DECISION

Fair Work Act 2009
s.739—Dispute resolution

The Civil Air Operations Officers' Association of Australia
v
Airservices Australia
(C2019/914)

Commonwealth employment

COMMISSIONER BISSETT MELBOURNE, 20 AUGUST 2019

Alleged dispute about any matters arising under the modern award and the NES; [s146].

[1] The Civil Air Operations Officer's Association of Australia (Civil Air) has made an application to the Fair Work Commission (Commission) for the Commission to deal with a dispute in relation to its member Mr Andrew Wren. The application to the Commission was made in accordance with s.739 of the *Fair Work Act 2009* (FW Act) pursuant to the dispute settlement procedure in the *Airservices Australia (Air Traffic Control and Supporting Air Traffic Services) Enterprise Agreement 2017-2020*[1] (Agreement).

[2] Mr Wren is employed by Airservices Australia (Airservices) as an Air Traffic Controller (ATC). Mr Wren had been stood down with pay and Airservices had determined to dismiss him from his employment as it did "not consider that [he is] capable of demonstrating consistent performance of safe and efficient air traffic control."[2] This decision followed a serious incident in October 2018 when Mr Wren, whilst on a Performance Improvement Plan (PIP) in relation to earlier matters, failed to maintain separation of aircraft.

[3] On 18 March 2019 I issued a decision[3] and interim orders[4] requiring that Mr Wren be returned to work on alternative duties until such time as the application by Civil Air could be heard and determined in full.

BACKGROUND

[4] Mr Wren is employed as an ATC. He commenced employment with Airservices in 1996. He is 50 years old.

[5] In mid-2015 Mr Wren was transferred from the Hasting Group (Hastings) to the Gwydir Group (Gwydir) at the Brisbane Centre. Gwydir operates arrivals into Sydney. Mr Wren had been responsible for departures when in the Hastings Group.

[6] After being moved to Gwydir Mr Wren was involved in a number of "incidents". These can be summarised as:

- 19 April 2016 – distracted at live console and consciously non-compliant with supervisory instructions;
- 28 November 2017 – breakdown of co-ordination;
- 26 August 2018 – incorrect runway assigned;
- 19 October 2018 – loss of aircraft separation.

[7] In addition Mr Wren had the following performance issues:

- 13 February 2018 – failed to reach the minimum standard in completing open book rating paper examination. Mr Wren's ATS privileges (his right to operate Airservices equipment) were withdrawn temporarily and reinstated when he completed a closed book examination;
- 14 May 2018 – failed to secure a readback to confirm receipt of a holding instruction;
- 31 May 2018 – deemed not competent during a Performance Assessment Report (PAR) renewal check. This resulted in a loss of privileges;
- 12 June 2018 – underwent a remedial PAR and was deemed competent (signed on 13 June 2018);
- 4 July 2018 – underwent a performance check and was deemed competent;
- 16 July 2018 – issued with a PIP.

[8] The following details were contained in the PIP:

- It was issued because of deficiencies in Mr Wren's performance identified by the incidents of 28 November 2017, 13 February 2018, 14 May 2018 and 31 May 2018;
- A review had been conducted which identified areas in which Mr Wren needed to develop, take action and be diligent.
- His performance would be assessed by compliance with policy and procedures including the code of conduct and fitness for duty provisions and that he would be provided with feedback to further improve and monitor his technical performance;

- Expectations and support to be provided. The support identified was "ALM guidance" including that Mr Wren should contact his ALM (Line Manager) or team members and discuss or clarify requirements with his ALM; and access to the Employee Assistance Program;

- A formal review of the PIP would occur at the end of the review period with possible outcomes, if he failed to reach or maintain the standard required, of training, a written warning, establishment of conditions, reduction in classification or termination of employment.

[9] The PIP was signed by Mr Wren and his ALM on 16 July 2018.

[10] The PIP set five milestones. Mr Wren successfully completed the first on 16 July 2018 and the second on 23 August 2018.

Loss of separation incident

[11] From 24 September 2018 to 9 October 2018 Mr Wren was an annual leave. On 9 October 2018 he undertook a familiarisation shift and on 10 October 2018 performed a night shift (a traditionally quiet shift). From 11 to 13 October 2018 Mr Wren was absent on personal leave and from 14 to 18 October 2018 he was absent on rostered days off.

[12] On 19 October 2018 Mr Wren returned to work and was involved in a loss of aircraft separation (LOS) incident. As a result of this Mr Wren again lost his privileges.

[13] Following the incident of 19 October 2018 Airservices management undertook a desktop review of Mr Wren's performance since 2002.[5] The desktop review did not draw any conclusions but set out, objectively, the relevant history in relation to Mr Wren's performance including the incidents he had been involved in.

[14] As a result of the incident of 19 October 2018 Mr Wren was not assessed against the third, fourth and fifth milestones in his PIP.

[15] On 29 November 2018 Airservices wrote to Mr Wren and advised him that a review of his PIP had been conducted and it had been concluded that his progress remained unsatisfactory in that he had been unable to meet the standards of the PIP. Airservices advised that it had concluded that no further training would address his performance deficiencies to enable him to sustain work at the required level of an ATC.

[16] On 12 December 2018 Mr Wren provided a response to the Airservices letter of 29 November 2018. Airservices ultimately determined to seek redeployment for Mr Wren or, should this not be possible, would proceed to termination of his employment. Redeployment was not successful, and Mr Wren was advised his employment would be terminated. Following a conference before the Commission this was delayed pending further attempts at redeployment. Again, this was not successful, and Mr Wren was advised his employment would be terminated on 15 March 2019. The interim orders of the Commission were issued shortly thereafter.

