr Lowe advised the plaintiff that he could not undertake the simulator training as the simulator was being repaired. This was, as Mr Lowe forthrightly accepted, untrue and was simply an excuse. Mr Ackland accepted that the absence of training would have impacted negatively on the plaintiff in terms of training hours.

[56] On 10 November 2009 the Police formally advised the company that they were investigating the plaintiff as a suspect for supplying a Class C drug. Detective Sergeant Borrell advised that no charges had been laid, and nor had the plaintiff been interviewed but that:

> ...because of the nature and circumstances of the allegations, the New Zealand Police are concerned that [B]'s employment as a pilot may place your customers and the general public at risk. We ask for your patience in this matter, to allow us to complete our investigation, but request you consider the safety issues relevant to your industry.

[57] In evidence the plaintiff contended that the company should not have been concerned about the matters raised in the letter as it made it clear that he had not yet been charged. In his view the appropriate course of action was for the company to ignore the letter. I do not accept that. His evidence reflected a minimisation of the concerns that the company was entitled to have relating to the matters raised by the

Police, given the serious nature of the potential criminal behaviour identified and the nature of his role as a pilot, and in light of previous issues raised with the plaintiff. I accept Mr Lowe's evidence that he believed that the Police inquiries went wider than the incident some five months prior.

[58] On 17 November 2009 the Police executed a search warrant on the plaintiff's property. On 19 November 2009 Mr Lowe made a request under the Official Information Act 1982 for information held by the Police relating to its investigation, citing safety concerns in support. The letter sought "statements from interviews, phone messages or transcripts relating to [the plaintiff's] involvement with illicit substances and the toxicology analysis of [N] indicating BZP was in her system following a party at [the plaintiff's house]." It was accepted that the company knew about the BZP result at this stage (although it did not have a copy of the report) and the existence of text messages (although not the substance of them). While the plaintiff was not provided with a copy of this letter, I accept Mr Scott's evidence that he was aware that a request had been made. The request was subsequently declined.

[59] On the same day (19 November) Mr Lowe wrote to the plaintiff advising that it had come to his attention that the Police were investigating him for the supply of Class C drugs and that there were concerns about safety. By this time the plaintiff was well aware of the Police's involvement. Mr Lowe advised the plaintiff that consideration was being given to suspension pending further inquiries being made due to concerns arising from the ongoing nature of similar and related issues "previously discussed with you." He was invited to a meeting to discuss this proposal. Mr Lowe advised that:

> Once the Police investigation is complete, you will be advised of whether any disciplinary proceedings will be initiated against you, up to and including termination of your employment.

[60] The meeting to discuss the suspension proposal took place on 30 November 2009. At the meeting the company reiterated that it had concerns about safety, brand and security, and was proposing suspension. Reference was also made to further concerns having been raised by "information received from the Police." No mention was made of the toxicology result or of text messages or discussions that Mr Lowe had had with the Police. Mr Lowe said that he was waiting for the detail of the text

messages along with the toxicology report to enable that information to be put before the plaintiff.

[61] At the meeting the plaintiff told Mr Lowe that he was not under any stress or strain, no safety concerns arose, and that he did not consider that he should be taken off flying duties.

[62] Mr Lowe advised the plaintiff that he was to be suspended by way of letter dated 1 December 2009. The suspension was to remain in force "pending the outcome of the police investigation," and was to be on pay. No steps were taken by the plaintiff to challenge this suspension.

[63] In the meantime Mr Lowe was seeking further information from the Police but his attempts were meeting with little success. On 16 December 2009 the Police advised that:[2]

> It appears that Police National Headquarters are reluctant to allow us to disclose much of the file to Pacific Blue. They are however, quite prepared to respond fully from a request from CAA. Can you suggest CAA apply to Police for the information? ... *we are just short of enough to prosecute criminally... so in terms of safety, I think CAA might have to take action*.

[64] At this stage Mr Lowe was becoming concerned about his obligations to the Director of Civil Aviation and whether CAA ought to be advised of the situation, in terms of its statutory obligations to ensure minimum standards of fitness.[3] A determination had previously been made to proceed down the medical route following the spa pool incident, rather than the fit and proper person processes under the Civil Aviation Act. However, since that time Mr Lowe had received the 10 November 2009 letter from the Police, which he believed might trigger the engagement of CAA. It was put to him that it was in fact the Police's suggestion that Mr Lowe seek disclosure of the Police file from CAA but Mr Lowe was adamant that it was not. And there was nothing in the email of 16 December to suggest (as the plaintiff accepted) that the idea was that CAA should apply to the Police for the information and then pass it on to the defendant, and nor was this what transpired.

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[2] Emphasis added.
[3] Section 10, Civil Aviation Act 1990.

[65] Mr Lowe wrote to CAA on a no-names basis on 18 December 2009 to clarify his obligations under the Civil Aviation Act.

[66] Mr Lowe's request for information from the Police file was formally declined on 23 December 2009, although the Police confirmed that the investigation (into the plaintiff's alleged involvement in the supply of a Class C Controlled Drug) was still current and that the defendant would be advised of the outcome in due course. The plaintiff submitted that this document confirmed that the Police had been supplying Mr Lowe with information directly about the BZP analysis and text/phone messages. It does not. Rather it refers to the Police having provided the company with some unspecified information regarding the investigation.

[67] On 12 January 2010, and after satisfying himself that it was appropriate to do so, Mr Lowe advised CAA that he would provide the name of the pilot being investigated by Police if CAA made a formal request.

[68] Further steps were taken to obtain a copy of the toxicology report from N on 18 January 2010, Ms Dons noting that as N's last day with the company was a week away it may be difficult to extract the information once she had left. Attached to Ms Don's email was one page (page 2) of the toxicology report, although Mr Lowe's evidence was that he did not attach much significance to it as he understood that the full report would follow and did not open the attachment. As it transpired page 2 of the report included the following information: that there was a delay of between 12-20 hours between the time of the alleged incident and the time the specimens were collected; according to (unspecified) "information received", N had taken an "over the counter herbal remedy" sometime on 9 June 2009; N took a pill around 4 am and was told it was a vitamin pill; N had no recollection of events subsequent to taking the pill until she woke at 11.45 am; and abnormally high levels of acetone were detected in N's blood and urine. It noted that high levels of acetone may occur naturally in the body as a result of a prolonged period of fasting or from diabetes.

[69] On 19 January 2010 the General Manager Airlines, CAA, wrote to Mr Lowe requesting further information relating to the unnamed pilot (the plaintiff) following contact it had received from the Police. The CAA advised that it was pursuing the

request under s 9(3) of the Civil Aviation Act to continue to satisfy itself that the fit and proper person test (s 10) was satisfied. The CAA noted that:

> To properly undertake its regulatory role the CAA considers that it is necessary to obtain further information about the pilot involved and the nature of the allegations and investigation conducted by the Police.

[70] Later that day Mr Lowe received a telephone call from the Police advising that they did not have sufficient evidence to lay criminal charges against the plaintiff. It was put to Mr Lowe in cross examination that at this stage he had no safety concerns relating to the plaintiff, and it was submitted in closing submissions that Mr Lowe had accepted that was so. I do not consider that he gave a clear answer to the question. Rather he stated that he was not sure that he completely understood what was being put to him and, when given the opportunity to re-ask the question, counsel moved on. It is true that, by this stage, the plaintiff had received a medical clearance. However, a number of concerns remained for the company and CAA was commencing a fit and proper person inquiry of its own.

[71] Mr Lowe responded to CAA's letter the following day, on 20 January 2010. He enclosed the Police letter of 10 November 2009 and the subsequent letter of 23 December 2009 advising that the Police would not provide further information to the company about its investigation. Mr Lowe advised CAA that "As I currently understand it, the Police investigation is still progressing." A copy of the letter was provided to the plaintiff for his information.

[72] The plaintiff sought to make something of Mr Lowe's reference to the investigation progressing, but it is clear from CAA's correspondence that it was intending to undertake a s 10 inquiry regardless of whether the Police investigation was ongoing, as the plaintiff accepted in cross-examination. And, in any event, it is clear from a subsequent letter from CAA to the plaintiff (dated 4 February 2010) that he himself had advised CAA that the Police had "ceased their inquiries but that [he] had been informed that the case would remain open in accordance with normal Police protocol...".

[73] N was spoken to again on 22 January 2010, following a request by Mr Scott that clarifying questions be put to her. She was asked, and answered, the following:

Did you ask [B] what type of pill it was?

Yes – he told me Vitamin B12 and Vitamin C in it as well

Have you ever taken drugs?

No

Did you take any other type of pills either prior, during or after the party?

No

Do you know what BZP is?

Yes I do now.

[74] Counsel for the plaintiff, Mr McGinn, made the point that N's answers indicated that there had been no opportunity for her to take a herbal remedy pill the day before the spa pool incident, that there appears to have been no discussion of what the herbal remedy referred to in the report was, that she was not asked to explain the presence of BZP, and nor was she asked about fasting or diet pills.

[75] On 5 February 2010 CAA wrote to Mr Lowe advising him that it had commenced its fit and proper person investigation and that it was supportive of the company's suspension of the plaintiff's licence until the matter was resolved. This, it said, was consistent with effective risk management.