[17] It is not contested that Airservices operates in a highly regulated environment where safety considerations are paramount. To this end and in order to be able to fulfil their duties ATCs are provided with induction training (*ab initio* training), specific training to enable them to work on designated airspace (endorsements); regular mandatory training; Performance Assessment Reports (PARs); regular performance checks; remedial training and on-going training as needed.[6]

[18] The role of an ATC requires that they:

- Maintain aircraft separation;
- Sequence aircraft;
- Maintain a search and rescue watch on aircraft;
- Co-ordinate aircraft movements with other ATCs; and
- Provide a flight information service.

THE PROVISIONS OF THE AGREEMENT

[19] Mr Wren says that in deciding to terminate his employment Airservices did not meet its obligations pursuant to clause 50 of the Agreement.

[20] Clause 50 of the Agreement is as follows:

> **50. PERFORMANCE, CONDUCT, TERMINATION OF EMPLOYMENT**
>
> 50.1. The primary focus of managing an employee whose performance and/or conduct is unsatisfactory should be to constructively assist the employee to improve their performance and/or conduct to a satisfactory level within a reasonable time, giving such feedback and assistance as is appropriate. Initial or 'early intervention' processes may include, but are not limited to, providing an employee with a course of training or other remediation. Note taking by the relevant manager during counselling or feedback does not constitute making this a formal process.
>
> 50.2. *Procedural fairness*
>
> Airservices will adhere to the principles of procedural fairness when managing an employee in relation to suspected under-performance or misconduct. This means that Airservices will:
>
> (a) promptly advise the employee of its concerns;
>
> (b) provide enough time to the employee to be represented or supported in relation to the performance and conduct management process;

(c) provide enough opportunity for an employee to respond to the concerns raised by Airservices and to genuinely consider that response;

(d) Airservices will be unbiased in the consideration of the employee's views and will genuinely consider the matters put by the employee or by their representative; and

(e) Take actions and issue sanctions that are proportional to the employee's performance and conduct.

50.3. *Formal Process*

Where Airservices has serious concerns with an employee's performance and/or conduct, Airservices will observe the principles of procedural fairness, advise the employee of its concerns in writing, setting out relevant particulars and arrange a meeting with the employee to discuss those concerns before taking any action against the employee. This process does not apply where the employee has engaged in serious misconduct that warrants summary dismissal.

Without exhaustively stating the actions that Airservices may take to manage an employee's poor performance and/or conduct, Airservices may:

(a) require the employee to undergo remedial training and/or counselling as appropriate to the circumstances of the case;

(b) give the employee a written warning appropriate to the circumstances of the case;

(c) set conditions with which the employee needs to comply;

(d) reduce the employee in classification for a period of time or indefinitely;

(e) terminate the employee's employment.

[21] Civil Air contends that Airservices has failed to meet the requirements of clause 50.1 of the Agreement in relation to Mr Wren in that it has not provided constructive assistance to him to improve his performance. Airservices disagrees with this characterisation.

[22] The dispute settlement procedure is set out in clause 10 of the Agreement There is no issue taken and I am satisfied that these procedures have been followed.

[23] Further I am satisfied that the dispute is in relation to the obligations on Airservices under clause 50 of the Agreement in circumstances where it has concerns as to the performance of an employee.

[24] I am therefore satisfied that the dispute is in relation to a matter arsing under the Agreement and the Commission has jurisdiction to deal with the matter.

WHAT DOES CLAUSE 50 MEAN?

[25] Prior to determining if Airservices has met its obligations under the Agreement it is first necessary to determine the meaning to be attributed to clause 50 of the Agreement.

[26] Civil Air says that the principals relevant to interpreting an Agreement were developed over a number of cases including *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU) v Berri Pty Limited*[7] (Berri). It submits that of particular importance is the obligation not to take a narrow or pedantic approach to the matter and to interpret an agreement in the context within which it was made.

[27] Civil Air submits that relevant context in this case is the history of the parties' conduct prior to the negotiation of the Agreement. Clause 50 of the Agreement is similar to provisions in previous agreements. The conduct of the parties under previous agreements is therefore important in determining meaning. This context, it says, includes the manner in which the performance of ATCs has been monitored and regulated in the past.

[28] Civil Air says that the historical regulation and monitoring of ATCs includes the provision of Training Support Agreements (TSAs) as support and assistance to ATCs at *ab initio* training, in endorsement training and in remedial training.

[29] Civil Air also submits that the word "should" in the phrase "The primary focus…should be to constructively assist…" is a derivative of the word "shall" and, in clause 50.1 of the Agreement, is used as an "auxiliary imperative verb in the present subjunctive (the mandative subjunctive) acting on the verb *to assist.*"

[30] In these circumstances Civil Air says that the provision should be read such that the provision of constructive assistance to an ATC is a mandatory requirement of clause 50 of the Agreement.

[31] Airservices does not take issue with the approach to interpreting agreements in relation to the principals to be applied. It says, however, that the starting point is the ordinary meaning of the words.

[32] As to the provisions of clause 50 of the Agreement, Airservices says that the "primary focus" of Airservices in managing poor performance of employees is important. Airservices agrees that it "should…constructively assist the employee…" but highlights the use of the words "primary" and "should" in clause 50.1 of the Agreement. Airservices, relying on the definition in the Macquarie Dictionary, says that "primary" relevantly means "first in order in any series, sequence, etc" such that the constructive assistance is required to be Airservices' first consideration. Airservices submits however that this does not mean that "constructive assistance" is the sole focus of Airservices in managing poor performance. It submits that there are other things that Airservices might do. Importantly Airservices says that "constructive assistance" does not act as a precondition to the exercise of Airservices' right to terminate the employment of an employee.

[33] Airservices says that the word "should" in context should be read as permissive and not as placing a mandatory requirement on Airservices. If it was otherwise Airservices submits that the words "shall" or "must" would have been used in clause 50.1 of the Agreement and not the word "should".

[34] Airservices further submits that the "constructive assistance" to be provided is further qualified by the expression "giving such feedback and assistance as is appropriate". This, it says, confirms that the assistance to be provided is dependent on the circumstances of the particular case. The appropriateness of the assistance to be provided is a matter for Airservices to determine taking into account the "particular case and the safety-critical nature of its enterprise."

[35] Airservices says that the lack of a particular definition of the phrase "constructive assistance" further supports its construction that what constitutes constructive assistance is a matter to be determined on a case by case basis.

[36] Airservices submits that its construction of clause 50.1 is consistent with the context of the Agreement as a whole. In particular it refers the Commission to clause 5.1 of the Agreement which it says is an acknowledgement by the parties that Airservices must "continuously provide safe and efficient air traffic services". Clause 50 of the Agreement, it says, in this context, acknowledges that employees should be given assistance if their performance is not up to the standard required but that this does not mean it is unable to terminate an employee's employment for under performance and further does not mean that it must comply with some rigid process.

Consideration

[37] The principals relevant to interpreting an agreement are well traversed and there is no dispute between the parties as to those.

[38] In *Berri* the Full Bench considered in detail the relevant authorities and summarised the relevant principles (not repeated here) arising from those authorities.[8]

[39] It is clear from these principles that the starting point to the interpretation of an Agreement is the ordinary meaning of the words. The interpretation of the text must be determined in the context of the Agreement as a whole.

[40] Clause 50 of the Agreement has three sections – clause 50.1 is a general statement with respect to managing performance and conduct matters. Clause 50.2 concerns the application of principles of procedural fairness and clause 50.3 deals with the formal process for managing performance or conduct.

[41] Clause 50.1 of the Agreement is a self-contained provision to the extent that it deals with the informal process for responding to performance or conduct matters (subject only to the obligation in clause 50.2 with respect to procedural fairness). Putting aside the word "should" for one moment the remainder of clause 50.1 is clear on its face.

[42] Clause 50.1 of the Agreement states that the "primary focus…should be to constructively assist the employee to improve their performance…giving such feedback and assistance as is appropriate. Initial or 'early intervention' processes may include, but are not limited to, providing an employee with a course of training or other remediation."

[43] "Primary" means "first in order in any series, sequence, etc."[9] "Focus" is the point of attention. This suggests that, on a plain reading, clause 50.1 of the Agreement requires that the first point of attention of Airservices should be the constructive assistance to the employee.

[44] Firstly then, whatever assistance is provided should be constructive – that is "positive; practical; helpful".[10] Second, the assistance given should be directed to improving performance within a reasonable time period. Third, the assistance should be as "appropriate" – that is, "suitable or fitting for a particular purpose, person, occasion, etc".[11]

[45] So, having identified a performance issue the first point of attention of Airservices "should" be positive, practical help to enable the employee to improve their performance within a reasonable period of time. The "help" given must be directed to the outcome sought.

[46] The use of the word "should" is, without any doubt, problematic given the breadth of meaning that can be attributed to it. "Should" can be read as creating an obligation somewhere between a mandatory requirement (must) and a strong suggestion (consider). Where it falls on the spectrum must be taken from the context within which it is used. The meaning to be attributed to the word "should" is the central issue in dispute in terms of the requirements that arise from the clause.

[47] The obligation imposed by clause 50.1 of the Agreement is, however, conditioned by the phrase "as is appropriate". Whilst the first point of attention is the constructive assistance to be offered to the employee this assistance must be "as is appropriate" to the circumstances of the case. This condition places an obligation on Airservices to positively determine what is appropriate in the circumstances of the particular employee. This means there is no one size fits all answer to what assistance should be offered taking into account the circumstances and cannot, in my view, be blind to what assistance has been provided to that point in time. Support for this is found in the second last sentence of clause 50.1 of the Agreement which gives examples of what may (but not must) be included in early intervention.

[48] I am not convinced that, when drafting the clause, the parties considered whether the word "should" was being used as the "auxiliary imperative verb in the present subjunctive…acting on the verb "to assist"." It does need to be remembered that industrial instruments are drafted by people with "a practical bent of mind"[12] and no more should be read into the words used than what they say. Rather, I consider "should" is used in the sense of creating an obligation on the employer, prior to commencing any formal process, to consider what might practically be done first to assist the employee to improve.

[49] In this respect I consider that the meaning to be given to the use of the word "should" can be gleaned from the context of the clause itself.

[50] Clause 50.1 of the Agreement deals with performance and conduct issues. If Civil Air is correct and "should" mandates the provision of assistance through the informal process then

this would be required for all performance and conduct issues, regardless of the severity of the poor performance or conduct. The formal process in clause 50.3 of the Agreement could not be initiated until the informal process (the constructive assistance) had occurred, yet there is nothing in clause 50.3 to suggest it cannot be utilised until the application of clause 50.1 is exhausted (however this might be measured).

[51] Further, clause 50.1 of the Agreement requires some assessment of the appropriateness of the assistance being offered. That the assistance must be appropriate imports some consideration of the totality of the circumstances confronting Airservices in relation to the particular employee in determining what assistance might appropriately be provided.

[52] The issue is whether, in all cases of poor performance or in each instance of poor performance, Airservices must go through this process in clause 50.1 of the Agreement before moving to the more formal process in clause 50.3 of the Agreement. In this regard it is my view that, in determining the assistance to be offered, the appropriateness of that assistance can, and should, properly consider past assistance. To not do so would be to ignore the context within which the assistance is being delivered.

[53] For these reasons I do not consider that it is mandatory that for each incidence of unsatisfactory performance or misconduct Airservices *must* provide constructive assistance directed at improving that particular performance or conduct of the employee concerned. Whilst the capacity or appropriateness of providing such assistance should be the first consideration it cannot be the only consideration. The word "should" is not to be read otherwise in the context of clause 50 of the Agreement.