[76] Mr McCabe emailed Mr Lowe on 16 February 2010 attaching what appeared to be an email from the Police advising that their investigation had been completed. He went on to say that, as the Police investigation had closed, the grounds for the plaintiff's suspension had also come to an end.

[77] Mr Lowe responded by advising that he was seeking written confirmation of the position from the Police and attaching a further letter to the plaintiff. While the plaintiff was critical of Mr Lowe's failure to accept the email train on its face I do not consider that his preference to obtain formal written confirmation of the position from Police was unreasonable in the circumstances.

[78] Mr Lowe's letter (dated 18 February 2010), entitled "further evidence requiring response", advised the plaintiff that Mr Lowe was now in receipt of the

toxicology report and that the report confirmed the presence of BZP in N's system. The toxicology report noted that BZP was found in N's urine, that it has similar effects to those exhibited by amphetamine type stimulants, and that in the past, BZP was readily available in various "party pills" as well as in come herbal remedies and weight loss pills but that it was now illegal in New Zealand.

[79] A copy of the toxicology report was attached to Mr Lowe's letter. As it later transpired the attachment omitted page 2, which had earlier been attached to the email to Mr Lowe but which he had not read. It was clear from the evidence that the omission was accidental and was not picked up by anyone at the time, including the plaintiff and his representative (despite the page numbers appearing on each page of the document).

[80] The letter referred back to the plaintiff's earlier assertions, during the investigation that led to the final written warning, that he had only distributed Red Alert pills and that the toxicology report supported his position that no drugs were found in N's system. As Mr Lowe pointed out in the letter, it had been highlighted to the plaintiff at the time that the toxicology results had not yet been provided and so his statements could not be supported by it. The plaintiff's response was sought on three questions, namely:

(a) How the evidence impacted on his previous statements given that he had been relying on there being no illegal substances in N's system to support his statement;

(b) How the presence of illegal substances in N's system could be explained given her statement (attached) indicating that she took no other pills before, during or after the party other than what the plaintiff had provided her with;

(c) How this evidence impacted on his claims that he had been completely open and honest with the defendant during the investigation.

[81] Mr Lowe emphasised that the company's trust and confidence in the plaintiff had been significantly diminished during the course of the investigation and he urged the plaintiff to be completely open and honest, noting that: "After considering your response, I will then make a decision as to whether it is necessary to meet and discuss or initiate further disciplinary action."

[82] I accept Mr Lowe's evidence that he was concerned about the ongoing nature of the plaintiff's suspension by this time. I do not accept that the company was deliberately engaging in delaying tactics to prevent the plaintiff from returning to work. At this stage CAA was conducting its investigation into whether the plaintiff met the minimum fit and proper person requirements to hold a licence, and Mr Lowe had made a complaint to the Ombudsmen about the refusal to provide access to the Police file. Nor was any issue taken by the plaintiff with the suspension at the time.

[83] Mr McGinn put it to Mr Lowe that he was effectively placing the onus on the plaintiff to explain the positive BZP result in N's system but that it had not been put to N herself to explain, and nor did the plaintiff at this stage know that N had taken an over-the-counter pill, which the company knew by this time (though not Mr Lowe, because he had not read page 2 of the report). I pause to note that, despite issues being raised about the propriety of the questions put to N at the hearing in relation to the BZP result, no such issues were raised by the plaintiff's representative at the time. And it is evident that the plaintiff was alive to the substance of these issues, from Mr McCabe's response to Mr Lowe's letter on 4 March 2010. He referred to the plaintiff's understanding that N purchased over-the-counter pills in Fiji, and that this would likely explain the BZP result in her system, noting that "Obviously if [she] is taking "diet pills" purchased in Fiji, then she will deny taking drugs in order to protect her own job with [the company]." He asked that further enquiries be made of N denying that she had ever taken drugs, and noted that the ESR results did not disclose BZP in her blood and had accordingly metabolised by the time of the test indicating that she took BZP well before the plaintiff gave her a Red Alert tablet. The plaintiff maintained that he had been completely open and honest with the company.

[84] The company took steps to clarify matters further, and interviewed another flight crew member on 16 March 2010 in relation to N and diet pill issues. She advised that she had been told that N was taking diet pills "a long time ago" (possibly 9-12 months previously) but that she could not remember and that it was "just gossip" which she had not taken much notice of. The plaintiff was advised of the outcome of this interview, to the extent that the flight crew member interviewed

had heard "gossip" that N was taking diet pills but had no firsthand knowledge that this was so.

[85] N was also reinterviewed, on 23 March 2010, and after she had resigned from the company. It was squarely put to her that the reason why she was being re-interviewed was because the company had received reports that she had been taking diet pills purchased in Fiji around the time of the spa pool incident and whether this could be the reason why she had BZP in her system. N responded by saying that she was not taking diet pills at the time, that she had purchased diet pills in Fiji but "ages after that, around December 2009" and that it had been on a trip with a flight crew member, who could confirm her version of events. Ms Dons made the point to N that when she had made her earlier statement she had had her job to protect and asked whether she now wished to add to or adjust anything in her original statement. N advised that she did not and that everything in her original statement had been accurate.

[86] The plaintiff was advised that N had been re-interviewed and that she had said that she was not taking diet pills at the time of the incident and did not take any diet pills until December 2009.

[87] Mr Lowe wrote to the plaintiff on 1 April 2010. The status of this communication was the subject of dispute between the parties. The plaintiff characterised the letter as a "re-opening" of the initial inquiry. The defendant contended that the letter advised that a new investigation was to be conducted.

[88] It is important to put the letter into context. The letter advised that:

> I refer to Pacific Blue's investigation into your conduct on 10 June 2009 which resulted in a Final Written Warning being issued on 29 September 2009. I recently provided you with some additional evidence which came to light and requested your comments on that evidence which you provided via a letter from your NZAPLA representative on 4 March 2010.
>
> ...
>
> …as outlined in the Final Warning issued to you, Pacific Blue still has significant doubt about your suitability to perform the role of pilot. Our trust and confidence in you as an employee has diminished significantly as a result of your conduct throughout the investigation.

> Given the additional evidence that has come to light, I would like to arrange a meeting with you to further discuss our concerns about your ongoing suitability for employment with Pacific Blue. I propose we meet on Monday 12 April...
>
> The CAA continues to support our decision not to allow you to fly at this point in time whilst their investigations are ongoing.

[89] The plaintiff received a favourable medical report on 15 April 2010 from Dr Elliott. He expressed the view that there was no evidence to suggest that the plaintiff would be anything other than a "perfectly safe and competent airline pilot" and that "an exhaustive testing and monitoring regime have confirmed that you are well and that the initial concerns, and in particular the accusations at the beginning, were quite unfounded."

[90] Despite Dr Elliott's medical clearance CAA's fit and proper person investigation was continuing. The plaintiff's suspension remained in place, and no issues were raised by the plaintiff at the time in relation to this. A meeting took place between the plaintiff, his representative and Mr Lowe on 16 April 2010. The plaintiff's position in relation to the matters raised in Mr Lowe's letter of 1 April 2010 was also set out in writing. Mr McCabe concluded by noting that the Police investigation had been brought to an end without charge; N had admitted drug taking (and that she had previously lied to the defendant about this); and that in all the circumstances an objective employer would accept that the position is:

> … now the same as when Pacific Blue issued [the plaintiff] with a warning. [The plaintiff] therefore asks to be returned to flying duties as soon as practicable. Bearing in mind the length of this investigation, [the plaintiff] asks that Pacific Blue conclude it within 14 days of the date of this letter.

[91] The plaintiff gave evidence that he could not recall the meeting. It is evident that points raised in Mr McCabe's correspondence of the same date were traversed. N's credibility was put in issue, including by way of reference to prior inconsistencies in her statements, why she might have lied, and contrasting her version of events with the information given by other attendees whose statements were consistent with what the plaintiff had had to say. It was said that there was no rational explanation for N having been given BZP and everyone else being given a Red Alert pill.

[92] Notes of the meeting record that a concession was made either by or on behalf of the plaintiff that no criticism was being made of the way in which Pacific Blue had acted. While the plaintiff's initial evidence was that he could not recall the meeting he later said that this concession was made by Mr McCabe and did not reflect what he (the plaintiff) thought, although he did not put Mr McCabe right at the time. Not surprisingly the company took the comment as an acceptance by the plaintiff of the process to date and of the need to investigate. The meeting concluded on the basis that the company would give matters further consideration.

[93] The plaintiff gave evidence that he considered that the company applied pressure on CAA to suspend his licence. He placed particular reliance on an email dated 19 April 2010 in this regard. However the email is an internal document from Mr Lowe to the Chief Executive Officer of the defendant company, Mr Ackland, and Mr Scott. It simply records that CAA was now in possession of the Police file and that Mr Hughes (of CAA) was proposing to the Director of CAA that the plaintiff's licence be suspended pending its own investigation. I do not accept that the email can reasonably be construed in the way contended for by the plaintiff. It simply records the position, and steps being taken by CAA, and suggests that it may be preferable to delay the meeting with the plaintiff until the suspension issue was resolved.

[94] The plaintiff obtained a medical report on 19 April 2010 in relation to the "half-life" of BZP, essentially confirming that:

> Failure to detect BZP in blood after two half lives could indicate that a low dose had been consumed, considering that it is likely very low levels are capable of detection in today's analytical methods. So the medical advice given to Pacific Blue is essentially correct. The detection level of BZP was not given in the ESR statement of 15 September 2009.

[95] A copy of the transcript of interview with N and Ms Dons was made available to the plaintiff, and Mr McCabe wrote to Mr Lowe noting that it appeared that N knew she was buying diet pills that contained BZP, and that her advice that she did not take pills until December 2009 was in direct response to the suggestion that the pills could be the reason for BZP in the toxicology report.

[96] Mr Lowe wrote to the plaintiff on 21 April 2010. The letter set out a number of issues that the company remained concerned about, namely:

- That the plaintiff had not been completely open and honest throughout the investigation, particularly in relation to the consumption of alcohol and the nature and extent of his involvement with unknown pills and substances;
- That a number of issues relating to the plaintiff's alcohol and/or drug or other substance consumption had had to be addressed over a short period of time;
- The plaintiff's actions had brought, or had the potential to bring, the company into disrepute;
- The plaintiff's behaviour was at odds with the essential requirements of the position, and that he may be exposing the company to unwarranted and unacceptable risk.

[97] The letter concluded with an invitation to a meeting, at which the plaintiff was to provide a response as to why, in light of the company's concerns, he should not be dismissed. While reference was made to "show cause" (which was an unfortunate choice of wording) the letter made it clear that no decision would be made until the plaintiff had the opportunity to respond to the concerns, and I accept that this is what occurred.

[98] Issues were subsequently raised as to the way in which the company's concerns had been expressed, and further specificity was sought. Mr McCabe reminded Mr Lowe of the need for the plaintiff to be given a real opportunity to provide reasons and explanations to allegations made against him.

[99] Mr Lowe responded to the request for further details on 22 April 2010. He advised that:

> Having considered all of [the plaintiff's] responses in both meetings and correspondence, we have concluded the toxicology report does materially change the facts on which the final written warning was issued. The report suggests [the plaintiff] was not open and honest with us during the investigation, particularly in relation to the extent of his involvement with unknown pills and substances.

> The report suggests that [N] did take BZP and we are concerned that it may have been [the plaintiff] who supplied her with the BZP. [The plaintiff] has maintained he only gave [N] a red alert pill, however the toxicology report, together with [N's] version of events suggests otherwise. Therefore, the specific issue giving rise to the concerns listed in our letter of 21 April 2010 is whether, in light of the toxicology report and information previously considered, [the plaintiff] did give [N] BZP and was not completely open and honest throughout the original investigation.
>
> Would you like further time to consider your response? ...

[100] A meeting was held on 23 April 2010. The plaintiff prepared some documentation in advance of the meeting, which he provided to Mr Lowe on 23 April. Mr Lowe's evidence, which I accept, was that he considered the matters that the plaintiff had raised, including those raised more generally at the meeting and his comments about unknown pills and substances.

[101] It is evident from the various notes of the meeting that issues relating to credibility as between the plaintiff and N were again traversed. Reference was made to apparent inconsistencies in the three original statements that had been provided to the plaintiff. The plaintiff requested that the flight crew member who had been with N during a trip to Fiji be interviewed, on the basis that she might be able to provide some clarity about when the diet pills were purchased.

[102] Mr McGinn suggested that the plaintiff was ambushed at the meeting when the discussion turned to queries about alleged "drug speak" although this was not a concern that was raised by either the plaintiff or his representative at the time. Meeting notes record the plaintiff being asked if "squares" and "purples" meant anything to him and him responding with "no". Mr Lowe did not accept that the plaintiff had been ambushed, and made the point that the plaintiff had been specifically advised that issues relating to drugs and alcohol would be traversed. While the plaintiff said that he did not know what Mr Lowe was referring to when Mr Lowe asked him about "purples" and "squares" he did accept that he knew that the meeting was about substances and that this was one of the concerns that the company had, and Mr Lowe confirmed that the plaintiff did not provide any further information following the meeting in respect of "squares" or "purples" or the like or seek further clarity.

[103] There was also discussion about the Police file at the meeting. I accept that the company became aware at the meeting that the plaintiff had a copy of the file, and promptly made a request for it. The plaintiff initially demurred. Mr Scott's evidence was that he specifically recalled asking why the plaintiff was not prepared to provide the company with the Police file and that the plaintiff had advised that he had concerns about personal text messages between himself and his deceased fiancé. He said that the plaintiff asked whether the company would be happy with a summary of the file and that it was confirmed that that would suffice, provided it contained information relevant to the text messages including text messages relating to drugs and alcohol. Mr Scott's evidence in this regard was consistent with Mr Lowe's evidence that the Police file was requested and that text messages on the file were discussed together with statements to the Police. Mr Lowe and Mr Scott both understood that this material would be provided (namely relevant documents from the Police file, including statements and text messages other than irrelevant personal messages) and that a request for this material had been made.

[104] As Mr McGinn pointed out, nowhere in the meeting notes is any mention made of an agreement to provide such records. However, the notes do not purport to be a verbatim record of the conversation and I accept the evidence of Mr Lowe and Mr Scott that the issue of text messages arose and that the plaintiff agreed to provide documentation from the Police file relating to them. Mr Lowe's notes of the meeting record that the plaintiff had the Police file (and that it was with his lawyer) and that the plaintiff asserted that there was "nothing to hide" on it.

[105] It is clear that the plaintiff harboured concerns about a summary report prepared by Constable Harris, and believed that Constable Harris was biased against him. The plaintiff said that he wanted advice from his lawyer on the summary report, specifically in relation to it containing adverse observations about him, prior to disclosing it to his employer. The plaintiff indicated that he would release the summary report, subject to review of that report by his lawyer but that proviso was not one that I find applied more generally.

[106] The plaintiff was adamant that he had not agreed to make a summary of the Police file available to the company. I do not accept his evidence. It conflicts with

the contents of a letter his lawyer wrote on 13 May 2010, in which Mr Hall advised that he was in receipt of an Eastlight folder of documents from the Police and that it contained a "huge amount of downloaded electronic communications". He went on to say that: "Before the police information is released to you, could you kindly provide full disclosure of all material that you will be considering prior to making your decision. It is pointless doubling up on material."

[107] I am satisfied that the plaintiff agreed at the meeting to provide a summary of the Police file that would include the transcript of text messages and statements, and that this was in response to specific concerns raised by Mr Lowe and Mr Scott about the existence of veiled drug speak messages on the Police file. This is supported by a letter forwarded to the plaintiff following the meeting, dated 12 May 2010. The letter refers to the plaintiff's agreement to provide the Police material. The letter also refers to an agreement that a statutory declaration would be provided together with the Police material, confirming that any material provided was the only material of relevance on the Police file. The plaintiff's evidence was that there had been no such agreement reached at the meeting. None is referred to in the meeting notes. Mr Lowe could not recall asking for a statutory declaration. Mr Scott could recall asking for it and it being agreed to. He said that was why he made reference to the agreement to provide a statutory declaration in the letter that Mr Lowe subsequently sent. Mr Lowe said that the statutory declaration was referred to in the letter because of Mr Scott's recollection of what had been agreed.

[108] It is notable that the plaintiff's response (through his lawyer) the next day did not refute the suggestion that a statutory declaration had been requested. And nor was any issue taken with the assertion that the plaintiff had agreed to provide a statutory declaration subsequently, despite repeated references to the agreement and the failure to provide a declaration in correspondence.

[109] I am satisfied that the plaintiff did agree to provide a statutory declaration, with the agreed material from the Police file, confirming that there was no other information or material of relevance to the company's investigation on the Police file at the meeting of 11 May 2010.

[110] On 27 April 2010 CAA suspended the plaintiff's licence pursuant to s 17(1)(b) for an initial period of 10 days on the basis that the Assistant Director was satisfied, on the balance of probabilities, that the plaintiff had failed to comply with the conditions of his licence. The plaintiff was advised of his right to appeal the decision to suspend his licence. There is no evidence that he took such a step. The plaintiff was also advised that an investigation, into whether he met the fit and proper person test, was to be conducted under s 15A. Mr Lowe was formally advised of the suspension by way of email dated 3 May 2010.

[111] The company took up the plaintiff's suggestion of speaking to the flight crew member who had been with N during a trip to Fiji following the meeting of 24 April 2010. She was not able to shed much light on the diet pill issue, other than saying that she had gone to a chemist in Fiji on a trip around November/December 2009 (some six months after the June incident had occurred and at a time consistent with N's statement) and saw N purchase some diet pills. She did not know at the time what the pills contained, although she thought they were illegal. She said that she Googled the pills some time later and that this suggested that a doctor's prescription was required, but she did not know whether the pills were illegal in New Zealand.