EVIDENCE

[54] Evidence in the proceedings was given for the Applicant by:

- Mr Andrew Wren;[13]
- Mr James Walsh, Air Traffic Controller of Airservices;[14]
- Mr Thomas McRobert, Air Traffic Controller of Airservices;[15] and
- Mr Russell Eastaway, ATS Ongoing Training Specialist of Airservices;[16]

[55] Evidence was given for Airservices by Mr Richard Foley-Lewis, ATM Service Manager.[17]

[56] Objections have been raised by Airservices to aspects of the evidence of Mr Eastaway, Mr McRobert, and Mr Walsh on the grounds of relevance, that it is opinion evidence and hearsay.

[57] I have considered and dealt with the objections as necessary as I have dealt with the evidence in my decision. I have not otherwise set out a recitation of the evidence or responded to each paragraph in the evidence to which objection is taken. The objections do not cast some general question of credibility on the evidence.

DID AIRSERVICES FULFIL ITS OBLIGATION UNDER CLAUSE 50.1

[58] Airservices determined that, having placed Mr Wren on a PIP and Mr Wren having been involved in a LOS incident, the most appropriate course of action in the circumstances was to redeploy Mr Wren through the formal process in clause 50.3 of the Agreement.

[59] Whilst the LOS incident was critical (no-one suggests otherwise) the more immediate question is whether Airservices met its obligation to consider constructive assistance to Mr Wren under clause 50.1 of the Agreement.

Was the assistance provided constructive?

[60] Civil Air submits that a consideration of both the policies and practices of Airservices demonstrates that the assistance provided to Mr Wren following the LOS incident was not constructive assistance as required by clause 50.1 of the Agreement.

[61] In particular Civil Air submits that both the ATS Training Operations Manual (ATOM) and the National ATS Administration Manual (NAAM) mandate the requirement for a training needs analysis to be undertaken, a training agreement be developed and training support be provided to Mr Wren. It submits that these are "sensible, sequential" steps but Mr Wren was not given the benefit of these prior to the decision of Airservices to seek to redeploy him.

[62] The NAAM, at Chapter 5, sets out the process to be followed in the event of an incident that may cause a risk to the continued safe operation of the National Air Space (NAS). This includes that an assessment of the competency, fitness for duty and wellbeing of the ATC involved in the occurrence be carried out. Mr Foley-Lewis agreed in his evidence that a LOS is a safety incident and comes within the processes of Chapter 5 of the NAAM.

[63] The flowchart at section 5.1.1.2 of Chapter 5 of the NAAM indicates that following an incident the competence of the officer is considered; if there is any doubt a consideration of whether the officer should be allowed to continue to operate is undertaken. If the answer to that question is no, privileges are withdrawn and a review and identification of contributory factors is required to be undertaken. If there is any element of attribution to the officer, operational remedial management must be completed.

[64] Operational remedial management is set out in section 5.2 of Chapter 5 of the NAAM. It provides that the operational remedial management response "must provide effective and relevant remediation of any identified issues of competence and techniques."

[65] Mr Foley-Lewis agreed that an ATC must remain competent in recovery of a LOS. He said that Chapter 5 of the ATOM – ATS mandatory training – provides for both mandatory and remedial training where an ATC does not meet the competency requirements of the ATS Mandatory Training Package. He further agreed that recovery of LOS standards is part of the mandatory training an ATC must complete each year. Mr Foley-Lewis agreed that, following the LOS incident, Mr Wren was not offered a remedial training program.

[66] Chapter 9 of the ATOM – Endorsement training – provides the "end-to-end training process and requirements through the training phase for endorsements."[18] Civil Air submits that the requirements in Chapter 9 includes circumstances where an ATC is seeking to regain an endorsement lost or to have privileges restored after they have been withdrawn. It says that Chapter 9 requires that a Training Needs Analysis (TNA) be undertaken (Chapter 9.1), a training agreement be developed (Chapter 9.3) and training support within the meaning of Chapter 9.10 be given. Civil Air also says that the process described in Appendix D of the ATOM was not followed.

[67] As to whether the provisions of Chapter 9 apply in relation to remedial training, Civil Air says that the evidence supports that these provisions have been applied in the past to ATCs post their *ab initio* training and they therefore can and should apply in this case.

[68] Civil Air says that following the LOS incident Airservices took no action to identify the cause of Mr Wren's poor performance. Mr Foley-Lewis said he had no regard to the ATS Human Performance Model and did not consider that he needed to take this into account in relation to Mr Wren although accepted that he should have sought to understand the spate of performance issues in relation to Mr Wren. In particular Civil Air submits that a Training Support Agreement (TSA) should have been developed for Mr Wren following the LOS incident. Such an approach, it says, was supported by Ms Ingrid Clements, Acting ATS Training Design and Capability Manager of Airservices, in an email to Ms Tammy Astill (Mr Wren's ALM) on 9 November 2019.

[69] Civil Air submits that, even if Chapter 9 of the ATOM is not mandatory in Mr Wren's circumstances, the processes set out therein is practical assistance that could and should have been made available to him.

[70] Airservices submits that following Mr Wren's various incidents from November 2017 through to May 2018 he was placed on a PIP in July 2018. This occurred only after he had been provided with substantial constructive assistance by Airservices to improve and maintain his performance.

[71] In the period leading up to the PIP and following his failure in the open book examination in February 2018 Mr Wren was given time away from operational duties to ensure he had time to study for the closed book examination he was required to undertake.

[72] Airservices says that on 14 February 2018 Mr Wren successfully completed training in respect of compromised separation of aircraft or LOS.

[73] Following the 31 May 2018 failure to achieve competence in his PAR leading to a loss of privileges, Mr Wren was provided with classroom and simulator training with Mr Gary Stein, an on the job training instructor (OTJI) on 1 June 2018, with Mr Chris Keyte, OTJI, on 4 June 2018 which ran for the period of his shift and with Mr Carl White, OTJI, on 5 June 2018 focussing on sequence management. In all training sessions Mr Wren was provided with a de-brief, coaching and feedback on his performance. On 8 and 9 June 2018 Mr Wren had further training with Mr Keyte focussing on sequencing and phraseology.