[112] The additional information discussed and agreed to at the meeting of 24 April 2010 was not provided by the plaintiff. This prompted further correspondence from Mr Lowe, dated 12 May 2010. Mr Lowe noted the requests for a summary of the Police file and the plaintiff's failure to respond. He put the plaintiff on notice that he regarded this as a failure to cooperate with the investigation and to comply with reasonable requests and directives as part of the investigation. He went on to say that the plaintiff's actions led him to believe that there was information on the Police file of relevance to the investigation which the plaintiff did not want the company to be aware of, despite the plaintiff's assertion at the meeting of 24 April that there was nothing to hide on the Police file. Mr Lowe advised the plaintiff that he needed to progress the investigation to a conclusion and intended to make a determination on 18 May 2010. He requested any additional information no later than the day prior to that date.

[113] Mr Hall replied the next day, advising that the plaintiff was not trying to be obstructive, that the Police did not have sufficient evidence to prosecute the plaintiff and that this should be enough for Mr Lowe.

[114] On 14 May 2010 Mr Lowe sought advice from Mr Hall as to when the Police information would be provided. The letter noted that all the material that would be considered had already been provided to the plaintiff and his representative and that he had had "multiple opportunities to comment on this material." Mr McGinn took issue with this, saying that the plaintiff had not been provided with missing page 2 of the toxicology report (which Mr Lowe did not know he had, and which was accordingly not relied on; knowledge of the fact that N had only disclosed the toxicology report after she had resigned (although issues relating to possible job protection had already been raised by Mr McCabe); Mr Lowe's previous dealings with the Police (the police file had been discussed along with the veiled text speak messages at the earlier meeting); the level of alcohol in N's system (the issue of high levels of intoxication and how much she had consumed had been identified by the plaintiff in earlier meetings); and unspecified "untrue" comments to the Police.

[115] Mr Lowe also made the obvious point that both the CAA and Police investigations were separate from the company's employment investigation. He noted that CAA's investigation was into whether the plaintiff was a fit and proper person and that the Police were concerned with potential criminal liability. As he pointed out:

> our investigation is a civil matter, independent of the criminality of the alleged conduct. The Police decision not to prosecute does not satisfy us that [the plaintiff] has not engaged in conduct that is of detriment to the employment relationship.

[116] Mr Hall wrote to Mr Lowe on 17 May 2010, advising that the only document that he was aware of that would be of any interest to the company was the report of the officer in charge of the Police investigation, which he enclosed. The report expressed the conclusion that:

> I suspect that [the plaintiff] has both used and supplied a variety of controlled drugs in the past year. There is some evidence to support the supply of Class A (LSD) ... and the supply of Class C (BZP) ...

> I feel there is insufficient evidence to charge him on either matter however.

[117] The report referred to text messages from the plaintiff's cell phone which were said to be "in veiled speech that appeared to relate to drug use and supply" and statements that had been obtained by the Police, including from one of the plaintiff's flatmates (whose name had been redacted from the report). The report noted that she had offered no information about the night of 9-10 June, other than stating that she had been given a pill by the plaintiff a few days beforehand, from a clear plastic bag, that it matched the description of the pill that had been given by N, that she, the plaintiff and others had taken the pill prior to going out and that she thought that it may have a similar effect to BZP pills she had had in the past. The report also noted that:[4]

> On 17 November 2009 Police conducted a search warrant at [the plaintiff's] home ... [redacted text] ... No *other* controlled drugs were located.

[118] Mr Hall advised that the summary report should be treated with caution, given that the officer was seeking evidence to support charges under the Misuse of Drugs Act 1975, contained opinion rather than evidence of illicit involvement in drugs, and that it would not be admissible. Mr Hall reiterated that his client denied any offending against the Misuse of Drugs Act and that there was no evidence that he had committed any criminal offence or any relevant transport offence. He concluded by saying that the plaintiff was entitled to the presumption of innocence, that he had demonstrated that he was drug free and that "therefore there are no grounds to suspend or discipline him further."

[119] This correspondence reflects an ongoing blurring of the criminal and employment process, and the reliance that the plaintiff sought to place on the fact that the Police had decided not to lay criminal charges against him. This decision simply meant that the Police had formed the view that there was insufficient evidence to pursue a criminal prosecution. It did not mean that the company was prevented from forming a different view as to the plaintiff's involvement in illicit drugs and whether or not there were grounds for disciplinary action to be taken

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[4] Emphasis added.

against him for breach of his employment obligations to it. Similarly, it could not have prevented CAA from exercising its independent statutory powers to determine, on the balance of probabilities, whether the plaintiff met the fit and proper person requirements set out in the Civil Aviation Act.

[120] The investigation then took another turn when, on 18 May 2010, the plaintiff's lawyer wrote to Mr Lowe advising that he had a conflict of interest and that he should step aside from the investigation as a result. The conflict was said to arise from an incident some two years previously. Mr Lowe had no recollection of the incident in question and declined to step aside from the investigation. The plaintiff accepted in cross examination that, on reflection, there was no conflict of interest but did not accept that raising the issue had simply been a delaying tactic or a tactic designed to de-rail the investigation.

[121] Mr Lowe did not accept Mr Hall's assurance that the only document on the Police file that was likely to be of interest in the context of the employment investigation was the summary report. He wrote to Mr Hall again on 19 May 2010 requesting copies of the text messages referred to in the Police summary report – noting that they had been requested on multiple occasions throughout the investigation. Mr McGinn submitted that Mr Lowe did not make it clear in his letter that a failure to provide the material could raise another trust and confidence issue but I consider that it was made abundantly clear to the plaintiff that the company wanted to have access to the material, that it considered it likely to be relevant, that it considered that the plaintiff was deliberately hiding something from it, and that he was failing to co-operate with its investigation.

[122] Further responses were specifically sought from the plaintiff in relation to the statement referred to in the Police summary report from his previous female flatmate relating to pills that were said to have been supplied by the plaintiff to her a few days before the incident and which (according to the report) were offered from a clear plastic bag. Mr Lowe advised that the report raised issues for him, including about the plaintiff's earlier advice during the course of the investigation that the pills had come in a blister pack; that the plaintiff may have provided his flatmate with a similar pill a few days before the incident; that the plaintiff's behaviour in handing

out unidentified pills in a plastic bag (which he indicated was unusual) was not isolated to the 10 June incident and gave further weight to the plaintiff's seemingly reckless and careless behaviour in regards to safety and behavioural expectations of someone in the role of a pilot. The plaintiff was advised that if the requested information was not provided Mr Lowe would proceed to make a determination on the basis of material available to him, and that a meeting would be arranged following receipt of the information/responses.

[123] The plaintiff chose not to respond to the requests for further comment or information. Rather he wrote, through his lawyer, on 21 May 2010 advising that he had no confidence in the investigation given Mr Lowe's decision not to recuse himself, that the Police file was covered by the Privacy Act 1993 and that the plaintiff had instructed his lawyer not to disclose it. No other response was provided.

[124] Mr Lowe advised that, given the position adopted by the plaintiff, he would move to make a decision. He invited the plaintiff to a meeting on 25 May 2010. He advised the plaintiff of his right to representation and again provided an opportunity to provide any further information prior to the meeting. This offer was once again extended on 24 May 2010. The plaintiff did not take up the offer.

[125] The meeting took place as scheduled on 25 May 2010. The plaintiff attended on his own. He declined a further opportunity to provide additional comment. Mr Lowe advised him that the company had lost trust and confidence in him. An opportunity was given to the plaintiff to resign rather than be dismissed, which was declined. Mr Lowe outlined his concerns, including that the plaintiff had not been completely open and honest, and was now trying to hide things (reflected in information recently obtained, such as the toxicology report which was said to have cast doubt as to what went on at the party, the Police investigation and the refusal to provide access to the Police file), a concern that the plaintiff posed a risk to safety and to the company's brand, particularly in light of the Police investigation, and a concern that it was not a one-off event, and that the plaintiff was careless and reckless with handing out pills.

[126] Mr Lowe confirmed his decision in writing, by way of letter dated 25 May 2010. He said that he had considered all of the information that the plaintiff had presented to him and that he did not accept the plaintiff's proposition that the toxicology report did not impact on statements previously provided; the plaintiff's failure to provide the information requested from the Police investigation, and to comment on questions raised in relation to it, indicated that he was not being open and honest with the company and was trying to hide critical information; while the Police did not press charges, the Police summary report cast further doubt on the plaintiff's conduct; and that the plaintiff's careless and reckless behaviour was not isolated to a single event. Mr Lowe concluded that the plaintiff's continued employment would expose the company to unwarranted and unacceptable risk, both in terms of safety and the company's brand and reputation. The decision to terminate the plaintiff's employment without notice was confirmed.

[127] A personal grievance was raised on 2 June 2010.

[128] To complete the chronology, on 9 November 2010 the Acting General Manager Personnel Licensing and Aviation Services, CAA (Mr Ford) reported on the outcome of his review of the panel's s 15A investigation report. The panel had concluded that the plaintiff was not a fit and proper person to hold a licence. The file was referred to the Acting General Manager for review and assessment as to whether he considered it necessary to recommend to the Director of CAA that he consider revoking the plaintiff's licence. Mr Ford concluded that, on the balance of probabilities, the plaintiff did not present an unacceptable risk to aviation safety and that it was unnecessary to take any further action in respect of his licence. He referred his report to the Director, with a recommendation that the plaintiff's current suspension be withdrawn. The CAA lifted the plaintiff's suspension on 11 November 2010, some six months after his dismissal and following a review of an earlier investigation report by the Authority.

[129] On 17 April 2011 the plaintiff presented himself at a hotel stating that he was a Pacific Blue pilot and requesting a room for the night. Hotel staff called the company and subsequently involved the Police. The plaintiff gave evidence that he was charged with obtaining by deception in relation to the matter but received

diversion, and paid the hotel $111 by way of reparation. He said that CAA was advised of the incident, but did not take any action in relation to it.

Analysis

[130] The plaintiff claims that he was unjustifiably dismissed and suffered unjustifiable disadvantage during the course of his employment. He also pleads that the defendant breached its obligation of good faith to him.

[131] At the time of the plaintiff's suspension and dismissal, s 103A of the Employment Relations Act 2000 (the Act) provided that:

> For the purposes of s 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.

[132] Under s 103(1)(b), to be successful in a claim for unjustifiable disadvantage an employee must show that his/her employment, or one or more conditions of it, were affected to the employee's disadvantage by some unjustifiable action by the employer.

Unjustified dismissal

[133] It is alleged that the decision to dismiss was unjustified because:

(a) It followed an unauthorised re-opening of an investigation that had been concluded with a final warning. It is submitted that the defendant was not entitled to re-discipline the plaintiff for the same conduct, particularly given that it had not reserved to itself the opportunity to reopen the investigation when it was aware that the toxicology results were not yet available;

(b) It took irrelevant matters into account in terms of alleged past behaviours that were never established or explained to the plaintiff at the time of dismissal;

(c) Its conclusions were "illogical, predetermined and biased and not consistent with what a fair and reasonable employer would have done in all the circumstances."

[134] The reasonableness or otherwise of the employer's actions cannot be assessed in a vacuum. They must be viewed in context, and in light of all of the circumstances. This includes the nature of the employer's business and the employee's role, and the history of the employment relationship.[5] The defendant operates in a safety conscious industry. Public safety is a core concern. The plaintiff held the position of pilot. It is self evident that the defendant must have the utmost trust and confidence in its pilots. I accept too that its reputation, particularly as it relates to public safety, is particularly important to it given the nature of the industry. It cannot be criticised for adopting a conservative, risk averse approach to matters relating to public safety. In this context any suggestion that the defendant was not entitled to act on concerns arising out of additional information following the final warning has an air of unreality about it.

[135] The defendant submitted that the Court ought to adopt a cautious approach to reaching a decision contrary to that of the employer where safety issues are involved, citing *Fuiava v Air New Zealand*[6] and *Air New Zealand v Samu*[7] in support of this proposition.[8] Mr McGinn submitted the force of this submission was somewhat diminished in light of Mr Lowe's "concession" in cross examination that from 19 January 2010 the safety concerns that had previously existed no longer arose. I do not accept that this reflects an accurate summary of the evidence and, in any event, CAA had formally sought confirmation of the plaintiff's identity to enable it to conduct an investigation into whether the plaintiff met the minimum standards for holding a licence. It commenced its investigation on 5 February 2010, confirming that it was supportive of the company's position in terms of its suspension for safety reasons.

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[5] See, for example, *Air New Zealand v V* [2009] ERNZ 185 at [30]; *Wellington Road Transport IUOW v Fletcher Construction* [1983] ACJ 653 at 666; *Air New Zealand v Hudson* [2006] ERNZ 415 at [142].
[6] [2006] ERNZ 806 at [68].
[7] [1994] 1 ERNZ 93 at 95.
[8] See also *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 40.

[136] The full toxicology report became available to the company after the final warning had been given, as did a Police summary report which suggested that the plaintiff may have given his flatmate a pill matching the description of the one provided to N only days before the 10 June 2009 incident. It further stated that she thought that the pill may have had a similar effect to BZP pills she had had in the past. This gave rise to reasonable concerns that the 10 June incident may not be an isolated event, gave apparent weight to N's version of events, suggested that the plaintiff may be acting in a reckless manner in relation to unknown substances, and that his behaviour may impact adversely on the company.

[137] It was proper for the defendant to take matters further at this point, and it would have been open to criticism (given its broader responsibilities and the nature of its business and the plaintiff's role) if it had failed to do so. Both reports raised issues which the defendant was entitled to be concerned about. A fair and reasonable employer would have put those concerns to the employee for comment. That is what occurred. The plaintiff responded to issues relating to the potential impact of the toxicology report on his earlier statements and the defendant followed up his request that other people be spoken to. The defendant also sought medical advice on the metabolisation rate of BZP, which was provided to the plaintiff, and explored alternative explanations for the BZP found in N's system.

[138] I do not consider that the defendant was required to expressly reserve its position in relation to the toxicology report and, in any event, Mr Lowe made it clear to the plaintiff when issuing the final warning that he had doubts about whether the plaintiff had been open and honest, including in relation to the nature and extent of his involvement with unknown pills and substances.

[139] The plaintiff submitted that the defendant could not have regard to the Potts Point, the family complaints and spa pool incident in reaching its decision to dismiss, citing *Ashton v Shoreline Hotel*[9] in support. There Chief Judge Goddard observed that:

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[9] [1994] 1 ERNZ 421 at 429.

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

[140] The re-opening of an investigation that has led to a final warning on receipt of additional information, or conducting a new investigation, is not akin to the sort of situation the Court was concerned about in *Ashton*. Further, as the Court observed in *Butcher v OCS Limited*[10] cases prior to s 103A (which requires regard to be had to the reasonableness of the employer's actions in all of the circumstances) must be viewed with caution.

[141] Mr McGinn submitted that cases such as *Butcher* involved instances of proven, admitted, or obvious misconduct. He made the point that the present case differs in that the investigation into the Potts Point incident was aborted at an early stage and on the basis that no conclusive findings could be made and that the family complaints were also left on a similar basis. While I accept that the employer could not treat these matters as previous misconduct they did form part of the matrix of the employment history and constituted part of the background circumstances.

[142] While both the Potts Point incident and the family complaints were referred to in the process leading to the final warning, I do not consider that they were the focus of Mr Lowe's attention subsequently. Rather, he was concerned about the extent to which the plaintiff was being open and honest, concerning aspects of the Police summary report, the plaintiff's refusal to engage co-operatively in providing additional information he had agreed to provide, and the toxicology report. I accept Mr Lowe's evidence that he did not rely on the previous incidents when deciding to issue the final warning. Nor do I consider that they were relied on in reaching the decision to dismiss the plaintiff, and no mention is made of them in the letter of 25 May 2010.

[143] Mr Rooney submitted, by way of alternative argument, that the concept of res judicata may have no application in disciplinary proceedings, referring to a recent decision of the Employment Appeal Tribunal in *Christou & Ward v London Borough*

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[10] [2008] ERNZ 367 at [49].

of Haringey.[11] In that case a baby (Baby P) died as a result of chronic lack of care and abuse. At the time the child was subject to a child protection plan devised by the Council and was on the child protection register. The social worker with responsibility for Baby P and her team leader were disciplined under the Council's simplified disciplinary procedure and given a written warning. The simplified procedure is applicable for relatively minor breaches of conduct where the likely sanction is merely a verbal or written warning. Following a significant amount of media attention and a change in management a second set of disciplinary proceedings was commenced in relation to the same employees and the same conduct. The original disciplinary outcome was revisited, and both were summarily dismissed. The Tribunal upheld their dismissals, holding that the employer's actions were fair in light of the new management regime, which took a different view of the seriousness of the employees' conduct.

[144] *Christou* has since been unsuccessfully appealed.[12] Counsel for the social workers submitted that the doctrine of res judicata applied so as to bar the second disciplinary process, because essentially the same charges were advanced in the second procedure as had been relied on in the simplified procedure, with no fresh evidence. This, it was said, gave rise to a cause of action estoppel. Since the second procedure ought not to have taken place, it should have been ignored and it followed that the dismissal was inevitably unfair. The Court rejected this submission.

[145] As the Court of Appeal observed, the doctrine of res judicata provides that where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot be re-opened by parties bound by the decision, save on appeal. The principles underlying this doctrine are well established, and relate to the need for finality in litigation and the notion that a party should not be subjected to re-litigation of the same issues. However, the exercise of disciplinary power by an employer is not a form of adjudication. In *Christou* the Court stated that:[13]

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[11] [2012] IRLR 622.
[12] *Christou & Ward v London Borough of Haringey* [2013] EWCA Civ 178.
[13] At [48].

> In the employment context the disciplinary power is conferred on the employer by reason of the hierarchical nature of the relationship. The purpose of the procedures is not to allow a body independent of the parties to determine a dispute between them. Typically it is to enable the employer to inform himself whether the employee has acted in breach of contract or in some other inappropriate way and, if so, to determine how that should affect future relations between them. It is true that sometimes (but by no means always) the procedures will have been contractually agreed, but that does not in my judgment alter their basic function or purpose. The employer has a duty to act fairly and procedures are designed to achieve that objective. The degree of formality of these procedures will vary enormously from employer to employer. But even where they provide apanoply of safeguards of a kind typically found in adjudicative bodies, as is sometimes the case in the public sector in particular, that does not alter their basic function. It is far removed from the process of litigation or adjudication, which is in essence where this doctrine bites.