[74] On 11 and 12 June 2018 Mr Wren completed a two-day performance check with a "Check and Standardisation Supervisor".

[75] As a result of the training delivered in June 2018 and successful completion of his PAR of 12 June 2018 Mr Wren received his privileges back.

[76] In addition to the training undertaken by Mr Wren in June 2018 and because of the incidents in November 2017, February 2018 and May 2018 Mr Wren was placed on a PIP on 16 July 2018.[19] The PIP indicated the milestones Mr Wren was expected to achieve and the performance assessment that would be undertaken. The PIP was instigated in accordance with the Performance Improvement Procedure. Mr Foley-Lewis said that this Procedure did not require or mandate that a person on a PIP be offered or placed on a TSA.

[77] Mr Wren went on annual leave on 24 September 2018 and, on his return, requested and was given a familiarisation shift (where he performed his duties under the supervision of another ATC).

[78] Airservices says that the training Mr Wren received through June 2018 (detailed above) and support on his return from leave was comprehensive and extensive. It submits that to concentrate on what training may have been provided following the LOS incident in October 2018 is to ignore the extensive identification of deficiencies in Mr Wren's performance and positive steps taken by Airservices to provide training and support to him to rectify these deficiencies. In essence it says that the case of Civil Air is that *more* training should have been provided to Mr Wren through the provision of a TSA.

Consideration

[79] The primary matter is whether, in the circumstances that did exist in relation to Mr Wren, Airservices met its obligation to him under clause 50.1 of the Agreement. This does require a consideration of the totality of circumstances of Mr Wren including the lead up to the LOS incident.

[80] I am satisfied that, prior to the PIP being introduced, Mr Wren was offered a range of training and support opportunities – these included:

- 1 June 2018 – Simulator training with Gary Stein;[20]
- 4 June 2018 – On The Job Training (OTJT) with Chris Keyte;[21]
- 5 June 2018 – OTJT with Carl White;[22]
- 8 June 2018 – OTJT with Chris Keyte;[23] and
- 9 June 2018 – OTJT with Chris Keyte.[24]

[81] Following from that training Mr Wren was assessed as competent on his PAR of 12 June 2018.[25] Importantly the assessment indicated that Mr Wren demonstrated good awareness and perception of aircraft disposition and sequencing actions required (his situation awareness having been identified as an issue in the 31 May 2018 PAR).

[82] To the extent that until this point there had been issues identified with Mr Wren's performance, I am satisfied that he was provided with constructive assistance to assist him in improving his performance. Further, I am satisfied that the assistance was appropriate to the issues identified in the May 2018 PAR.

[83] Despite being found competent on his PAR of 12 June 2018 Mr Wren was placed on a PIP on 16 July 2018. He was placed on the PIP because of the deficiencies identified in his performance apparent through the following:

- Breakdown of co-ordination (28 November 2017);
- Failure to achieve minimum standard in open book exam (13 February 2018 – his ATS privileges were withdrawn and reinstated when he successfully completed the exam);
- Failure to secure a readback to confirm receipt of instructions (14 May 2018);
- Deemed not competent in his PAR (31 May 2018).

[84] The PIP had a stated aim of providing Mr Wren with "reasonable opportunities to develop…practices and techniques that [would] improve [his] operational capability and technical proficiency to allow [him] to maintain operational status."[26]

[85] The PIP set five milestones for Mr Wren. Prior to the completion of those milestones Mr Wren was involved in the LOS incident.

[86] Whilst it is not obvious why Mr Wren was placed on the PIP given his successful PAR of 12 June 2018, this is not a matter I need to determine although I would observe that, until the LOS incident, he had successfully met the PIP milestones. The LOS incident however, may be taken as an indication that his "operational capability and technical proficiency" was no longer satisfactory. It is apparent that the reason Airservices took the action it finally did was not because of some failure against the PIP milestones but rather the LOS incident that came following a level of support, training and assistance being provided to Mr Wren.

[87] Whilst it may be, as Mr Walsh suggests in his evidence, that the PIP did nothing to "constructively assist" Mr Wren to improve his performance it is not apparent that at the time the PIP was issued there were other than broad concerns about Mr Wren's capacity to *maintain* his performance. In any event it does appear that Mr Wren was given substantial assistance to improve his performance prior to the PAR of 12 June 2018 when he was deemed competent.

[88] The LOS was a serious matter. I do not take that anyone argues with this. Not only did Mr Wren fail to maintain separation he was apparently non-responsive to the alarm that

sounded to alert him to the LOS. Further, Mr Wren failed to report what is a reportable incident.[27]

[89] Following the LOS incident an Air Traffic Management Investigation Report[28] was completed. In the report the investigator said that:

> It is likely that this oversight or 'Blind Spot' LOS event, occurred as a result of confirmation bias…
>
> The controller was unable to report as to why they missed the conflict. It is likely however, their limited attention resource was more focussed elsewhere and, as a result, perceived a need to deal with the request as quickly as possible; thus rushing the vertical clearance, rather than following their structured scan to assess the traffic picture…[29]
>
> When a controller's mental mode has convinced the controller that the traffic picture is safe, it is not uncommon for a controller to not react as expected to a compromised separation scenario, which has been identified by a system alert…
>
> The controller was subject to a check on the 04 July 2018. This was 3 weeks after ATS privileges were reinstated following a period of remedial management that included classroom theory with the Group Training Specialist (GTS), simulator exercises with the GTS, and OJTI in the operational environment. The controller was assessed to be competent, but at the request of the Gwydir ALM, the expiry date was altered to 3 months to ensure that their performance would be monitored with more regularity than the minimum prescribed by regulation…[30] [sic]

[90] There is an argument as to whether the LOS incident was a continuation of the same performance issues identified with Mr Wren, culminating in the assistance outlined above leading to the 12 June 2018 PAR, or if those early performance matters were "settled" by that training such that the LOS was a performance matter which required separate attention (without reference to earlier assistance) for the purposes of clause 50.1 of the Agreement.