[146] The Court of Appeal held that the doctrine of res judicata has no application in disciplinary proceedings, and nor was it drawn to an argument that the second proceedings constituted an abuse of process.[14] As the Court observed, in considering whether the dismissals were fair, consideration had to be given to whether it was fair to institute the second proceedings at all (although this would not, of itself, be determinative). It found that while the factual substratum remained the same, the particular focus of complaint in the second proceedings was different. The first proceedings focussed on procedural errors while the second concentrated more firmly on substantive errors of judgment and breaches of the applicable care plan, that were considered to justify the institution of fresh proceedings.[15]

[147] In the present case the plaintiff argued that the defendant was prohibited from re-opening the disciplinary process, in the absence of fresh information. I do not accept that a blanket legal barrier of the sort contended for applies. This conclusion is reinforced by the wording of s 103A itself.

[148] Closer to home, Judge Ford recently declined to uphold the actions of a new chief executive officer revisiting the decision of her predecessor not to take any action in relation to alleged misconduct by an employee in *Service v Young Mens'*

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[14] At [56].
[15] At [55].

Christian Association of Christchurch Incorporated.[16] He found that:[17]

> What happened in the present case is that the incident in question was appropriately brought to the attention of the employer by the employee and the employer, through its CEO at the time, determined that the matter had been handled adequately by the employee and no disciplinary action was necessary. Some 20 months later a new CEO, from a different background and with different values and expectations, heard about the historical incident and proceeded to re-open the matter through a formal disciplinary investigation. In my view except in exceptional circumstances, which do not exist in the present case, such action is inherently unfair and unjust and is not the type of conduct that a fair and reasonable employer would embark on.

[149] However, *Service* is not directly analogous to the present case. Additional information came to light justifying further inquiry by the company. In this sense the decision to dismiss that followed was not a simple substitution, based on the same facts, for the original final warning. It is more closely analogous to the circumstances that arose in *Peterson v Board of Trustees of Buller High School.*[18] There fresh allegations arose after the allegations of sexual impropriety had been dealt with and the new information was held to warrant further investigation by the Board.

[150] Somewhat ironically, while arguing that the defendant was not entitled to take into account prior incidents involving the plaintiff during his short time with the company, the plaintiff submitted that he was entitled to challenge the final warning in the context of these proceedings, notwithstanding the fact that he had not challenged it at the time. Mr McGinn relied on the requirement in s 103A to consider the justification for a dismissal having regard to all of the circumstances, citing *Air NZ v V* in support.

[151] I do not accept that s 103A's reference to "all of the circumstances" requires the Authority and/or Court to review the justification or otherwise for prior disciplinary action predating a decision to dismiss and nor do I consider that an approach of this sort can be taken from the full Court's judgment in *V*. Such an

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[16] [2011] NZEmpC 8.
[17] At [62].
[18] [2002] 1 ERNZ 139.

interpretation would cut across the statutory timeframes for bringing a grievance and well established case law.

[152] The reality is that the plaintiff was on a final written warning at the time his dismissal occurred. This was a disciplinary outcome that he had advocated for as appropriate through his representative. It came after the meeting of 23 September 2009, during which the plaintiff (through his representative) acknowledged the defendant's concerns. No objection was taken in respect of the process that had been followed in investigating the 10 June 2009 incident at the time the final warning was given. The plaintiff accepted the final warning. In the final warning letter Mr Lowe recorded the plaintiff's understanding as to why the defendant was taking matters seriously and that he was prepared to make "major life changes." He made it clear that he had reservations about whether the plaintiff had been completely open and honest, particularly in relation to the nature and extent of his involvement with unknown pills and in relation to the Red Alert explanation he had given. The plaintiff accepted that his behaviour was perceived poorly and that it had the potential to damage the defendant's brand and reputation. Mr Lowe made it clear that perceptions of risk to public safety would not be tolerated and were particularly serious. Mr Lowe accepted the plaintiff's assurances. He would otherwise have decided to dismiss the plaintiff.

[153] While a sustained attack was mounted on the final warning during the course of the hearing, the fact remains that it was not challenged at the time. The plaintiff is not entitled to seek to challenge the warning at this belated stage, and is well outside the statutory timeframe for doing so.[19] Even if the plaintiff was otherwise able to point to deficiencies in the warning, or the process leading up to it, the warning can only be relevant by way of background context to the plaintiff's ultimate dismissal in the circumstances.

[154] The terms of the warning were set out in Mr Lowe's letter. Mr Lowe had made it clear, as part of the warning, that he had residual concerns that the plaintiff had not been completely honest during the course of the investigative process and

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[19] Employment Relations Act 2000, s 114.

made particular reference to his concern about unknown pills and substances. This came back into focus in light of subsequent information which came to Mr Lowe's attention.

[155] While the plaintiff, through his representative, raised a number of concerns about reliance on the Police summary report he refused to provide any comment on the information contained within it. I do not consider that this was consistent with the plaintiff's obligations to be communicative and responsive.[20] Despite being invited to comment both by way of letter and at the meeting of 25 May 2010 the plaintiff declined to do so. This approach provided a platform for two things:

(a) The defendant to reasonably proceed on the basis of the information it had available to it at the time;

(b) To draw an adverse inference from the plaintiff's silence: *Northern Hotel etc IUOW v Maintenance Free World (NZ) Ltd*.[21]

[156] While the plaintiff had agreed to provide a summary of the Police file and a statutory declaration to the defendant he later declined to do so. It was put to the plaintiff that this was because the material contained information that he did not want his employer to see. He denied that this was so but I am satisfied that this was likely to be the reason underlying the marked change in approach in relation to the issue. I was not drawn to the plaintiff's evidence in relation to the reasons why he did not provide additional information to the defendant from the Police file. His statements that he did not know what was on the file were not credible given his acceptance that he had possession of them, through his lawyer, and the potential importance of that information to the employment investigation would have been readily apparent. I found his evidence vague and contradictory in relation to when he obtained the file. His initial reason for refusing to provide the Police file was that he was concerned about revealing personal text messages between himself and his

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[20] See: *Radius Residential Care v McLeay* [2010] NZEmpC 149 at [55]-[56].
[21] [1989] 3 NZILR 1 (LC), where it was held that an employer is entitled to regard the failure of an employee to deny allegations as an admission. See also: *Auckland Chemical, Paint etc IUOW v Healtheries of NZ Ltd* [1990] 2 NZILR 701 (LC); *Pallet Supplies Co Ltd v Yates* [1998] 1 ERNZ 532; *Taiapa v Te Runanga o Turanganui a Kiwa Trust* [2013] NZEmpC 38, at [62].

fiancé before her death. It was not until later that he advised that he would not be providing the information under the Privacy Act.

[157] At the hearing the plaintiff asked the following rhetorical question: if he had something to hide on the Police file why would he hand over the summary report that contained adverse material in it? Mr Scott's response to the following line of questioning by counsel was apt:

> Q. But if he's trying to hide information which is what you say why would he give you the worst possible interpretation of his conduct by a police officer?
>
> A. Well if he was prepared to give us something like that how are we supposed to know there wasn't worse remaining in the file?

[158] No issues of self incrimination or double jeopardy arose because by this time the Police had confirmed that they were not going to charge the plaintiff. And even where an employee is facing parallel criminal proceedings there is no immutable rule that s/he is entitled to refuse to respond to questions arising in a disciplinary context.[22] Performance of the duties of good faith contained within s 4(1A)(b) (to be responsive and communicative) are couched in mandatory, not discretionary, terms.[23] The plaintiff failed to meet his obligations to his employer.

[159] Nor was I drawn to the plaintiff's evidence as to the circumstances surrounding the alleged conflict of interest that Mr Lowe was said to have, and which was raised at the eleventh hour of the investigative process. I consider that it is more likely than not that it was raised in an attempt to de-rail the investigation at a belated stage.

[160] It was alleged in the statement of claim that Mr Lowe was biased against the plaintiff, although no particulars were pleaded. I was unable to discern any evidence to support an allegation of actual or apparent bias against Mr Lowe. I am satisfied that he approached matters relating to the plaintiff with an open mind. The reality was that the disciplinary processes raised some difficult issues that Mr Lowe was

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[22] *Wackrow v Fonterra Co-operative Group* [2004] 1 ERNZ 350 at [80].
[23] See the discussion in *Vice-Chancellor of Massey University v Wrigley* [2011] NZEmpC 37, [2011] ERNZ 138 at [86].

obliged to navigate his way through. Allegations of bias and predetermination against Mr Lowe are also inconsistent with his decision to issue a final warning (as advocated by the plaintiff), rather than dismiss.

[161] Mr Lowe came away from his meeting with the Police and Customs with concerns about the plaintiff's potential involvement with illicit substances. He was not privy to the details of the information that either agency held, but was aware that there were text messages with allegedly thinly veiled drug speak. Mr Lowe was expressly asked by the Police to keep matters confidential, so as not to impede the Police investigation by "tipping" the plaintiff off. This placed Mr Lowe in an invidious position. I do not consider that he can be criticised for the way he responded, for reasons which are set out in greater detail below. He asked for formal confirmation that the Police were investigating, and this occurred on 10 November 2009. The letter did not set out the details of the investigation but did state that the nature and circumstances of the allegations that formed the basis of their investigation raised concerns for the Police about public safety given the nature of the plaintiff's role as a pilot. The company was asked for its patience, "to allow us to complete our investigation, but request you consider the safety issues relevant to your industry."

[162] The plaintiff submits that the refusal to provide the Police material should have been specifically raised as a fresh allegation and that he ought to have been advised that a failure to provide it could lead to his dismissal. I have already dealt with this submission. While it would have been the preferable course to expressly advise the plaintiff in the way contended for, I do not consider that the plaintiff could have been under any misapprehension about the nature and importance of the request for the information sought, the reasons why the defendant was seeking it, and that a failure to comply with the defendant's repeated requests was likely to have a disciplinary outcome.

[163] In the absence of any further comment or explanation from the plaintiff in respect of the issues that the Police summary and toxicology reports gave rise to, the defendant was left in the position of weighing up the material that was before it. The material included suggestions that the plaintiff had supplied his flatmate with an

unidentified pill only days before 10 June 2009 which appeared to have similar effects to BZP and that the plaintiff had provided N with a similar pill in the early hours of 10 June 2009; N was hospitalised less than 12 hours later and BZP was found in her system the same day; N consistently denied taking any pills on or before 10 June 2009; the plaintiff was sent a text message on 10 June 2009 which referred to a pill in a way that does not appear consistent with either a vitamin tablet or a caffeine pill.

[164] One page of the toxicology report was missing from the copy of the report provided to the plaintiff, and considered by Mr Lowe. This omission was inadvertent. Mr McGinn submitted that it was difficult to see how the investigation into alternative explanations for the BZP in N's system had been thorough given that one page (page 2) of the report was missing. It was submitted that because of the half life of BZP, it was possible for N to have taken a pill containing BZP prior to the spa pool incident and for it still to have shown up in her system at the time she was tested. Mr McGinn submitted that the missing page 2 referred to a suggestion that N may have taken a herbal remedy earlier in the day on 9 June, and had this been known it would have provided the plaintiff with a further line of response to his employer's concerns. However, the significance of the missing page's contents was limited, as the defendant had in any event explored issues relating to what pills, if any, N had taken prior to the incident and had explored possible alternative explanations for the presence of BZP in her system.

[165] Mr McGinn further submitted that while the omission was accidental it constituted an act of negligence and amounted to a breach of good faith. I deal with this latter submission later. The plaintiff also contended that he was not given full information held by the employer in relation to what N had said.

[166] There is a duty to provide information to an employee which is relevant to the continuation of their employment.[24]

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[24] Section 4(1A)(c); *Wrigley* at [49].

[167] It is clear that the plaintiff did not receive a full copy of each iteration of N's statements, although it was readily apparent that amendments had been made. The first draft was not prepared by or confirmed by N. N's handwritten amendments to the draft following her discharge from hospital appear in subsequent tracked changes. It is apparent that handwritten notes of the interview with N on 16 June 2009 were made available to the plaintiff. The statement that was confirmed as true by N was provided to the plaintiff. While the plaintiff complained that he was belatedly given a copy of the 23 March 2010 transcript of the interview with N, notes of the meeting (which the plaintiff cannot recall) reflect that he acknowledged that he did have a copy of them. I am satisfied that he was provided with a copy of those notes. I am unable to discern any significant amendments made to N's statement and nor do I consider, based on the evidence before the Court, that there is any basis to suggest that the defendant applied any inappropriate influence over N in terms of what she said.

[168] It is not uncommon for statements to be refined to the point where witnesses are satisfied that they accurately reflect their recollection of events, and it is clear that the first draft of N's statement was prepared by Ms Dons rather than by N herself. Mr Lowe's evidence was that he only considered the final, confirmed statements that he was provided with and I accept his evidence on this point. While the plaintiff contended that inconsistencies between the drafts and the final versions of the statements may have provided fertile ground for further inquiry, it is evident that apparent inconsistencies were identified by the plaintiff and his representative during the course of the disciplinary process and were specifically addressed. It is also evident that although the plaintiff did not have page 2 of the toxicology report he did take the opportunity to raise the full range of issues relating to the report with his employer, most particularly in relation to possible alternative explanations for the presence of BZP in N's system. He knew too that N's alcohol level was high, N having disclosed in a statement provided to the plaintiff that she had probably consumed more alcohol based on test results. The plaintiff made submissions about the possibility that N had been taking diet pills, and accepted that he had done so.

[169] As the Chief Judge observed in *Kaipara v Carter Holt Harvey Ltd*,[25] while a failure to provide information may amount to a breach of s 4(1A)(c) of the Act it does not follow that any such breach renders a dismissal or disadvantage unjustified.

[170] I do not consider that the fact that the plaintiff was not provided with page 2 of the toxicology report and draft versions of N's statements is of material significance in the circumstances of this case.

[171] The plaintiff submitted in closing that Mr Lowe ought to have interviewed N personally in order to assess her credibility as against the plaintiff's, who he did hear from, although this alleged deficiency in the process was never complained about at the time. As would have been readily apparent to the plaintiff and his representative during the course of the process, Mr Lowe was provided with written statements to consider. The defendant submitted that the fact that Ms Dons interviewed N and supplied her statement to Mr Lowe does not render the process or the decision to dismiss unjustified, referring to *AFFCO New Zealand Limited v Nepia*[26] in support. In that case the Court acknowledged that it may be appropriate for a decision-maker to delegate the investigation part of a disciplinary process to another person.[27]

[172] Issues relating to inconsistencies between the various statements were identified by the plaintiff at an early stage and the defendant complied with requests that further questions be put to witnesses, including N. I am satisfied that Mr Lowe weighed the accounts against the information that was available to him, and he heard personally from the plaintiff.

[173] The defendant concluded that the toxicology report did impact on the plaintiff's previous responses and that the BZP in N's system was explained by the pill provided to her by the plaintiff. Given the failure of the plaintiff to respond in any way to the issues that the additional information raised, it was permissible for the employer to reach this view based on the information available to it at the time.

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[25] [2012] NZEmpC 40 at [22].
[26] WC25/07, 28 September 2007.
[27] At [57].

[174] While not pleaded, an issue was raised during the course of the hearing as to the identity of the decision-maker. The plaintiff asserted in evidence that Mr Ackland was in fact the decision-maker. This was not put to Mr Ackland in cross examination, or Mr Lowe. I am satisfied on the evidence that Mr Lowe was the decision-maker.

[175] In evidence the plaintiff also suggested that he had been subjected to unjustified disparity of treatment. While disparity of treatment had not been pleaded, counsel made particular reference to the way in which N had been treated, assurances she appears to have been given that she would not get into trouble as a result of the incident, and the fact that it seems no action was taken in respect of any of the other employees following the spa pool incident.

[176] It is well settled that disparity of treatment, in the absence of adequate explanation, does not necessarily render a dismissal (or disadvantage) unjustified.[28] Mere speculation as to what lies beneath apparently different treatment of staff is insufficient for the Court to draw a conclusion that a breach has occurred. The evidence falls well short of establishing actionable disparity of treatment.

[177] I am satisfied that the information that was before the defendant at the time the decision to dismiss was made disclosed conduct which a fair and reasonable employer would regard as serious misconduct.

[178] While not a text-book-perfect process, I am satisfied that the overall principles of fairness were complied with in the circumstances of this case in terms of the decision to dismiss.[29]

[179] Standing back and considering the evidence, I am satisfied that the dismissal was justified, both procedurally and substantively. On an objective basis, the defendant's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

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[28] *Buchanan v Chief Executive of the Department of Inland Revenue* [2006] NZSC 37, [2006] ERNZ 512 at [7].
[29] *Chief Executive of Unitec Institute of Technology v Henderson* (2007) 4 NZELR 418 at [56].

Allegedly unjustified suspension

[180] The plaintiff alleges that his continued suspension following the completion of the Police investigation was unjustified.

[181] Mr Lowe wrote to the plaintiff on 19 November 2009 advising him that it had come to his attention that the Police were investigating him for the supply of Class C drugs, that there was a concern about safety, and that suspension was being considered. Mr Lowe did not take this to mean that the Police investigation was limited to events that had occurred on 9 May 2009, and I accept that this was so. The plaintiff was invited to a meeting to discuss the proposal. The meeting took place on 30 November 2009. The decision to suspend was confirmed by way of letter dated 1 December 2009.