[91] I am not of the opinion that the LOS incident could be identified as a single incident to be considered in isolation of more recent performance issues. As is apparent Mr Wren's performance did deteriorate after his entry to Gwydir.[31] The LOS incident was the latest in a series of performance matters. He was, at the time, on a PIP because of those earlier performance issues. In this respect the training offered prior to the successful 12 June 2018 PAR cannot be ignored in considering if, in relation to this latest performance issue (LOS incident), Mr Wren was given the constructive assistance to improve his performance.

Could Mr Wren have been offered *more* constructive assistance?

[92] I am satisfied that Airservices provided Mr Wren with the constructive assistance in the lead up to the 12 June 2018 PAR. Further, I am satisfied that Airservices could take this into account in determining what further assistance was appropriate following the LOS incident. In doing so it is apparent that Airservices considered no further assistance was appropriate.

[93] An important consideration is whether *further* constructive assistance was necessary after the LOS incident because of the invocation of the NAAM procedure which dictated "remedial training" or if the training Mr Wren had received was sufficient such that the requirements of clause 50.1 of the Agreement had been satisfied. This raises the legitimate question as to how often more "constructive assistance" is to be provided to an employee whose performance is inconsistent.

[94] As is clear from the material before the Commission Mr Wren had a range of performance issues in 2017 and 2018.

[95] It is apparent that Airservices took no action to determine the cause of Mr Wren's poor performance. As Civil Air submitted, and I agree, Mr Wren's performance prior to his placement in Gwydir was generally unremarkable. He commenced in Gwydir in November 2015 after a period of training. His performance once in the Gwydir appears to have deteriorated without any attempt by his managers to identify an underlying cause.

[96] I am not, in this case, convinced that Airservices was *required* to offer Mr Wren more training following the LOS incident given the extensive support and assistance he was provided with in the lead up to the June 2018 PAR. Airservices' failure to determine any underlying cause of Mr Wren's poor performance is, however, surprising, given the investment in training and skills as is apparent for ATCs and given Mr Wren's years of service. Had it done such an investigation it may have reached a different conclusion as to further support for Mr Wren. I would note however that there has not been any suggestion from Civil Air (beyond a claim of greater complexity in Gwydir which was disputed but I do not need to resolve) or in Mr Wren's written response to Airservices as to the cause of Mr Wren's poor performance.

[97] With respect to the submission of Airservices that a TSA is not an appropriate tool for an employee in Mr Wren's position I am satisfied, on the basis of the evidence before me, that TSAs have been used for employees for the purpose of remedial training and there would be nothing inconsistent and certainly no bar to the provision of a TSA in Mr Wren's case.

[98] However, I do not consider that a TSA is *mandatory* as was suggested by Civil Air. If it was mandatory it seems to me that Airservices would have no recourse to a PIP or to take further action against an employee whose performance was not satisfactory but where the nature of the poor performance changed each time (as appears to be the case with Mr Wren).

[99] Whilst evidence was provided of employee's who were only required to work in sectors of the Gwydir air space, I am not sure what assistance this provides to Mr Wren. Mr Wren had a history of poor performance in Gwydir. Bar the most recent occasion assistance was provided to him to assist him in meeting the performance expectations of Airservices.

[100] Of course there is always *more* assistance that could be relevant to the performance issue identified but this will more often than not be the case. The question is to what extent was Airservices required to provide assistance. Airservices made a judgement that it had provided assistance and that, despite this, Mr Wren's performance continued to lapse.

Conclusion

[101] While I am satisfied that Airservices could take into account the training and assistance provided to Mr Wren it is not apparent that such training was directed to remediating issues in relation to aircraft separation.

[102] That said however, I have found above that the obligation found in clause 50.1 of the Agreement does not mandate that, in every instance of poor performance, Airservices must provide further or particular assistance. Whilst I am of the view that more *could* have been done I am satisfied that Airservices had an objectively rational basis for determining that it had provided the necessary support and assistance to Mr Wren over a period of time that was appropriate and that no more was appropriate in the circumstances.

[103] For this reason I am satisfied that Airservices has met its obligations under clause 50.1 of the Agreement.

DID AIRSERVICES' ACTIONS MEET THE REQUIREMENTS OF CLAUSE 50.2?

[104] Clause 50.2 of the Agreement sets out how Airservices will conduct itself such that the requirement for procedural fairness might be satisfied. The principles in clause 50.2 of the Agreement are not limited in their application to either clause 50.1 or clause 50.3 but apply equally to both.

[105] Civil Air says that Airservices has not met its obligations in relation to procedural fairness in deciding to seek to redeploy or dismiss Mr Wren because:

- It relied on matters not subject to complaint or information nor provided to Mr Wren;

- It relied on audio sampling which Mr Wren had not been given an opportunity to address.

[106] Civil Air submits that the opportunity to respond is a "foundational element of the obligation to accord procedural fairness" and that this was denied to Mr Wren. It says that this is supported by the requirements of clause 50.2(a), (b) and (c) of the Agreement.

[107] Civil Air submits that the provision of all information on which Airservices relied is "expressly provided for in clause 50.2" as well as informing the obligation to give constructive assistance. Further, it submits that by clause 50.2(e) Airservices is not to take steps disproportionate to the employee performance. The proportionality of the steps taken by Airservices it says must be seen in the context of the Agreement including the obligation on Airservices to provide constructive assistance.

[108] Civil Air further says that Airservices denied Mr Wren procedural fairness in that Airservices provided an undertaking that it would not rely on the earlier conduct of Mr Wren in reaching its decision.

[109] Civil Air submits that Mr Foley-Lewis acted in a biased manner and hence denied Mr Wren procedural fairness in that he refused to consider the advice of Airservices' own expert in respect of the provision of training to Mr Wren.

[110] Airservices submits that Civil Air has sought to impose some additional obligations beyond those set out in clause 50.2(a)-(e) of the Agreement in affording procedural fairness. It says that there is no common law obligation to afford procedural fairness by an employer who dismisses an employee. In any event it says that it has provided Mr Wren with procedural fairness in that:

- He was advised of Airservices' concerns following the incident of 19 October 2018 (the LOS);
- He was given an opportunity to be represented;
- He was given an opportunity to respond;
- His response was considered by Airservices;
- There was no suggestion of bias;
- The decision of Airservices was proportionate to his on-going poor performance and conduct in light of his behaviour on 19 October 2018.

[111] Airservices disputes the assertion made by Civil Air that the failure to provide constructive assistance to Mr Wren denied him procedural fairness. It submits that no such obligation is imported into clause 50.2 of the Agreement.

[112] Further, Airservices submits that there is no obligation in clause 50.2 of the Agreement or otherwise that it must provide "all adverse information" to an employee. Rather it says it must provide an employee with an opportunity to respond. Airservices says that it has done so and considered the response given by Mr Wren.

[113] With respect to the audio samples mentioned in the letter from Airservices to Mr Wren of 29 November 2018 Airservices submits that at no time has Mr Wren requested the samples and, whilst it had produced the transcript of the audio pursuant to a notice to produce issued by the Commission, Mr Wren has still not requested the audio samples.

[114] Airservices rejects the submission of Civil Air that it, Airservices, disavowed its reliance on Mr Wren's history of poor performance. It says that this was not put to Mr Foley-Lewis. Further, it says that the evidence of Mr Walsh on this point is not credible and there is no documentary evidence to support the contention. Further, Airservices says that in assessing Mr Walsh's evidence it should be borne in mind that he suggested that a LOS between two commercial jets could be equated to bashing into someone's car on the way home.[32]

[115] Airservices says that any claim that Mr Foley-Lewis was biased in his decision-making should be rejected as it was not put to Mr Foley-Lewis that this was the case such that he could respond.

[116] Airservices submits that its decision to redeploy Mr Wren (or terminate his employment if no suitable redeployment could be found) is not disproportionate in light of the history of poor performance over the prior 12 months. This poor performance had seen Mr Wren's privileges withdrawn twice, the provision of significant training and support to assist him and a formal PIP. Despite this he was involved in a LOS incident on 19 October 2018.

Did Airservices make representations that it would not rely on earlier conduct?

[117] Civil Air submits that I can rely on the written evidence of Mr Walsh in relation to this matter. Further, it says that Airservices' characterisation of Mr Walsh's evidence in relation to LOS incidents is not supported by the transcript.

[118] In his written statement in reply Mr Walsh said that reliance on the audio tape sampling "appears to be a fishing exercise" as the results were not shared with Mr Wren until a meeting he attended with Mr Wren on 29 November 2018. Further, he says that Ms Astill assured him that this was an example for background information only.[33]

[119] Mr Foley-Lewis' evidence is that he did have regard to the audio samples in reaching his decision with respect to Mr Wren's future.[34]

[120] To the extent that Mr Wren was not aware that the audio sampling would be a matter considered by Mr Foley-Lewis in reaching his decision, Mr Wren was not given an opportunity to respond on that matter prior to Mr Foley-Lewis reaching his decision.

[121] To the extent that this, in the scheme of the performance issues identified with respect to Mr Wren denied Mr Wren procedural fairness, is unclear. What is clear is that the audio samples was one input into a range of matters that influenced Mr Foley-Lewis' decision, but it was one consideration amongst a number of substantive matters, all of which Mr Wren was aware.

[122] Whilst it would have been preferable that Mr Wren be given access to the audio and be given an opportunity to respond, that he was not does not render the entirety of the process undertaken by Airservices a denial of procedural fairness as articulated in clause 50.2 of the Agreement.

[123] To the extent that it was raised in submissions I would note for the record that the transcript does not suggest that Mr Walsh equated a LOS to "bashing into someone's car on the way home". Rather he said that accidents happen, although no-one wants them to. I took from his comments that a LOS is an "accidental" matter in that it is not deliberate, just as having an accident driving home from work is not deliberate. This was as far as the comment should be taken.

Did the failure to provide further constructive assistance to Mr Wren mean that procedural fairness was denied?

[124] I do not accept the submission of Civil Air that a failure to provide what it considers to be the necessary constructive assistance to Mr Wren to constitute a denial of procedural fairness in the decision-making of Airservices. To suggest otherwise would again place Airservices in a position where it could not, objectively, consider the totality of the assistance provided to an employee and determine whether it should proceed to a more formal process as contemplated by clause 50.3 of the Agreement.

Was Mr Foley-Lewis biased?

[125] Civil Air submits that Mr Foley-Lewis acted in a biased manner when he failed to act on the advice of Airservices' own expert.

[126] Whilst not explicit in its submissions I take this as a reference to an email sent to Ms Astill by Ms Clements who recommended that Mr Wren be provided with a "period of formal Training Support in conjunction with the PIP" to ensure that Mr Wren be given sufficient opportunity to address the deficiencies.

[127] I do not accept the submissions of Civil Air on this point. Firstly, it is not apparent that Mr Foley-Lewis saw this email (it was sent to Ms Astill). Even if he had, to decide to pursue a different path (redeployment) is not indicative of bias in decision-making. Further, that he may have been biased in his approach to the matter or decision-making was not put to Mr Foley-Lewis in cross-examination such that he could respond to such submissions.

Was the decision proportionate?