[182] The plaintiff argues that while the defendant linked the proposed suspension with its knowledge of the Police investigation it had known about the investigation for some months, prior to the issue of the final warning and it knew of the toxicology result prior to 19 October 2009. I have already dealt with the latter point in relation to timing. Mr Lowe's letter of 19 November 2009 referred to the proposed suspension "whilst the Police investigation takes place." The plaintiff submitted that the reason for the suspension ended when the Police decided not to proceed with criminal charges. I do not accept this submission. Concerns about the potential risks posed by the plaintiff remained, despite the fact that the Police subsequently formed the view that they did not have sufficient evidence to prosecute (their assessment apparently being that the evidence fell "just short" for these purposes). The Police expressed the view that CAA might have to take action, and suggested that organisation might apply to the Police for their file. Mr Lowe had made it clear to the plaintiff that there may be employment consequences for him following the outcome of the Police investigation.

[183] In the event the Police did not formally confirm that it was not proceeding against the plaintiff, despite Mr Lowe's request for written confirmation as to the status of the Police investigation. Constable Harris did however advise Mr Lowe on 19 January 2010 that the investigation would "probably" be complete within the

week. It is apparent that Mr Lowe was concerned about the ongoing nature of the plaintiff's suspension and whether he ought to be sent back on line. This line of thought was not more broadly accepted within the company.

[184] However, by this time CAA was seeking the plaintiff's name, to enable it to commence its own investigation. It formally advised the company that it was going to do so on 5 February 2010. It is apparent that CAA had been in contact with the Police, although it is unclear what information may have passed between the two organisations. The Authority expressed support for the defendant's decision to prevent the plaintiff from flying, observing that this was "consistent with effective risk management."

[185] Mr McGinn submitted that the fact that Mr Lowe turned his mind to returning the plaintiff to flying duties at the conclusion of the Police investigation meant that CAA's comment on the defendant's decision to suspend was irrelevant to an assessment of justification. I disagree. Plainly there remained issues of safety, reinforced by CAA's subsequent decision to suspend the plaintiff's licence under the Civil Aviation Act pending the conclusion of its investigation.

[186] Mr Ackland accepted that the delay in referring matters to CAA on a fit and proper person basis could have disadvantaged the plaintiff by delaying the start of the Authority's process. However, no issue was taken with the ongoing suspension following the defendant's correspondence of 18 February 2010 (advising that CAA was conducting a fit and proper person investigation and that the Authority supported the defendant's decision not to allow the plaintiff to fly in the meantime) and 1 April 2010 (indicating that the Authority continued to support the defendant's decision). And at the meeting of 16 April 2010 the plaintiff's representative stated that they would "really like" to see him returned to flying duties within 14 days but no challenge or objection was made to the suspension continuing beyond this point.

[187] From 27 April 2010 CAA imposed its own suspension on the plaintiff's licence, having satisfied itself that there was a basis for doing so. There was no evidence that any action was taken by the plaintiff to challenge this suspension,

which remained in place until well after the plaintiff's employment had been terminated.

[188] I do not consider that it is open to the plaintiff to challenge the suspension continuing after 19 January 2010 at this late stage, and well after the statutory timeframe for doing so has expired.

[189] I am not satisfied that the defendant's suspension of the plaintiff constituted an unjustifiable disadvantage in the circumstances. And even if the suspension was unjustifiable from the time the Police communicated their decision not to charge the plaintiff with a criminal offence (which I reject), the period of any unjustified suspension was minimal – namely at the earliest from 16 February 2010 (the date on which Mr McCabe advised Mr Lowe that the Police investigation was concluded) to 27 April 2010 (when CAA exercised its statutory powers to suspend the plaintiff's licence). From 27 April 2010 the plaintiff would not have been entitled to fly, even if his employment suspension had been lifted on the earlier date. And while I accept that there is a value in pilots accumulating flying hours, the plaintiff remained on full pay during the entire period at issue.

Alleged breaches of good faith

[190] Section 4(1A)(c) of the Act requires an employer:

> ... who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment ... to provide the employees affected –
>
> (i) Access to information, relevant to the continuation of the employees' employment, about the decision; and
>
> (ii) An opportunity to comment on the information to their employer before the decision is made.

[191] The plaintiff alleges that the defendant breached its obligations of good faith by failing to provide him with all of the information it was considering. The particulars of the alleged breach are set out in the statement of claim as follows:

(a) Failing to provide the full toxicology report to him;

(b) Failing the disclose the fact that N had only disclosed the toxicology report after she had resigned;

(c) Failing to disclose the dealings that Mr Lowe had with the Police and Customs;

(d) Acting in a misleading and deceptive manner over the flight simulator training.

[192] I deal with each of these allegations in turn.

[193] There was an admitted failure to provide the missing page of the toxicology report. I accept that the missing page contained relevant alternative explanations for how BZP ended up in N's system. However, given that those alternative explanations were explored in the absence of page 2 of the report the plaintiff was not disadvantaged by the omission. The mistake was an obvious one on the face of the document, but was not picked up by either the plaintiff or his representative. The failure to provide the missing page was the result of an inadvertent oversight. Even if such an oversight could otherwise give rise to a breach, I would not have considered it appropriate to impose a penalty in the circumstances.

[194] The plaintiff submitted that he ought to have been advised that N had provided the defendant with the toxicology report following her resignation. However that information was already available to the plaintiff in terms of N's final statement. And issues relating to N's veracity, and reasons why she may have lied (including to protect her employment and reputation), had been well traversed by and on behalf of the plaintiff in any event.

[195] The plaintiff contends that the defendant was obliged to advise the plaintiff as soon as it had contact with the Police.

[196] The general obligation imposed by s 4(1A)(c) is subject to the exception in s 4(1B). An employer is not required to provide access to "confidential information if there is good reason to maintain the confidentiality of the information." This

raises two questions. Firstly, whether the information complained about was confidential information for the purposes of s 4(1B) and, if so, whether there was good reason to maintain confidentiality over it.

[197] As the full Court pointed out in *Vice Chancellor of Massey University v Wrigley*,[30] for the purposes of s 4(1B) information should be regarded as "confidential information" if it is provided in circumstances where there is a mutual understanding of secrecy. While three circumstances are specified in s 4(1C) which constitute good reason to maintain the confidentiality of information, they are expressed as inclusive rather than exclusive. In any particular case whether a sufficiently good reason exists will require consideration of the likely effects of giving access to the information and those of maintaining confidentiality.[31]

[198] Mr Lowe was advised by the Police that the plaintiff was the subject of a criminal investigation and was specifically asked not to pass this information on. The information was provided under a mutual understanding of secrecy. Mr Lowe was asked by the Police not to "tip off" the plaintiff about its investigation, so as to protect the integrity of its inquiry. A search warrant was subsequently sought by the Police of the plaintiff's house, and this was granted and executed.

[199] I consider that a sufficiently good reason existed in the circumstances to withhold the information at issue from the plaintiff. I do not consider that the failure to immediately advise the plaintiff that he was the subject of a criminal investigation constituted a breach of any of the good faith obligations owed to him. If Mr Lowe had done so it would have undermined the criminal justice process.

[200] It was clear that the plaintiff held the view that Mr Lowe had been acting in concert with the Police and that he had been privy to a considerable amount of information. I have already rejected this proposition.

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[30] [2011] NZEmpC 37, [2011] ERNZ 138 at [67].
[31] *Wrigley* at [81].

[201] The plaintiff also suggested in evidence that the defendant had manipulated the involvement of CAA. The evidence did not support the plaintiff's criticisms. While there was correspondence between the two organisations it is evident that CAA was not interested in whether or not the criminal investigation was ongoing and would still have taken action. This is consistent with the different role of CAA, including the nature of the fit and proper person assessment it is obliged to undertake and the standard of proof that applies under its empowering statute.

[202] The plaintiff contended that Mr Lowe's failure to respond to the query raised in Mr McGinn's letter of 21 April 2009 amounted to a breach of good faith. While it would have been preferable for Mr Lowe to have responded the issue was never the subject of any follow-up action by the plaintiff.

[203] I accept that Mr Lowe ought not to have given erroneous advice as to why the simulator training would not proceed. The simulator was not being repaired, and allowing the plaintiff to undertake simulator training would not have raised any issues of safety. Nor would it have jeopardised the Police investigation. This was potentially misleading and deceptive conduct under s 4(1)(b) of the Act. However, for a penalty to be awarded for breach of s 4(1) the Court must be satisfied that the threshold requirements of s 4A have been met. In the broader circumstances, I do not consider that the behaviour in question meets the required threshold and I decline to award a penalty.

Conclusion

[204] The plaintiff's claim is accordingly dismissed.

[205] In terms of s 183(2) of the Act, this judgment now stands in place of the Authority's determination.

[206] Because of the findings I have reached I do not need to deal with the defendant's fall-back argument, that subsequently discovered misconduct on the part of the plaintiff would have justified dismissal. Nor do I need to deal with issues relating to remedies.

[207] The parties are encouraged to seek to agree costs between themselves. If this does not prove possible costs may be the subject of exchanged memoranda, with the defendant filing and serving any such memorandum and material in support within 30 days of the date of this judgment and the plaintiff within a further 30 days. The Registrar will need to convene a telephone conference to enable the non-publication orders currently in place on an interim basis to be finally determined, as requested by the parties.

Christina Inglis
Judge

Judgment signed at 1.30 pm on 20 March 2013