[128] Airservices says that its response to the performance of Mr Wren was proportionate taking into account his history over the preceding 12 months and the support and assistance provided to him.

[129] At the time Mr Wren was advised that he was to be redeployed and, if that was not successful, dismissed Civil Air had put alternatives to Airservices to consider. These included moving Mr Wren back to Hastings where there were, on Mr Walsh's evidence, vacancies or providing Mr Wren with "professional cognitive testing and assistance" prior to placing him back in Gwydir.

[130] At the time the decision was taken to redeploy (or, if not successful, dismiss) Mr Wren, Mr Wren did not have privileges, this having been removed by the LOS incident although I do accept he had otherwise successfully completed two milestones on his PIP.

[131] The evidence before the Commission does not suggest that a LOS incident for an ATC will always result in consideration of redeployment or dismissal of an employee. Mr McRobert gave evidence that he is a participant of the Civil Air Professional and Technical Committee and has been for approximately three years.[35] The Committee arises from the Agreement and is constituted by various people from Civil Air and Airservices. The minutes of the meeting held on 12 December 2018 indicate that in the August to November 2018 reporting period there were 53 LOS/LOSA (loss of separation assurance) events. Of these, 38 were "ATS Airservices attributable" with the remainder attributable to the Pilot.[36] Mr McRobert said that the figures had been relatively stable in his experience.[37] He was aware

that the Air Traffic Safety Bureau had investigated some of the incidents. Mr McRobert agreed that LOS/LOSA incidents are extremely serious[38] but very rare.[39]

[132] I acknowledge and accept the evidence of Mr McRobert. It is apparent from the NAAM that an incident such as the LOS that Mr Wren was involved in is one where operational remedial management is considered a proportionate response. Operational remedial management "must provide effective and relevant remediation of any identified issues of competence and technique."[40]

[133] I do not take from the NAAM however that the only proportional response to a potential safety occurrence is assessment and further training. In some circumstances Airservices must be able to respond by removing the ATC from the role where the performance of the ATC compromised safety. The next step (training or the more formal clause 50.3 of the Agreement process of the Agreement) must be determined taking into account the totality of the circumstances. Proportionality must be considered in this context.

[134] It might be arguable that, by responding to the LOS incident in relation to Mr Wren in the way that it did, Airservices did not follow the requirements of the NAAM, but this does not mean that Airservices' response was not proportionate such that it did not comply with the procedural fairness requirement of clause 50 of the Agreement. In making the decision it did to commence the formal process and ultimately to seek to redeploy Mr Wren, Airservices did take into account Mr Wren's performance and the assistance provided to him over the previous 12 months.

Conclusion

[135] For these reasons I am satisfied that Airsevices provided procedural fairness, as defined in clause 50.2 of the Agreement, in its dealing with Mr Wren. That Mr Wren would have preferred an alternative response to the LOS incident does not mean that he was denied procedural fairness.

[136] In reaching this conclusion I make no findings as to the reasonableness or otherwise of attempts to redeploy Mr Wren. Further I make no findings as to any ultimate outcome for Mr Wren or if any decision to terminate Mr Wren's employment would be unfair as defined in the FW Act. This decision is restricted only to the application of clause 50 of the Agreement.

CONCLUSION

[137] For the reasons given above the application of Civil Air is dismissed and the interim order issued by the Commission on 18 March 2019[41] is hereby set aside.

COMMISSIONER

Appearances:

E. White, of counsel, for the Applicant.

M. Minucci, of counsel, for the Respondent.

Hearing details:

2019.
Melbourne:
May 27, 31.

Final written submissions:

Applicant: 19 June 2019 and 3 July 2019
Respondent: 26 June 2019.

Printed by authority of the Commonwealth Government Printer

<PR710940>

Endnotes:

[1] AE423762.

[2] Exhibit Civil Air 1, attachment AW2.

[3] [2019] FWC 1732.

[4] PR705904.

[5] Exhibit Civil Air 4, attachment JW1.

[6] Exhibit Civil Air 7, paragraph 12.

[7] [2017] FWCFB 3005.

[8] [2017] FWCFB 3005 at [114].

[9] Macquarie Dictionary online.
[10] Ibid.
[11] Ibid.
[12] *Kucks v CSR Limited*, (1996) 66 IR 182 at p.184.
[13] Exhibits Civil Air 1 and Civil Air 2.
[14] Exhibits Civil Air 3 and Civil Air 4.
[15] Exhibit Civil Air 7.
[16] Exhibits Civil Air 5 and Civil Air 6.
[17] Exhibit AS1.
[18] Exhibit Civil Air 7, attachment TM-3, p.25 of 45.
[19] Exhibit AS4, attachment RFL-3.
[20] Exhibit AS4, attachment RFL-10.
[21] Exhibit AS4, attachment RFL-11.
[22] Exhibit AS4, attachment RFL-12.
[23] Exhibit AS4, attachment RFL-13.
[24] Exhibit AS4, attachment RFL-14.
[25] Exhibit AS4, attachment RFL-15.
[26] Exhibit Civil Air 3, attachment JW-7.
[27] See record of conversation between Ms Astill and Mr Wren, Exhibit AS4, attachment RFL-21.
[28] Exhibit AS4, attachment RFL-19.
[29] Ibid, section 4.1.1.
[30] Ibid, section 4.2.1.
[31] Desktop Review dated 8 November 2018.
[32] Transcript PN1544-PN1545.
[33] Exhibit Civil Air 4, paragraph 9.
[34] Exhibit AS4, paragraph 115.
[35] Transcript, PN1999 and PN2009.
[36] Exhibit Civil Air 9, page 3, item 5.2.
[37] Transcript, PN2010.
[38] Transcript, PN2075.
[39] Transcript, PN2074.
[40] Exhibit Civil Air 7, attachment TM-4, at item.5.2.1.3.
[41] PR705904.